

1974

Perspectives on the Fourth Amendment

Anthony G. Amsterdam

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Amsterdam, Anthony G., "Perspectives on the Fourth Amendment" (1974). *Minnesota Law Review*. 848.
<https://scholarship.law.umn.edu/mlr/848>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Perspectives On The Fourth Amendment

Anthony G. Amsterdam *

This Article is the text of the Oliver Wendell Holmes Lectures, delivered by Professor Amsterdam at the University of Minnesota Law School on January 22, 23 and 24, 1974. Oliver Wendell Holmes, Jr., left a large part of his estate to the United States at his death in 1935. By Act of Congress in 1955, the disposition of the property was entrusted to a Permanent Committee, which, among other projects, sponsors the annual Holmes Lectures by a distinguished legal scholar.

I. INTRODUCTION: OF JUSTICES, THEIR CRITICS, AND THEIR MORE IMPORTANT VEXATIONS

For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product. In Mr. Justice Frankfurter's graceful phrase, "[t]he course of true law pertaining to searches and seizures . . . has not . . . run smooth."¹ Professor LaFave, who borrowed that phrase to title an article, observed that "[n]o area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate"² In a badly fractioned recent decision, one of the few passages that commanded a majority of the Court conceded "it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony."³ A subsequent article concluded simply that "[t]he fourth amendment cases are a mess!"⁴

In one sense, all of these critical comments—even the last—are understatements. During many years as a fourth amendment buff, I have read Supreme Court search and seizure cases with the righteous indignation that only academics can consistently sustain. (Dissenting Justices occasionally achieve it but, with the acquisition of a few additional votes, they tend to lapse from skeptics to believers.⁵) Over the years, when I have heard tax lawyers complain that the Supreme Court should be relieved of jurisdiction over tax cases because the Court has never understood the tax laws, I have especially relished my standing as a fourth amendment buff. It is seldom given to mortal man to feel superior to a tax lawyer. With what gratifying condescension, then—how like Captain Ahab's ghost hearing trout fishermen prattle of the big one that got

* Professor of Law, Stanford Law School.

away—have I listened to the tax lawyers' criticisms of the Supreme Court!

Yet I think that the Court's critics—and myself, when I am in this mood—are not entirely fair to the Court. When we fault the Court for its lack of clarity and consistency, we are inclined to forget that these are virtues in whose practice we have every advantage over the Justices. I speak not only of such mundane but vital advantages as leisure for reflection and freedom to go outside the records of particular cases. Three basic constraints bind the Court that do not bind its critics. These constraints make it far more difficult for the Court than for its critics to produce "a single coherent analytical framework"⁶ for decisions that the Court must make. But they enhance the functioning of the Court in other, equally important dimensions.

First, the Court is a committee. In various aspects of our social organization, decisionmaking power is given to committees rather than to single men because a committee is less likely to be despotic than a single man, and more likely than a single man to ponder all relevant considerations before coming to judgment. These characteristics of a committee are indispensable to the role that the Supreme Court plays in American government. But they have their price.

The wise joke that defines a camel as a horse drafted by a committee only begins to describe that price. Insofar as the Court observes—for excellent reasons—"series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision,"⁷ and particularly the rule against deciding "constitutional issues . . . on a broader basis than the record . . . imperatively requires,"⁸ the Court is in the unenviable posture of a committee attempting to draft a horse by placing very short lines on a very large drawing-board at irregular intervals during which the membership of the committee constantly changes. In addition, unlike most committees, the Court is expected to write a reasoned opinion explaining the placement of each of these short lines without unduly extending the lines so as to make perfectly comprehensible why, in its judgment, the resulting camel is a horse. You will appreciate, I think, that I question the entire fairness of a critic who rides merrily up upon his own horse and deprecates the Court's camel by comparison.

Second, the Court cannot always state openly all of the considerations that affect its decisions. For example, I am con-

vinced that the major force shaping the evolution of Supreme Court confession cases from *Brown v. Mississippi*⁹ through *Haynes*¹⁰ and *Escobedo*¹¹ to *Miranda*¹² was distrust of the fact-finding propensities of state trial courts.¹³ Doubtless, the same distrust accounts for the unexplained and intellectually unsatisfactory "discretion" that *Townsend v. Sain*¹⁴ allowed to federal habeas corpus courts to conduct new evidentiary hearings notwithstanding prior state-court hearings meeting every objective test of fairness. Yet obviously the Supreme Court could not talk about its distrust of state-court factfinding in these cases. Both decorum and the necessity of encouraging better performance by state judges in the enforcement of federal rights forbade the Supreme Court Justices "to put their brethren of the state judiciary on trial."¹⁵

Instead, the Court responded to perverse factfinding by expanding constitutionally protective legal rules in a manner that made the suspect facts irrelevant. It did not announce outright that its reason for disregarding the facts was their susceptibility to manipulation by triers of fact who were not to be trusted. It simply treated apparently relevant facts as irrelevant. In so doing, of course, it exposed itself to the scourges of critics fore-armed with Henry Friendly's lashing quip about "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."¹⁶ The quip is a masterful metaphor but betrays a certain lack of appreciation of the art of dominoes. Skillful domino players have a prescient purpose in the moves they make, however arbitrary these may seem to an observer lacking knowledge of their hidden pieces or their game plan.

Third, the Justices of the Supreme Court, unlike their critics, bear the responsibility of decision. People who bear that responsibility soon learn that the welter of life is constantly churning up situations in which the application of clear and consistent theories would produce unacceptable results. The results are unacceptable not because of mere personal or emotional aversion to them, but because the case has stirred some profound countervailing principle. The contours of the principle and its relationships to prevailing theories may be still obscure; it may lack a name, a nexus, or it may go forth in the guise of something it is not. Nonetheless, it speaks imperatively to the case and wrests it from the grip of all the theory that has been before.

At the first stirrings of such principles, critics may postpone

their articles, change their topics, take a sabbatical, or otherwise procrastinate till muddy waters clear. The Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old, still less to say how much the old must be displaced and whether or how the old and new can be accommodated. If the Court declines to give birth to the new principle, it will never acquire the experience or the insight to answer these latter questions. If it attempts to answer them at the moment of the new principle's birth, it is not likely to answer them wisely. Clarity and consistency are desirable, certainly, to the extent that they can be achieved. But the temptation to achieve them by ignoring the complex and the unpredictable quality of real problems is fortunately less beguiling to Justices perennially faced with responsibility for solving those problems than to the Justices' academic critics.

I make these points at the outset to explain both the objectives and the tenor of my lectures. What I should like to do during these three days is not to articulate any single, comprehensive theory of the fourth amendment. It is rather to identify and to discuss a number of basic issues that complicate the development of a single, comprehensive fourth amendment theory. Even for a lone theoretician—for a monarchical, everlasting fourth amendment enforcer—the complications would render a coherent construction of the fourth amendment exceedingly difficult. For the Supreme Court, functioning under the constraints that I have just described, the difficulty may be insuperable.

When I say, as I shall, that the Court has not confronted these basic fourth amendment issues in any systematic way, I am not implying that it could or should have done so. Nor do I suppose, when I discuss what the Court has not discussed, that I am gifted with insights not granted to the Justices. To the contrary, I suspect that the Court's failure to discuss these issues has been altogether advertent.

I can think of no point in time when their discussion would not have badly splintered the committee then comprising the Court. Probably it would also have required the saying of some things that seemed impolitic for the Court to say. Even if a majority could have been mustered to say these things and to decide these issues—a far more tormenting task than the mustering of a majority to decide particular cases upon shallowly reasoned grounds—it is possible that their decision would not

have been worth the torment. These are not the sorts of issues that early decision settles for very long. The judgments that they require are too large, too ungoverned by a commanding text or clear institutional dictates, to be laid solidly to rest. Precedents upon such issues are particularly fragile under the buffeting of rapid historical developments that incessantly place unprecedented strains upon the Court.

Nevertheless, the unexpressed views of individual Justices upon these issues have undoubtedly shaped the growth of fourth amendment doctrine and will continue to do so. Doubtless, too, the time will come when each is ripe for collective consideration by the Court. For these reasons, my discussion of them in a forum where they can be bruited without the pretense of definitive resolution may contribute to an understanding of the directions in which the law of search and seizure has progressed and can progress from here.

Such an understanding seems to me worth striving for, whether or not it makes the choice of directions any easier. For when we seek to understand the Supreme Court's difficulties in grappling with the fourth amendment, we observe the Court in the throes of one of its noblest labors. That labor is to be the instrument by which a free society imposes on itself the seldom welcome, sometimes dangerous, always indispensable restraints that keep it free.

Mr. Justice Jackson put it well when he described the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself."¹⁷ The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents. They deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be the absolutely necessary means, for government to obtain legitimate and laudable objectives. Obviously, the agency of government primarily charged with interpreting these documents would be paralyzingly conflicted even if the constitutional restrictions were relatively clear and if the agency's own mandate to impose them upon other branches of the government were unimpeachable.

But the fourth amendment is not clear. The work of giving concrete and contemporary meaning to that brief, vague, gen-

eral, unilluminating text written nearly two centuries ago is inescapably judgmental. In the pans of judgment sit imponderable weights.

On the one hand is the recognition that restrictions upon means of law enforcement handicap society's capacity to deal with two of its most deeply disturbing problems: the fact and the fear of crime. Not alone, the New Centurions (those whom President Nixon calls the "peace forces") see society's gravest responsibility as the maintenance of order and accordingly see disorder, starkly symbolized by crime, as society's gravest terror. It was, after all, Learned Hand who admonished us that "[w]hat we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."¹⁸ On the other hand, it was Mr. Justice Frankfurter—no watery sentimentalist—who reminded us that "[t]he history of liberty has largely been the history of observance of procedural safeguards."¹⁹ And the history of the destruction of liberty, one may add, has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society.

As though the difficulty of accommodating these intensely clashing forces were not great enough, the Supreme Court's authority to make the accommodation is constantly called into question. I am not now speaking of extreme and easily rebutted assertions that the Court entirely lacks competence to enforce the Constitution against its coequal federal branches or the states. Far more nagging and more enervating are the seriously debatable questions: questions concerning the Court's enforcement of the Bill of Rights against the states through the due process clause of the fourteenth amendment; questions concerning the Court's choice among the means of enforcement, such as the Court's use of the exclusionary rule to enforce the fourth amendment; questions concerning the Court's exercise of independent judgment in determining the application of broadly worded constitutional guarantees to particular practices approved by executive or legislative authority or both.

To be sure, the first two of these questions have been legally decided. The fourth amendment now binds the states, by "incorporation" into the fourteenth, in exactly the same measure that it binds the federal government.²⁰ The products of unconstitutional searches and seizures must be excluded from evidence in both state and federal criminal trials.²¹ But the de-

cision of disputable questions of this nature leaves its residue of discomfort in the decisionmaker. And when the Supreme Court comes to apply the arguably inapplicable fourth amendment through the arguably ill-conceived exclusionary rule in a state criminal proceeding, and then is asked to override by the mere judgment of nine Justices (or five) some police practice that is widely embraced by law enforcement officials and perhaps even legislatively endorsed,²² the cumulative weight of this discomfort may understandably reach confidence-shattering proportions.

I shall return later to describe specific doctrinal areas in which I think qualms of self-mistrust have caused the Court to function less well than it might. My present point is to impress upon you how remarkable and admirable it is that the Court can ever function reasonably well in the torturous task—performed under torturous conditions—of interpreting and thereby preserving constitutional guarantees of individual rights such as the fourth amendment. If hereafter I invite you to be critical of a number of the Court's decisions, I hope that you will keep this point continually in view.

Turning now to the tough stuff of my subject, let me tell you how I propose to proceed. I should like to give you first a general summary of fourth amendment doctrine in black-letter form. Law professors' black-letter statements of the law, like the testimony of all other criminal accomplices, ought to be received with caution and scrutinized with care. Mine will put the fourth amendment in the nutshell whence I shall attempt to extract it piece by piece throughout the balance of my presentation.

Second, I should like to pose a series of questions that lie at varying levels beneath the surface of fourth amendment doctrine but are almost never identified or discussed. Their submarine existence seems to me to account for numerous judicial shipwrecks upon fourth amendment waters, and the process of dredging them up has given me the major organizational problem of these lectures. On the one hand, it is difficult to consider these questions or to develop their significance in isolation from the specific doctrinal issues beneath which they lurk. On the other hand, specific doctrinal issues raise the underlying questions only incompletely and distortingly.

I shall try to solve the problem by proceeding from my doctrinal summary to a listing and description, without discussion, of these underlying questions. Then I shall return to a

doctrinal framework and discuss the underlying questions as they arise in connection with particular doctrinal issues. This third phase of the lectures, which will occupy tomorrow and the following afternoon, will consider (a) the scope of application of the fourth amendment,²³ that is, the kinds of law enforcement activities to which it applies;²⁴ (b) the restrictions that the fourth amendment imposes upon those activities; and (c) the use of the exclusionary rule to enforce the restrictions.

II. A SUMMARY OF FOURTH AMENDMENT LORE AND SOME UNANSWERED QUESTIONS

The fourth amendment to the Constitution 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.²⁵

The words "searches and seizures" and the words "persons, houses, papers, and effects" are terms of limitation. Law enforcement practices are not required by the fourth amendment to be reasonable unless they are either "searches" or "seizures."²⁶ Similarly, "searches" and "seizures" are not regulated by the fourth amendment except insofar as they bear the requisite relationship to "persons, houses, papers, and effects."²⁷

"Searches" of "persons" include any physical touching of an individual's body or clothing that causes hidden objects or matters to be revealed,²⁸ such as extracting an individual's blood by means of a hypodermic needle,²⁹ or taking scrapings from beneath his fingernails,³⁰ or rummaging through his pockets,³¹ or "patting" him down.³² It is not a "search," however, to discern observable characteristics of an individual,³³ or even to compel him by legal process to furnish voice exemplars³⁴ or handwriting samples.³⁵ A demand that an individual disclose or hand over a concealed object is generally treated as a "search,"³⁶ but a mere request is not.³⁷ "Searches" of houses and other closed private premises³⁸ include any physical entry by law enforcement officers³⁹ and any physical intrusion of a surveillance device into the premises.⁴⁰ Observation into the premises from outside was not traditionally viewed as a "search"⁴¹ even when assisted by electronic amplifying devices.⁴² However, in 1967 the Supreme Court decided in *Katz v. United States*⁴³ that electronic monitoring of a telephone booth without physical intrusion into the booth was a fourth amendment "search." The

Court said that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure,"⁴⁴ and characterized the placing of an electronic amplifier against the outer wall of the telephone booth as a "search" because it "violated the privacy upon which [the user of the booth] . . . justifiably relied."⁴⁵ The application of *Katz* to non-electronic surveillance and to electronic surveillance of persons outside of closed private areas has not yet been determined by the Court.⁴⁶ "Searches" of "papers" and "effects" include any opening of a packet or object⁴⁷ and any physical handling that discloses its contents,⁴⁸ but do not include surface observation (such as a "mail cover")⁴⁹ and may not include internal examination by electronic devices that do not physically pierce the cover.⁵⁰ "Seizures" of "papers" and "effects" include any gathering up or carrying off of these items by law enforcement officers,⁵¹ but may not include the officers' mere receipt of them from other persons.⁵² "Seizures" of "persons" include arrests,⁵³ "investigatory detentions"⁵⁴ and any other "detention of [an individual] . . . against his will."⁵⁵ All that is required is that an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."⁵⁶

Prior to the *Katz* decision, the Supreme Court⁵⁷ and the lower courts⁵⁸ commonly used the concept of "a constitutionally protected area"⁵⁹ to define the scope of the fourth amendment's protection of "persons, houses, papers, and effects." The bodies⁶⁰ and clothing⁶¹ of "persons" were protected; and so, within their perimeters, were such "papers, and effects" as letters,⁶² parcels,⁶³ cabinets,⁶⁴ and automobiles,⁶⁵ whether or not they were in a person's possession or on his premises, so long as they were not "abandoned."⁶⁶ The constitutional protection of houses was extended⁶⁷ to apartments,⁶⁸ hotel rooms,⁶⁹ and garages,⁷⁰ and to business offices,⁷¹ stores,⁷² and warehouses,⁷³ to the degree that these were closed to the public.⁷⁴ It was not extended to "the open fields,"⁷⁵ although the "curtilage"⁷⁶ around a house was protected.⁷⁷ The 1967 *Katz* opinion, however, rejects the concept of "constitutionally protected areas" as the exclusive formula of fourth amendment coverage. Starting with the proposition that "the Fourth Amendment protects people, not places,"⁷⁸ *Katz* concludes that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"⁷⁹ whereas "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁸⁰ The question, once again, is whether

the government has "violated the privacy upon which [an individual] . . . justifiably relied."⁸¹ Supreme Court decisions since *Katz* have generally used this "privacy" formulation to determine issues of the fourth amendment's scope,⁸² although it remains unclear to what extent the formulation supplants earlier doctrines.⁸³ *Katz* itself says explicitly that the fourth amendment's "protections go further [than the privacy of persons], and often have nothing to do with privacy at all."⁸⁴ The amendment continues to protect, for example, "personal security"⁸⁵ and also interests in "houses, papers, and effects" that are independent of the owners' interests in the privacy of their "persons."⁸⁶

"Searches" and "seizures" affecting protected interests are forbidden by the fourth amendment only if they are "unreasonable." In 1950, the Supreme Court took a broad and elastic view of the phrase "unreasonable searches and seizures,"⁸⁷ and occasional opinions expressing this view have been handed down even recently.⁸⁸ During the past twenty years, however, the Court has increasingly emphasized that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the [fourth amendment's] warrant clause."⁸⁹ Under this theory, the Court has uniformly condemned searches and seizures made without a search warrant,⁹⁰ subject only to a few "jealously and carefully drawn" exceptions.⁹¹ Search warrants may be issued only by a neutral and detached judicial officer,⁹² upon a showing of probable cause⁹³—that is, reasonable grounds to believe⁹⁴—that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted.⁹⁵ The warrant must specifically describe both the place to be searched⁹⁶ and the items or matters to be seized.⁹⁷ An officer executing a search warrant may not seize anything that is not described in it⁹⁸ except contraband⁹⁹ and perhaps other manifestly criminal objects¹⁰⁰ which he inadvertently encounters¹⁰¹ in plain view.

Exceptions to the warrant requirement fall into three groupings: consent searches, a very limited class of routine searches, and certain searches conducted under circumstances of haste that render the obtaining of a search warrant impracticable. The theory underlying the consent-search exception is unclear,¹⁰² but its substance is that searches without a warrant or probable cause may be made upon the voluntary consent¹⁰³ of the party affected¹⁰⁴ or of someone authorized by that party to control access to the places or things searched.¹⁰⁵

The routine-search category is not as broad as that term

suggests:¹⁰⁶ I use the term only as a shorthand description of the rare cases in which unconsented searches may be made without either a warrant or any individuating judgment that the person or place to be searched is connected with criminal activity. These cases include searches of persons and objects entering the United States across an international border,¹⁰⁷ searches of premises licensed for the distribution of such regulated commodities as firearms and liquor,¹⁰⁸ perhaps inventory searches of vehicles properly taken into police custody,¹⁰⁹ and perhaps stoppings of moving vehicles for operator's license, registration and safety checks.¹¹⁰ Searches in these cases remain subject to the fourth amendment's general requirement of reasonableness;¹¹¹ they may not be made, for example, in an abusive¹¹² or unduly intrusive¹¹³ manner.

The third and most significant group of exceptions involves cases in which an individuating judgment of criminal activity is required but a fast-developing situation precludes resort to a magistrate. Warrantless searches may be made of motor vehicles that are capable of being driven away before a warrant can be procured,¹¹⁴ if the searching officer has probable cause to believe that the vehicle contains criminally related objects.¹¹⁵ Apparently, warrantless searches of other highly mobile articles—such as luggage deposited for shipment out of rail or air terminals—are also permissible when there is probable cause to believe that they contain criminally related objects.¹¹⁶ There is some dictum in Supreme Court cases suggesting a more general class of "exceptional circumstances"¹¹⁷ in which the imminent removal or destruction of seizable items might permit warrantless searches,¹¹⁸ but this language has never been applied by the Court to validate an entry into a building without a warrant¹¹⁹ except in pursuit of a fleeing and dangerous criminal.¹²⁰ Warrantless searches incident to a valid arrest—that is, an arrest authorized by law, with or without an arrest warrant, upon probable cause to believe that the arrested person has committed an offense¹²¹—are allowed¹²² within the limited area into which the "arrestee might reach in order to grab a weapon or evidentiary items."¹²³ Such searches may not ordinarily precede the arrest¹²⁴ because their justification rests upon the likelihood that a person taken into custody will attempt to harm the arresting officer or to destroy evidence.¹²⁵ However, when a confrontation between an officer and a suspect simultaneously gives the officer probable cause to arrest and alerts the suspect to the officer's suspicions, a warrantless search of the

suspect's person may be made prior to arrest, to the restricted extent necessary to prevent him from destroying evidence.¹²⁰ A "frisk" of the body of a suspicious person stopped on the street for investigative questioning¹²⁷ may also be made if there are reasonable grounds to believe that he is armed and dangerous.¹²⁸ The "frisk" may not go beyond what is necessary to detect the presence of a weapon.¹²⁹ A line of lower-court cases holds that an officer who has an arrest warrant¹³⁰ or probable cause¹³¹ to arrest an individual may make an entry without a search warrant into any premises where he reasonably believes that the person whom he seeks to arrest is located.¹³² However, this arrest-entry doctrine is currently undergoing reconsideration,¹³³ and will probably survive only in "hot pursuit" situations.¹³⁴ Searches in the third group of exceptions to the warrant requirement, like those in the second, must be conducted in a reasonable manner,¹³⁵ and their scope is generally limited by their specific justifications.¹³⁶

These, summarily, are the substantive rules of the fourth amendment. They have doubtless suffered somewhat from my compression of them, as have you and I. The compression of volatile constitutional principles, like that of volcanic gases, inevitably occasions some discomfort to the compressor as well as to the compressesee. Nevertheless, if you will indulge me during one more moment, I shall briefly conclude my black-letter statement with a word about remedies.

The substantive fourth amendment rules are enforceable, to some extent, by civil and criminal actions against officers who violate them.¹³⁷ But such actions are seldom maintained, nor are they, as a practical matter, maintainable;¹³⁸ and the primary instrument for enforcing the fourth amendment has long been the exclusionary rule—a judicially fashioned doctrine that excludes the products of unreasonable searches and seizures from admission into evidence against those whose rights have been violated.¹³⁹

In order to claim the benefit of this rule, a party must have "standing":¹⁴⁰ he must be someone "whose rights were violated by the search itself"¹⁴¹—"a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."¹⁴² If the search is of a "person," ordinarily only that person may complain.¹⁴³ The owner¹⁴⁴ or possessor¹⁴⁵ of "papers"

or "effects" may complain of their search or seizure, but not a stranger.¹⁴⁶ Similarly, standing is given to the owner,¹⁴⁷ possessor¹⁴⁸ or occupant¹⁴⁹ of a searched vehicle, the owner of a telephone¹⁵⁰ or any party talking on the line when it is tapped,¹⁵¹ the owner¹⁵² or occupant¹⁵³ of searched premises or anyone legitimately on the premises when the search occurs,¹⁵⁴ but not to persons who "were not on the premises at the time of the contested search and seizure" and who "had no proprietary or possessory interest in the premises."¹⁵⁵ Ownership, possession or occupancy need not be exclusive in order to confer standing:¹⁵⁶ one of several persons sharing an office may complain, for example, if the office is unconstitutionally searched.¹⁵⁷ What is required is that the person invoking the exclusionary rule "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises."¹⁵⁸

When invoked by a party who has proper standing, the exclusionary rule forbids admission into evidence of any article discovered or any observation made in the course of an unconstitutional search or seizure.¹⁵⁹ It also excludes derivative evidence,¹⁶⁰ the "fruit of the poisonous tree,"¹⁶¹ that is, any evidence which "has been come at by exploitation of [the] . . . illegality [rather than] . . . by means sufficiently distinguishable to be purged of the primary taint."¹⁶² The issue of "taint" is generally treated as a question of causal connection in fact:¹⁶³ the inquiry to be pursued¹⁶⁴ is whether the challenged evidence was obtained as a consequence of events that flowed historically from an unconstitutional search or seizure,¹⁶⁵ or whether it was obtained from an "independent" source.¹⁶⁶ Some causal connections are said, however, to "become so attenuated as to dissipate the taint."¹⁶⁷ Frankly, even the iron discipline that has led me single-mindedly almost to the end of my black-letter statement of the law of the fourth amendment—even my fixed purpose never to question whether black is grey or whether some monstrous anti-doctrine leers behind the arras of the rules—fails me now in this last extremity. The subject of derivative evidence, that land of poetry, of "fruits" and "dissipations" and their bacchanalian train, utterly resists my best efforts at cartography. Having mapped the rest of the terrain, let me now pass from the declarative to the interrogative mode and ask some questions as to what the fourth amendment is all about.

The first question is whether the amendment should be viewed as a restriction upon only particular methods of law en-

forcement or as a restriction upon law enforcement practices generally. One extreme answer to that question would be that the fourth amendment was directed against specific historical evils, "searches" and "seizures" in the sense of forcible official entries into homes and offices to ransack the owners' drawers and closets under general warrants and writs of assistance,¹⁶⁸ and that the amendment should apply to nothing else. Another extreme answer would be that the fourth amendment expresses "the very essence of constitutional liberty and security";¹⁶⁹ that

[i]t is not the breaking of [a person's] . . . doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence;¹⁷⁰

and consequently that the fourth amendment reaches every government activity which searches out or seizes up the private or the precious stuff of life.

A satisfactory answer doubtless resides somewhere between the extremes. For it is true, on the one hand, that the fourth amendment, "even more than its fellows, . . . was the product of particular events that closely preceded the Constitution and the Bill of Rights";¹⁷¹ that "we . . . can find specified in the pages of history the abuses against which the fourth amendment was particularly directed";¹⁷² that the constitutional terms "searches and seizures" and "persons, houses, papers, and effects" are not indefinitely extensible; and that history must have a place in their definition. On the other hand, "it is a *constitution* we are expounding";¹⁷³ the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future";¹⁷⁴ and "a principle to be vital must be capable of wider application than the mischief which gave it birth."¹⁷⁵ There was an unfair joke that passed among civil rights lawyers during the troubled days following desegregation of the Little Rock schools, in which President Eisenhower deplored the extremism of both sides—the extremism of those who wanted to close down the public schools to avoid desegregation, and the extremism of those who wanted to keep them open. At the risk of sounding like President Eisenhower in the joke, I repeat my conviction that the True Law of the fourth amendment must lie somewhere between the extremes, but I do so without prejudice to my right to argue later that it lies very, very close to one of them.

I mean to return to that argument tomorrow. For the mo-

ment, I am merely making the point that a fundamental question about the fourth amendment is what method should be used to identify the range of law enforcement practices that it governs and the abuses of those practices that it restrains. The methodological question underlies issues relating both to the coverage of the amendment and to the nature of the restrictions that it imposes upon covered activities.

Let me take coverage issues first. Indisputably, forcible entries by officers into a person's home or office are the aboriginal subject of the fourth amendment and the prototype of the "searches" and "seizures" that it covers. It is equally indisputable that the amendment goes further, both because the Supreme Court has so construed it for a century¹⁷⁶ and because to construe it otherwise would render it a constitutional step-child.¹⁷⁷ How far beyond the prototypes does the amendment's coverage extend, and according to what principles?

Is the fourth amendment called into play when, instead of entering a house, policemen stationed outside use a parabolic microphone to overhear the occupants' conversations? When a policeman places his unassisted ear against the thin outer door of a tenement lodging? When a police detective climbs a telephone pole and peers with binoculars through the three-inch crack beneath a second-story window blind? When a patrolman shines his flashlight through the windows of an automobile parked on a dark street? When a police dog trained to bark at the odor of marijuana is unleashed—poor dog!—in the corridors of a college dormitory? When an undercover agent prevails upon a student to admit him to the student's room where they smoke a joint together?

In deciding each of these cases, it seems to me imperative first to establish what we are looking for and how we shall know it when we see it. Consider the implications of two approaches representing tolerably moderated versions of the extreme positions that I have previously described. The first approach proceeds from the premise that the fourth amendment is addressed essentially to the forcible rummagings of the English messengers and colonial customs officers. It concedes that the amendment extends to similar cases, identifies the relevant attributes of similarity, and ends by asking whether the police practice now in issue is sufficiently similar to the messengers' and customs officers' rummagings in the relevant regards. This approach will lead to differing results, of course, depending upon what

attributes of similarity are thought relevant and what degree of similarity is demanded.

The second approach begins by asking what concerns and judgments are implied in the decision to establish a constitutional restriction upon a category of official activity generically described as "searches and seizures" and known to include the messengers' and customs officers' rummagings. It then inquires whether the police practice now in issue falls within the ambit of those concerns and judgments. This approach too will lead to differing results in particular cases depending upon the setting within which we analyze the implications of the constitutional restriction — whether, for example, we attempt to reconstruct the setting of the framers' values and conditions or look to the values and conditions of our own time. But, although the choice between the two approaches will not alone decide cases, it will make a considerable difference in the decision of a considerable number of them. It is one thing to ask whether a marijuana-sniffing dog is very like Lord Halifax's messengers. It is a different thing, conducive to different conclusions, to ask whether the values that shut out the one must not consistently shut up the other.

The Supreme Court has decided numerous cases defining the coverage of the fourth amendment, including cases that control two of the hypothetical problems in my series. Yet I find in its decisions no considered or consistent indication of the approach to be taken in resolving such problems. The omission is particularly striking inasmuch as one of the earliest and most celebrated fourth amendment cases decided by the Court posed the problem squarely.

In 1886 *Boyd v. United States*¹⁷⁸ presented the question of the constitutionality of a federal statute which provided that in certain non-criminal proceedings the court might issue a notice to a party opposing the government, requiring the production of any business book, invoice or paper that the government asserted would tend to prove specified allegations. If the business book, invoice or paper was not produced, the government's allegations were to be taken as confessed. If produced, it could be examined and introduced into evidence by the government, but was otherwise to remain in the custody of its owner subject to the order of the court. Here was a procedure that was hardly a "search" or "seizure" in any linguistically evident sense. It was a far cry from the breakings and rummagings of the messengers or customs officers. Mr. Justice Miller and Chief Justice Waite

concluded that the notice procedure, as applied in a forfeiture proceeding, violated the fifth amendment privilege against self-incrimination but that there was "no search and no seizure authorized by the statute."¹⁷⁹ However, Mr. Justice Bradley for a majority of the Court held that the statutory procedure violated both the fourth and fifth amendments:

[A] compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.¹⁸⁰

"Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation" of the fourth amendment as well as the fifth.¹⁸¹

Following *Boyd*, it is no surprise to find the Supreme Court holding that subpoenas *duces tecum* are controlled by the fourth amendment.¹⁸² It is surprising that the Court felt no obligation to grapple with the basic approach of *Boyd* and the subpoena cases when it decided in *Olmstead v. United States*¹⁸³ that telephone wiretapping was not a "search" or "seizure," apparently because wiretapping insufficiently resembled "the use of governmental force to search a man's house, his person, his papers and his effects," which lay within "[t]he well known historical purpose of the Fourth Amendment."¹⁸⁴ *Olmstead* was overruled by the *Katz* case¹⁸⁵ in 1967 through the medium of an analysis that places more emphasis upon the interest to be protected than upon the means of violating it.¹⁸⁶ But the *Katz* opinion goes to pains to avoid identifying what interests the fourth amendment does protect,¹⁸⁷ and after *Katz* the Court has held that those interests do not include freedom from being ordered to submit handwriting or voice exemplars to a grand jury,¹⁸⁸ or freedom from having one's home infiltrated by an undercover government informer equipped with electronic transmitting equipment.¹⁸⁹ Surely either of these latter practices is, in *Boyd's* language, "a material ingredient, and effects the sole object and purpose of search and seizure."¹⁹⁰ And as I shall say when I return to this subject later, I can conceive of no rational system of concerns and values that restricts the government's power to rifle my drawers or tap my telephone but not its power to infiltrate my home or my life with a legion of spies.

The question of the degree of generality with which the fourth amendment controls law enforcement practices may also be decisive in determining the nature of the restrictions it imposes upon official activities that are plainly "searches and seizures." Looking back once again to the specific incidents of Anglo-American history that immediately preceded the adoption of the amendment, we shall find that the primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause,¹⁰¹ the fact that they were—as Wilkes proclaimed Lord Halifax's warrant for the authors and publishers of No. 45 of the North Briton—"a ridiculous warrant against the whole English nation."¹⁰² But let us now consider a class of cases in which indiscriminate searches are held not to violate the fourth amendment, for example, border searches.¹⁰³ A customs agent may routinely search every person who enters the United States across the Mexican border. Suppose he does not do so. Suppose he searches only long-haired hippie types. The abuse here—if there is one—is not indiscriminateness, but selectivity. Is this an abuse against which the fourth amendment offers protection? Supreme Court decisions in another context suggest that the answer may be yes;¹⁰⁴ and I am sure that that conclusion could be drawn from the immediate purpose of the amendment to prohibit warrants issued without probable cause, if we ascribe to the framers not merely an appreciation but a concern that one evil of the existence of arbitrary power is the inevitability of its discriminatory exercise.¹⁰⁵ But the route to the conclusion is surely straighter and more compelling if we ask whether any system of values that we are prepared to accept could be concerned with indiscriminate searches but not with discriminatory ones.

Or take another case. An officer having probable cause to arrest a citizen for felony possession of marijuana encounters the citizen on the street. The citizen turns tail and runs, outdistancing the officer. The officer then effects the arrest by shooting the citizen in the back, pursuant to the power (which most state laws continue to confer even today) to use deadly force if necessary to apprehend a fleeing felon. Is that power limited in any degree by the fourth amendment? The pre-constitutional history of the amendment discloses no specific evidence of a concern against the use of excessive force to effect a search or seizure that could otherwise be properly effected.¹⁰⁰ Yet the Supreme Court has strongly hinted that a search or sei-

zure may be constitutionally unreasonable by virtue of undue brutality alone.¹⁹⁷ Such a doctrine would respond to other abuses than those that lay immediately at the fourth amendment's roots, but so does most of the Supreme Court's fourth amendment jurisprudence during the last fifty years. Unquestionably, the Court's major work of these years has been to contain warrantless searches, primarily by refining the "exceptions to the rule that a search must rest upon a search warrant."¹⁹⁸ The pre-constitutional history, on the other hand, is concerned with the abuses of search warrants, not warrantless searches¹⁹⁹—a contrast that has led Telford Taylor to observe that "[f]rom a historical standpoint, [the Justices] . . . have stood the fourth amendment on its head."²⁰⁰ Whether Professor Taylor's observation is an indictment or an accolade depends largely upon the answer to the first question that I have sought to raise with you today, that is, the extent to which the fourth amendment *should* be restricted to its historical origins.

My second question is whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct. Does it safeguard *my* person and *your* house and *her* papers and *his* effects against unreasonable searches and seizures; or is it essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures? Plainly, the Supreme Court is operating on the atomistic view, although it has never discussed the issue. This is the premise upon which "standing" to invoke the exclusionary rule has been demanded,²⁰¹ the premise upon which the Court has said that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."²⁰² But why, when the fourth amendment speaks of "[t]he right of the people," is it thought to mean the "personal rights" of isolated individuals? Why does it not speak of "the people" as in "We the People" or—since I am driving at the point that the amendment's purpose may be squarely to control the police—as in "Power to the People"?

A Newtonian view of the fourth amendment (Huey that is, not Sir Isaac) has a wide range of doctrinal implications. It may affect not only issues of standing but also other aspects of the exclusionary rule—a subject to which I shall later return.²⁰³ It may affect issues relating to the amendment's coverage and to the nature of the restrictions that the amendment imposes upon

covered activities, by controlling the perspective from which such issues are approached. A hypothetical case will exemplify the problem of perspective.

Suppose that two men drive into Minneapolis and rent a hotel room, paying in advance for three nights. During the first night, they plan a bank robbery which they execute the next day. Following the robbery, they drive directly out of town, never returning to the hotel. Late that same evening, policemen go the rounds of the local cheap hotels, armed with a police artist's sketch of the unmasked half of one bank robber's face drawn from a bystander's description. The night manager tells the officers that the sketch looks like one of the guys in room 212. From outside the hotel, the officers observe that the lights in 212 are lit. The night manager informs them that the occupants checked in yesterday afternoon for three days. After obtaining the manager's permission, the officers break the door of room 212 in force with drawn guns. No one is there, of course; but the officers find and take away a penciled map of the bank area, parts cut from a stocking to make a stocking mask, and other items that are later sought to be used in evidence to connect the former occupants of the room with the bank robbery after their apprehension.

On the defendants' motion to suppress this evidence, the first question that the court will ask is whether any violation of the fourth amendment occurred. From the perspective of the occupants, room 212 was "abandoned"²⁰⁴ and they had no constitutionally protected interest in it at the time of the search.²⁰⁵ From the perspective of the police, however, the room appeared to be occupied; they entered it upon that assumption; and it is difficult to imagine a more egregious case of the kind of police conduct that the fourth amendment was designed to prevent.²⁰⁶ Which perspective controls?

I must say that if I were a judge, I could and probably would write an opinion suppressing the evidence, even though I considered myself bound by an atomistic philosophy of the fourth amendment. I would say that the purpose of the exclusionary rule was deterrent and preventive;²⁰⁷ that deterrence requires fourth amendment rules to be fashioned from the perspective of the police; and that, in order to prevent the police from committing subsequent violations of real fourth amendment interests indistinguishable to them from the apparent fourth amendment interests that they flouted in this case, the evidence would

have to be suppressed. But I would be exceedingly unhappy with this opinion.

In the first place, it is not obvious that the deterrent efficacy of the exclusionary rule depends upon its enforcement in every case where the police think that they are acting unconstitutionally;²⁰⁸ the Supreme Court's standing decisions imply that deterrence is amply served by "preventing the incrimination of those whose rights the police have violated";²⁰⁹ and I could as well say here, as the Supreme Court has said there, that it will be time enough for a *real* fourth amendment victim to step forward and "object for himself when and if it becomes important for him to do so."²¹⁰ Second, there is obviously something wrong with my reasoning about deterrence:²¹¹ if a policeman is not deterred from conducting a search by the knowledge that he will lose its fruits on the facts as he thinks they are, he will certainly not be deterred by the unanticipated contingency of losing its fruits also on the facts as he thinks they aren't. Yet the most unsatisfactory aspect of my reasoning is that, by making the tail of the exclusionary rule wag the dog of the fourth amendment, I have cheated on my professed premises. I am paying only lip service to the view that the fourth amendment is a collection of portable little spheres of interest in which you and I and the defendants plunge about like swimmers in so many diving bells. Rather, I am treating it as a general regulation of police behavior. And, if I am going to do that, I might as well do it honestly by admitting that the regulation of police behavior is what the fourth amendment is all about.

Upon a regulatory view of the amendment, my case becomes as easy as deciding a suppression motion on the transcript of an Elliot Ness show. For the fact that the defendants abandoned room 212 prior to the search is as completely immaterial as that the room was numbered 212 instead of 211. To be sure, a regulatory view of the fourth amendment need not imply universal standing to invoke the exclusionary rule; it may well permit distinctions between persons who are and persons who are not permitted to suppress unconstitutionally obtained evidence.²¹² But, however else those distinctions may be turned, they cannot be turned upon the fact that a defendant has departed premises unbeknownst to the police prior to the time when the police enter the premises expecting to find him there.

Similar problems of perspective arise, of course, whenever issues of the fourth amendment's coverage or requirements depend upon factual propositions. The amendment protects the

"curtilage" around a house, but not "open fields."²¹³ "Curtilage" is defined not merely by geographic proximity to a dwelling but also by domestic use.²¹⁴ Is the relevant question, then, how the area is in fact used, or how the officers think it is used, or whether the officers have probable cause to believe that it is not used as a part of the domestic economy?

The fourth amendment requires probable cause to support an arrest²¹⁵ and reliable indications of criminal activity to support an investigative "stop."²¹⁶ Arrests and stops are defined in terms of differing degrees of restraint.²¹⁷ Is the relevant question whether a policeman thinks that he is restraining a citizen whom he accosts, or whether the citizen thinks that he is being restrained, or whether the policeman's conduct involves certain objective indicators of restraint?

The fourth amendment requires a search warrant for the search of a motor vehicle unless "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."²¹⁸ Is the relevant question whether the vehicle can in fact be quickly moved, or whether the officers think, or reasonably believe, that it can?

You will be surprised to learn that there are no authoritative answers to these questions. I have seen suppression motions litigated from one factual perspective or the other, or upon a jumble of both, while the court sat uncommitted and the attorneys did not dare discuss the problem because of uncertainty as to what view the court was taking or would take if the problem were articulated. Once again, I am not asserting that a choice between the basic atomistic and regulatory conceptions of the fourth amendment would dictate one logically inescapable answer to each of these questions, still less a common answer to them all. But I do assert that the choice is a starting point for analysis: under atomistic and regulatory theories, analysis will proceed by differing routes, often to differing conclusions.

I suggest that the choice is also important for reasons that transcend particular doctrinal issues. "Policing the police"²¹⁹ is both an epithet and an activity that most judges would prefer to avoid. Of course, "policing the police" is a phrase of many meanings, and a good part of the aversion and defensiveness that it arouses in judges stems from confusion among those meanings. Insofar as it signifies that the judges are free to depart from the judicial function and to assume a "roving com-

mission" to superintend police departments according to their "own notions of enlightened policy,"²²⁰ I can imagine few people "in the democratic tradition"²²¹ who would not decry policing the police. Insofar as it means that the judges are charged with providing "some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials,"²²² and are therefore obliged to decide what police activities violate those guarantees, few would deny the propriety — indeed, the inevitability — of policing the police.

But the first use of the phrase tends to discolor the second, particularly since judges striving conscientiously to interpret constitutional clauses of the vaguest scope and signification must be always plagued by fears that they have crossed the forbidden line and found the meaning of the Constitution in their own inwards. The "ordeal of judgment,"²²³ already intense by reason of the gravity of the stakes and those self-doubts that any human being must feel when his own lights are controverted by the lights of others upon dark questions,²²⁴ is thus further intensified by the nagging sense that "policing the police" is none of judges' business.²²⁵ Recognition that the fourth amendment is quintessentially a regulation of the police—that, in enforcing the fourth amendment, courts *must* police the police—serves to counteract that sense.

What is involved here is a matter of mood, of tone, of the basic attitudes that shape a court's perception of problems and its will to act upon them. Certainly, in one sense all judges appreciate that the fourth amendment is concerned with regulating police behavior. But it makes a difference whether that regulation is conceived to be the primary thrust of the amendment or a mere by-product of the amendment's protection of isolated enclaves of individual interest against invasion by particular police actions. The Supreme Court's coerced-confession cases, obviously, developed increasingly stringent limitations upon police interrogative practices²²⁶ when the Court began to move from the view that coercion was primarily a matter of the impact of police actions upon an accused²²⁷ to the view that the coercion doctrine stemmed in large part from a "deep-rooted feeling that the police must obey the law while enforcing the law,"²²⁸ and was therefore directly concerned with police misconduct.²²⁹ This parallel development may be a mere coincidence; or I may be putting the cart before the horse; or the relationship between forthright acceptance of a regulatory power and vigor in its exercise may be unique to the confession area;²³⁰

but I do not think so. The elaborate canon of rules governing police interrogations that the Court eventually announced in *Miranda v. Arizona*,²³¹ although explained as "safeguards"²³² to assure an accused "full opportunity to exercise the privilege against self-incrimination,"²³³ seems to me both the natural consequence of, and an upshot that could only arise from, the Court's anterior shift of coerced-confession principles from an atomistic to a regulatory axis.

Similarly, I shall suggest later in these lectures that the fourth amendment may require the police to promulgate and observe written rules governing certain aspects of their activities. While this requirement might be justified in the language of *Miranda* as a "safeguard" against violations of individuals' isolated spheres of fourth amendment rights, it would find a firmer footing in the alternative conception of the amendment as a general command to government to respect the collective security of the people in their persons, houses, papers and effects, against unreasonable searches and seizures.

Finally, this conception would demand that courts consider fourth amendment doctrines as components of a regulatory system and would thereby emphasize questions of methodology in the shaping of the doctrines that tend currently to be ignored. Two of these, in particular, are the remaining questions that I wish to raise with you this afternoon. My first two questions were concerned with choices among basic models of the fourth amendment: they combine to ask whether the amendment should be viewed as protecting specific interests of specific individuals against specific abuses of specific police procedures or as regulating police practices broadly, generally and directly. My next two questions have to do with methods of devising legal rules to implement either model, although the questions become most visible in connection with the regulatory model.

First, to what extent should fourth amendment rules turn upon subjective as well as objective considerations affecting police conduct—not only the circumstances under which policemen act, but the reasons, the purposes, the motives for their actions? This is an exceedingly vexatious subject which the Supreme Court has never coherently discussed and which the current case law handles inconsistently in different contexts. For example, just last month the Supreme Court sustained warrantless full-scale body searches incident to arrests for traffic violations notwithstanding the arresting officers had neither

grounds nor purpose to look for weapons or criminal evidence upon the persons of the arrestees.²³⁴ The Court did not suggest any justifications for the search-incident-to-arrest exception to the warrant requirement²³⁵ other than the traditionally recognized justifications of immediate need to remove weapons or destructible evidence from the arrested person's reach.²³⁶ It merely said that since the fact of arrest confers the right to search, it was immaterial that the officer entertained none of the purposes for which the right was given.²³⁷ At the same time the Court did not question,²³⁸ and Mr. Justice Powell's concurring opinion appeared to approve,²³⁹ the considerable line of lower-court decisions holding that an officer having valid grounds for arrest who makes²⁴⁰ or times²⁴¹ the arrest as a "pretext"²⁴² for invoking search-incident-to-arrest powers to avoid the warrant requirement thereby acts unconstitutionally. In other words, an arrest may not be used as a pretext for a search incident to arrest, but a search incident to arrest may be used as a pretext for a general search.²⁴³

For the most part, as my doctrinal summary of fourth amendment lore should have indicated, the constitutional rules governing searches and seizures allow, withhold or limit the search power upon the basis of entirely objective criteria. When objective circumstances authorizing an exercise of that power exist, a policeman may exercise it within objectively defined limits;²⁴⁴ and courts will not ordinarily inquire whether its exercise was actuated by the right or wrong motives.²⁴⁵ However, there are some contrary cases holding that, if an officer's conduct would be lawful in pursuit of one purpose but unlawful in pursuit of another, it is unlawful when directed to the wrong pursuit.²⁴⁶ Justices White, Harlan and Stewart strongly criticized this view in an opinion written half a dozen years ago with the comment that to send "state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."²⁴⁷ But a majority of the Court refused at that time to consider whether a "policeman's unlawful subjective intentions require exclusion of evidence obtained by lawful conduct";²⁴⁸ and only six weeks later a different majority of the Court, including Justices White, Harlan and Stewart, sustained a police officer's entry into an impounded car, purportedly to roll up the windows because it had begun to rain, on the basis of "precise and detailed [factual] findings . . . to the effect that the[entry was made] . . . to protect the car while it was in police custody,"²⁴⁹ while reserv-

ing the question whether the entry would have been legal for the purpose of conducting a search.²⁵⁰

Obviously, we shall have to return to these problems of purpose and intent, which send some very menacing tremors through the structure of objective fourth amendment doctrines that the Supreme Court has elaborately constructed.²⁵¹ My last question of the afternoon is yet more tremorous, and threatens to precipitate the structure into a perfect pit of ooze. That question is the extent to which fourth amendment doctrines should be carved out into large categories or, on the other hand, graduated in fine degrees.

The question runs the length and breadth of the amendment, but two examples of its application should suffice to show its nature and importance. You will recall that in my doctrinal summary I emphasized "one governing principle [that] . . . has consistently been followed" by the Supreme Court²⁵² as constituting "the very heart of the Fourth Amendment directive,"²⁵³ namely, "the rule that a search must rest upon a search warrant,"²⁵⁴ "subject only to a few specifically established and well-delineated exceptions."²⁵⁵ Does this language, "specifically established and well-delineated exceptions," mean what it plainly appears to say: that the roster of exceptions is closed? I would have thought so as late as 1972, both because the Supreme Court had just delivered a striking sequence of opinions drawing very hard and fast lines around each of the major exceptions to the warrant requirement²⁵⁶ and because the Court had twice in two years steadfastly refused to reason by analogy from established exceptions to the creation of new ones.²⁵⁷ Then in 1973, with only Justices Douglas and Brennan dissenting, the Court established a new and totally unheralded exception, permitting what it called a "very limited search"²⁵⁸ of the body of a person whom the police have probable cause to arrest but do not arrest, in a very limited class of circumstances.²⁵⁹

Notwithstanding the limitations, the Court's decision makes the kind of very small hole in the fabric of the fourth amendment which customarily begins the process by which entire tapestries unravel. You have doubtless all heard about the progress of the apocryphal author of the celebrated treatise called *Jones on Easements*. The first sentence of the first edition began: "There are fourteen kinds of easements recognized by the law of England." But the work was well received, and the author labored to produce a second edition, in two volumes, which nec-

essarily began: "There are thirty-nine kinds of easements." After the author's death, the treatise was scrupulously updated by his literary scions and now appears in a solid 12-volume sixth edition beginning with the sentence: "It is impossible to say how many kinds of easements are recognized by the law of England." If the Supreme Court's 1973 decision recognizing a new—albeit very tiny—exception to the warrant requirement does not commence a second edition of the fourth amendment, anyone familiar with the law of easements will be justly amazed.

The problem, of course, in shaping both the law of easements and the law of the fourth amendment is that the variety of situations with which they deal is mindboggling; each situation bristles with considerations and demands that are "not easily quantified and, therefore, not easily weighed one against the other";²⁶⁰ and it seems "too dogmatic"²⁶¹ and improperly insensitive to the practical complexities of life to categorize or pigeon-hole situations for the purpose of enforcing a discipline of rules upon the richness of events. But if some discipline is not enforced, if some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.

Take another instance of the same difficulty. When the stop-and-frisk cases came before the Supreme Court in 1967, the opponents of stop-and-frisk urged the Court to recognize only two categories of police-citizen street encounters. Either a citizen was being restrained in his freedom to walk away from the accosting officer—restrained in any degree, for any length of time, for any purpose—or he was not. If he was being restrained, that was a fourth amendment "seizure" of his person and was lawful only upon probable cause to believe him guilty of a crime. If he was not being restrained, there was no "seizure," and of course the officer was free to talk to the citizen as much as he wished, upon any grounds or none at all—so long as the citizen also wished to stop and listen.

The proponents of stop-and-frisk urged the Court to reject any such poster-color model of the fourth amendment. They argued that "in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess."²⁶² Thus an officer should be permitted to approach and question a citizen on the street

without cause; he should be permitted to stop and frisk the citizen—that is, to detain him briefly for questioning and to pat him down—upon “reasonable suspicion”; and he should be permitted to arrest and search the citizen thoroughly upon probable cause. The Supreme Court essentially adopted this latter position. Its 1968 decisions are commonly read as recognizing three categories of street encounters: mere conversation, which an officer may commence without any particularizing cause; “stops,” which require some reliable indicia of criminal activity not amounting to probable cause; and “arrests,” which require probable cause.²⁶³

But why only three categories? Why not six, or a dozen, or an even hundred? If a flexible set of graduated responses is what is wanted, why not recognize simply the principle that increasing degrees of restraint require increasing amounts of justification? In this fashion, we could achieve the infinitely sensible result that two-minute street detentions are allowable upon a 37 percent probability of criminality, four-minute street detentions are allowable upon a 39 percent probability of criminality, and so on.

Several years ago when I was teaching at Penn, we had our local version of the grading reform boom that has since swept the law schools of the nation. Students and some faculty rebelled against the rigidities and artificialities of the 100-point numerical grade scale then in use. Other faculty members were loath to abandon it, and challenged the reformers to devise a better scheme. Some suggested a seven-point scale; some said three grades would be sufficient; some stood upon the plank that categories ought to be entirely abandoned, leaving each professor to fill the margins of his bluebooks with such withering or admiring adjectives as he might choose.

Finally, some political genius hit upon a solution. One hundred pairs of adjectives were chosen to replace the 100 numbers of the 100-point grade scale, ranging from “abysmally abominable” for zero to “celestially sublime” for 100. The system was to be called the Peachy Keen Scale because “peachy keen” was the adjectival equivalent for a 78, which everyone agreed ought to remain the median grade, or adjective, at the law school. The system was a fireball until several professors—who had never previously felt unduly confined by the numerical scale because numbers are recognizedly artificial—complained that the Peachy Keen Scale contained an insufficient

number and quality of adjectives to express their views upon the infinite variety of student writing.

The motto, I suppose, is that any number of categories, however shaped, is too few to encompass life and too many to organize it manageably. The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves. The question must be answered with a due regard for the practical workings of the institutions that administer, and are governed by, any particular set of rules. It is among the questions that will vex us when we resume tomorrow.

III. THE SCOPE OF THE FOURTH AMENDMENT

I can think of few constitutional issues more important than defining the reach of the fourth amendment—the extent to which it controls the array of activities of the police. You will doubtless think that that statement bears the same relationship to tunnel vision that a transatlantic tunnel would bear to a termite hole, so let me present it to you in another form: I can think of few issues more important to a society than the amount of power that it permits its police to use without effective control by law.

Oh, I know the objections that will be raised against this reformulation. Doesn't he know that there are other amendments to the Constitution than the fourth? Doesn't he know that there are other legal controls upon the police than the Constitution? Doesn't he know that the Constitution has little impact upon what the police actually do? I am vaguely aware of the first two of these propositions and painfully aware of the third, but I continue to believe that the limits of American society's effective control over the largest part of the spectrum of police powers and potential abuses depend upon the scope given to the fourth amendment.

I do not disparage other constitutional guarantees. The first amendment imposes restrictions upon police interference with exercises of free speech—with the activities of public speakers,²⁶⁴ demonstrators,²⁶⁵ handbillers,²⁶⁶ and the like—that are vital to a free society and particularly important in times of articulate dissent.²⁶⁷ But speech activity is a small albeit precious part of the lives of most citizens, and even its fullest protection leaves the police unfettered to deal as they please with

most of us most of the time.²⁶⁸ The fifth and sixth amendments restrict a somewhat wider range of police conduct,²⁶⁹ although both have been markedly curtailed by Supreme Court decisions in recent years.²⁷⁰ Even assuming, as I do, that these decisions neither need to be accepted as the gospel nor will stand the test of time, the fifth and sixth amendments necessarily will remain limited in the sorts of police conduct they control: the fifth, to police conduct that extracts something from a citizen by compelling the acquiescence of his will;²⁷¹ and the sixth, to police contacts with citizens that a lawyer can do something about.²⁷² I wish that there were more of the latter than there are, but as Michael Meltsner—my soul-brother and collaborator in many litigations against police abuses—has recently written: “no one feels so irrelevant as a lawyer in a shoot-out.”²⁷³

The privilege of the writ of habeas corpus²⁷⁴ is a priceless right, but one that comes into play only when police practices involve the restraint of an individual's liberty.²⁷⁵ Even then, the protective force of the writ depends primarily, although not exclusively, upon the various more specific substantive guarantees that it enforces,²⁷⁶ principally the fourth amendment.²⁷⁷ The equal protection clause states, I think, the finest aspiration of our society, and its letter might be invoked by courts, or its spirit in political or administrative forums, to control provably discriminatory police practices.²⁷⁸ But, as anyone who has tried to challenge those practices in any forum knows, the fact of discrimination is one thing and its proof is quite another.²⁷⁹ If there were no fourth amendment, due process of law might be pressed into service to restrain unfair, arbitrary or abusive police practices.²⁸⁰ But the generality of the clause makes its use unlikely in any situation where the fourth amendment fails.²⁸¹ Once again, I do not minimize the value of any of these safeguards or of others that may be drawn by reasoning from them.²⁸² I do not denigrate the sum of the protections that together they provide. I say only that, notwithstanding all of them, an enormous range of police power stands unrestrained and subject to abuse.

Nor do I ignore the possibility of controlling that power and restraining its abuses by subconstitutional law. I only wish that the possibility might become a reality. But our fondest hopes must be tempered by a little common sense. The long-time, wholesale “legislative default”²⁸³ in regulating police practices is no accident.²⁸⁴ Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protect-

ing persons under investigation by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control.

From a legislative point of view, the problem of crime in a civilization as complex as ours can be handled in either of two ways. One involves both an honest admission that we do not now know how to deal with the problem effectively and the commitment of enormous resources and enormous patience to the uncertain work of seeking new approaches that will probably entail large-scale institutional and social change. The other involves perpetuation of the myth that crime is simply a matter of criminals who can be brought to book in due order if the police are given a free hand and sufficient hardware. Under this view, if the police fail to solve the crime problem or commit excesses in their zealous efforts to solve it, *they* are left holding the bag.²⁸⁵ There seems to me little doubt which ticket most legislators will choose to run on, now or in the future. Under the stimulus or apprehension of constitutional decisions by the courts, legislatures may be moved to act.²⁸⁶ In any area that is outside the pale of constitutional controversy, legislatures may confidently be expected to do nothing.

Back in 1966, a prison correspondent of mine was astounded to read that the Supreme Court had been asked in *Miranda v. Arizona* to defer decision upon the constitutionality of taking confessions from uncounseled suspects, pending the action of "state legislative bodies and advisory groups"²⁸⁷ who were then engaged in drafting legislation to control police interrogative practices. His answer was testier than that given by the Chief Justice for the Court, but you will perhaps understand his bitterness when I explain that he was one of the thousands of men left with unprovable claims of coercion after *Miranda* was declared non-retroactive.²⁸⁸ Where, he wondered, had these legislative bodies and advisors been during all the years when police were beating heads before the courts moved in?

I have somewhat more hope for the prospect of police self-regulation through the process of departmental rulemaking, a subject to which I shall later return.²⁸⁹ But I agree with Professor Davis that police rulemaking is unlikely to proceed very far without considerable nudging from the courts.²⁹⁰ It will be interesting to see, for example, whether there is any movement toward the regulation of police entrapment practices by either

legislation or rulemaking, now that the Supreme Court has definitively cast the entrapment area out into the nether darkness of constitutional uncontrol.²⁰¹ You may place your bets, ladies and gentlemen, while the ink is still scarcely dry upon the Supreme Court's opinion. Only my recent New Year's resolution not to make book against civil liberties this year forbids me from covering all the optimists.

But am I not myself unduly optimistic to believe that any construction given the fourth amendment will affect what the police do? I shall return later to my doubts and hopes upon that score. For now, let me say only that our prospects for developing any generally effective control over police practices depend upon two things. The first is the creation of new regulatory devices, principally police rulemaking, that can be created and maintained in working order only by the stimulation and the oversight of courts enforcing constitutional law.²⁰² The second is the preservation and extension of the notion that the deepest values of our social order set limits upon how far the police may go, even in the indispensable work of investigating and apprehending criminal malefactors.

Chief Justice Burger recently observed that our long dependence on the exclusionary rule as a means of enforcing the fourth amendment makes it impossible for us to abandon the rule before effective substitutes are instituted—and, presumably, take hold—lest we give law enforcement officials “the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on ‘criminals’ had been declared.”²⁰³ The force of the observation runs deeper. For generations, our great American vacuum of subconstitutional controls upon police practices has left the people and the police of this nation with the unfortunate, but unmistakable and indelible impression that the Constitution is our one instrument for keeping the police within the rule of law. If we can ever be weaned of that impression, I shall count it as a great advance—although I do not think I shall still be counting by terrestrial civic standards when it comes. Before that time, we must count upon the Constitution, and primarily upon the fourth amendment, to identify the areas of concern, keep the concerns alive, set at least the minimum standards for each area, and provoke, inform and monitor the processes of enforcement in each area where we want to govern our police instead of being governed by them.

Let us then examine what areas of police activity the fourth

amendment governs and the problems of demarking them. Police perform, of course, a wide range of functions: investigating specific criminal offenses, gathering general intelligence about the occurrence and the existence of possible sources of crime or trouble, responding to calls from the victims of crime and other persons in need of assistance, quieting disputes, controlling and dispersing crowds, patrolling the streets, directing traffic, un-treeing cats, shoveling up drunks who are down and leveling down drunks who are up—to mention just a few.²⁹⁴ It is not my purpose to deal with all of these activities, or even with all of the varied methods by which the police pursue the function of criminal investigation,²⁹⁵ which has been the focal point of most fourth amendment law to date.²⁹⁶ Rather, after reviewing some of the concepts that the Supreme Court has used to delimit the outer boundaries of the fourth amendment and discussing several major problems that confound the work of boundary-marking, I shall talk about a few specific police practices that exemplify the problems.

My summary yesterday indicated that the Court's traditional approach to determining whether a particular police practice lay within the ambit of the fourth amendment was to ask two successive questions. Was the practice a "search" or "seizure"?²⁹⁷ Did it invade the constitutionally protected area of some person, house, paper or effect?²⁹⁸ If the answer to either question was no, the amendment was inapplicable. For example, the Court early²⁹⁹ said that the use of a searchlight or a spyglass was not a search,³⁰⁰ a ruling that was taken generally to mean that the eye cannot commit a search³⁰¹—nor, by parity of reasoning,³⁰² can "the uninvited ear"³⁰³—and that a physical intrusion of some sort was required.³⁰⁴ The maxim that the eye or ear could not commit a search, of course, harked back to English common law and had been mentioned by Lord Camden in his celebrated judgment in *Entick v. Carrington*,³⁰⁵ which has always been justly received³⁰⁶ as something of a lexicon of the "original understanding" of the fourth amendment.³⁰⁷ Also quite early the Supreme Court held that even a physical trespass upon an owner's "open fields" was not within the coverage of the amendment,³⁰⁸ thereby spawning a body of law that involved such concepts as "curtilage"³⁰⁹ and concerned itself with determining whether a particular sort of "area [was] immunized by the Constitution from unreasonable search and seizure."³¹⁰

The interaction of these two limitations upon the operation of the fourth amendment is seen most clearly in the 1928 *Olm-*

stead decision,³¹¹ holding telephone wiretapping outside the reach of the amendment. The Court's reasoning was straightforward: eavesdropping upon a phone conversation was neither a "search" nor a "seizure" because the ear cannot commit a search or seizure,³¹² and the tap of the telephone wire was not an intrusion into any area protected by the Constitution in favor of the phone owner, because those "wires are not part of his house or office any more than are the highways along which they are stretched."³¹³ The Court subsequently applied the same reasoning to deny that any search or seizure had occurred when police officers overheard conversations in an individual's office or shop by placing an electronic amplifying device against the outside of a party wall³¹⁴ or by sending in an undercover spy wired for sound.³¹⁵

But there was considerable dissatisfaction with *Olmstead* among the Justices,³¹⁶ and the process of whittling it away began in 1961 when the Court found that the fourth amendment covered electronic monitoring of conversations within a house by officers who inserted a spike-mike into a party wall and struck a heating duct.³¹⁷ The case went off on "physical penetration into the premises,"³¹⁸ and the Court found no necessity to reconsider *Olmstead* or its progeny while declining to extend them, as it said, "by even a fraction of an inch."³¹⁹ Fourth amendment Court-watchers began waiting for the other shoe to fall.³²⁰ It fell in *Katz v. United States*,³²¹ the 1967 decision that figured so prominently in my doctrinal summary yesterday because it marks a watershed in fourth amendment jurisprudence.

As I mentioned, *Katz* involved police monitoring of the conversation of an individual in a public pay telephone booth through the medium of an electronic amplifying device attached to the outside of the booth. The parties, as might have been expected in the light of all twentieth-century Supreme Court discussions of the fourth amendment, thought that the case raised two issues: whether the phone booth was a constitutionally protected area and whether observation into it without physical intrusion was a search or seizure.³²² But the Supreme Court rejected this formulation of the issues as "misleading,"³²³ said that "the Fourth Amendment protects people, not places,"³²⁴ reasoned that it therefore protects "what [an individual] . . . seeks to preserve as private, even in an area accessible to the public,"³²⁵ and concluded that the "Government's activities [which] . . . violated the privacy upon which [the user of a telephone booth] . . . justifiably relied . . . thus constituted a 'search

and seizure' within the meaning of the Fourth Amendment."³²⁶ *Olmstead* was overruled on the view that its "underpinnings" had been "eroded by . . . subsequent decisions"³²⁷ of two sorts: the 1961 spike-mike case, holding that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law,'"³²⁸ and several other cases saying, in contexts not relating to the scope of coverage of the amendment, that fourth amendment rights are not controlled by "'property interests.'"³²⁹

I have taken the time to rehearse the background and the grounds of decision of the *Katz* case in order to emphasize its extraordinary character and implications. The case is, of course, now generally recognized as seminal and has rapidly become the basis of a new formula of fourth amendment coverage. The formula is that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion."³³⁰ Notwithstanding the Supreme Court's several repetitions of this formula or variations of it,³³¹ and notwithstanding even its apparent acceptance by Mr. Justice Stewart (the author of the *Katz* opinion),³³² I believe that it destroys the spirit of *Katz* and most of *Katz's* substance.

Let us start with the seemingly harmless substitution of the phrase "governmental intrusion" for the finding in *Katz* that the government had "violated" *Katz's* interests.³³³ If the word "intrusion" is used, as "violated" plainly was, to mean only that interests protected by the fourth amendment have been defeated by the "Government's activities,"³³⁴ I have no quarrel with it. The problem with the word lies in its subtle suggestion that a particular kind or sort of government activity, labeled an "intrusion," is necessary to trigger the fourth amendment.³³⁵ But this, in my view, was precisely the approach to fourth amendment coverage that *Katz* decisively rejected.

The entire thrust of the opinion is that it is needless to ask successively whether an individual has the kind of interest that the fourth amendment protects and whether that interest is invaded by a kind of governmental activity characterizable by its attributes as a "search." Rather, a "search" is anything that invades interests protected by the amendment.³³⁶ It is only upon this assumption that the underpinnings of *Olmstead* could have been thought to be eroded by intervening decisions which recognized protection for interests that *Olmstead* held unprotected,³³⁷ but did not (as *Katz* did) involve the invasion of those interests

by other means than physical trespass.³³⁸ *Katz*, in other words returned to the grand conception of *Boyd v. United States*,³³⁹ a case that Mr. Justice Brandeis said would "be remembered as long as civil liberty lives in the United States"³⁴⁰ but which the Supreme Court had largely forgotten throughout the *Olmstead* era.³⁴¹ *Katz* held, as *Boyd* had, that whatever "is a material ingredient, and effects the sole object and purpose of search and seizure"³⁴² is a search and seizure in the only sense that the Constitution demands.

Now let us consider the word "expectation" in the "reasonable expectation of privacy" formula to which *Katz* is speedily being reduced. "Expectation" is not a term used in Mr. Justice Stewart's majority opinion in *Katz*; it has been lifted by subsequent cases³⁴³ from Mr. Justice Harlan's concurring opinion, where it is used to mean "an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"³⁴⁴ But Mr. Justice Harlan himself later expressed second thoughts about this conception,³⁴⁵ and rightly so. An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

I need hardly add that, for many of us, the announcement would be gratuitous.³⁴⁶ I shall not speak for any of my associates or acquaintances, lest my disclosure of their expectations, or the lack thereof, prejudice their fourth amendment rights. For myself, I have had no actual, subjective expectation of privacy in my telephone, my office or my home since I began handling civil rights cases in the early 1960's. Perhaps the energy crisis will become so bad as to restore that expectation, but it seems unlikely. Even if every police agency in this country reduced its electronic surveillance by 10 or 15 percent to meet general government goals for the reduction of power usage, we would still have an extremely slim basis for much actual expectation of privacy. Fortunately, neither *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.

Finally, it is plainly wrong to capsule *Katz* into a comprehensive definition of fourth amendment coverage in terms of "privacy." *Katz* holds that the fourth amendment protects certain privacy interests, but not that those interests are the only interests which the fourth amendment protects. To the contrary, the *Katz* opinion says in so many words that "its protections go further, and often have nothing to do with privacy at all."³⁴⁷ In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivity in any formula. An opinion which sets aside prior formulas with the observation that they cannot "serve as a talismanic solution to every Fourth Amendment problem"³⁴⁸ should hardly be read as intended to replace them with a new talisman.

As a doctrinal matter, it seems clear that the effect of *Katz* is to expand rather than generally to reconstruct the boundaries of fourth amendment protection.³⁴⁹ *Katz* is important for its rejection of several limitations upon the operation of the amendment, but it offers neither a comprehensive test of fourth amendment coverage nor any positive principles by which questions of coverage can be resolved. The fourth amendment is not limited to protection against physical trespass, although the pre-constitutional history of the amendment was concerned with trespasses. "Searches" are not particular methods by which government invades constitutionally protected interests: they are a description of the conclusion that such interests have been invaded. The key to the amendment is the question of what interests it protects. Mr. *Katz*'s conversation in a pay telephone booth was protected because he "justifiably relied" upon its being protected³⁵⁰—relied, not in the sense of an expectation, but in the sense of a claim of right. In the end, the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection.

Of course this begs the question. But I think it begs the question no more or less than any other theory of fourth amendment coverage that the Court has used. *Olmstead* said that "the words search and seizure" could not be enlarged so "as to forbid hearing or sight."³⁵¹ But why? Because Lord Halifax's messengers had used their feet and their hands as well as their ears and eyes? *Boyd* had already rejected the premise of fourth amendment construction upon which that logic rests. Because the ear and eye could not commit a trespass "by the laws of

England"?³⁵² Putting aside quibbles over the status of eavesdroppers at common law,³⁵³ it is plain that the process of disentangling fourth amendment protections from "subtle distinctions, developed and refined by the common law in evolving the body of private property law"³⁵⁴ had begun prior to *Olmstead*.³⁵⁵ *Olmstead* tells us that telephone wires are entitled to no more protection than the highways beneath them. But why? For want of a basic conception as to what the fourth amendment protects or protects against—a conception which, as I said yesterday, the Supreme Court has never developed—*Olmstead's* answers to these questions remain as conclusionary as the contrary answers of *Katz*.

That brings me to the problems of formulating such a basic conception. Foremost among them, obviously, is the point that I made earlier this afternoon: that the police engage in a vast range of activities affecting a broad spectrum of citizens' interests in a complex variety of ways.³⁵⁶ If we were to start from scratch in defining and regulating police practices with a due regard for those citizens' interests, we would want first to decide what powers should be given to the police and then to limit each power according to its nature, to the interests it potentially affects, and to the abuses foreseeable in its exercise.³⁵⁷ But a very large part of the activities of the police are not specifically authorized by law;³⁵⁸ the activities are simply conducted by the police in the discharge of their broad general duties to enforce the law and keep the peace.³⁵⁹ Legislative and executive limitation of the practices has been "minor to the point of nonexistence."³⁶⁰ The consequence has been not only that the fourth amendment has been flung into the breach³⁶¹ but that the Supreme Court is strongly cautioned to keep its contours fluid, so as to maintain extensibility over the unexpected. In simpler terms, the Court never knows what the police will come up with next. In recent years, of course, rapid technological advances and the consequent recognition of the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society"³⁶² have underlined the possibility of worse horrors yet to come.

In part this difficulty is endemic in the very institution of enforcement of the Federal Constitution as a limitation upon state practices—or, for that matter, as a limitation upon the practices of the nonjudicial federal branches. Coherent regulation of any power requires an integration of the terms in which the power is authorized and the terms by which it is limited; and an

agency which controls some of the terms of limitation but none of the terms of authorization is generally likely to prefer mobility to consistency in its regulatory techniques. However, the degree to which mobility must be maintained and consistency must be sacrificed to maintain it depends upon the extent of variability that can be expected in the practices that the Court is called upon to regulate. When the Court deals with the sixth amendment right to counsel in the criminal trial setting, for example, or the sixth amendment rights to confrontation and a jury trial, it can develop a fairly consistent definition of these constitutional rights with the reasonable expectation that subsequent events will not produce surprises proving the definitions insufficient or embarrassing. Criminal trials are pretty standardized events; their evolution is relatively slow; changes in their form can ordinarily be predicted well in advance.³⁶³ Police practices, on the other hand, are a perpetual Pandora's box. It demands a great deal of the Court to ask that it develop coherent principles for the definition of "searches" and "seizures" without knowing what is going to come out of that box in Meridian, Mississippi or New York City tomorrow.

The second problem in developing such principles arises from a complicated relationship between the scope of coverage of the fourth amendment and the protections that it affords in the areas that it covers. We can begin to see this problem if we return for a moment to the *Katz* case. In *Katz* the government argued that even if its electronic surveillance were held to be a search or seizure within the purview of the amendment, it was not an *unreasonable* search or seizure. It was not unreasonable, the government urged, for three reasons: first, because its agents bugged the pay phone only after their investigations had produced "a strong probability"³⁶⁴ that *Katz* was using that particular phone to violate federal law by the interstate transmission of gambling information; second, because they limited their surveillance to the brief periods during which *Katz* was known to use the booth; and third, because they took great care to overhear only *Katz's* conversations, no one else's. Conceding all of this and that a warrant could therefore have been issued authorizing what the agents did, the Court held their surveillance unconstitutional for want of a warrant. This, of course is nothing more or less than the familiar fourth amendment warrant requirement,³⁶⁵ but I hope that its familiarity will not cause you to overlook the implications of its imposition here. Having once held that a coin telephone booth was protected by

the fourth amendment against non-trespassory electronic surveillance, the Court proceeded to require the same justifications for that surveillance as would be required before an officer could go barging into Katz's bedroom.

Let me quickly say that this *result* does not surprise me or seem wrong. The insidious, far-reaching and indiscriminate nature of electronic surveillance—and, most important, its capacity to choke off free human discourse that is the hallmark of an open society—makes it almost, although not quite, as destructive of liberty,³⁶⁶ as “the kicked-in door.”³⁶⁷ Certainly I would not quarrel with anyone who made that judgment on that basis. Perhaps the Court made it in *Katz*. But the Court's opinion in *Katz* says nothing about the particularly repressive characteristics of electronic surveillance; it simply takes up the warrant requirement from the dwelling-entry cases and applies it routinely to the bugging of a public telephone booth. The same approach is taken throughout the fourth amendment cases generally: searches of garages within the “curtilage” of a dwelling³⁶⁸ or of automobiles parked in the driveway,³⁶⁹ for example, are subject to the identical warrant requirement as searches of the dwelling itself.

The fourth amendment, then, is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings.³⁷⁰ To label any police activity a “search” or “seizure” within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a “search” or “seizure,” it is subject to no significant restrictions of any kind.³⁷¹ It is only “searches” or “seizures” that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.³⁷²

Obviously, this kind of all-or-nothing approach to the amendment puts extraordinary strains upon the process of drawing its outer boundary lines. It is true, as Mr. Justice Holmes said, that “[w]henver the law draws a line there will be cases very near each other on opposite sides.”³⁷³ But where the consequences that turn upon the line are enormous, out of all proportion to the differences between the cases lying close on either side, courts are likely to be impelled either to wiggle the line or to keep it fuzzy.

Examples of wiggling are easy enough to find. In 1948, for

example, the Supreme Court confronted a case in which warrantless police officers secured entry to a boarding house by having one of their number climb through the landlady's window. They then proceeded to a second-floor common hallway, stood on a chair, looked through the transom above a tenant's door, saw the tenant conducting a gambling operation, yelled to the tenant to open the door, and, when he did so, arrested him and seized the gambling paraphernalia.³⁷⁴ The Government's argument was obvious enough: (1) the officers' entry through the landlady's window violated only her rights, not the tenant's;³⁷⁵ (2) therefore, so far as he was concerned, they were lawfully in the hallway; (3) the hallway itself was a common-use area unprotected by the fourth amendment;³⁷⁶ (4) looking through the transom was not a search because the eye cannot commit a search;³⁷⁷ (5) what the officers saw through the transom gave them probable cause for a warrantless arrest;³⁷⁸ (6) a warrantless arrest entry was therefore permissible;³⁷⁹ (7) the gambling paraphernalia could be seized without a warrant incident to arrest.³⁸⁰ The Supreme Court did not, as it said, "stop to examine that syllogism for flaws." It simply announced: "we reject the result,"³⁸¹ without announcing why. Examination of the syllogism would, I think, have stirred some of the fourth amendment's deeper difficulties.³⁸² But the rejection of its result was as foreordained as Zarathustra's rejection of the gods, and for much the same reason. If this totally unreasonable conduct were not a search and seizure, how could the Supreme Court condemn it as an unreasonable search and seizure? *Therefore*, it was a search and seizure.³⁸³

A case decided by the Fifth Circuit in 1964 uses the same technique to validate a search. There a federal agent had probable cause—indeed, cause approaching proof positive—to believe that the occupants of a motel cabin had concealed stolen money orders somewhere under the cabin. Without first securing a warrant, he crawled underneath the cabin and extracted the money orders from their resting place atop a brick pillar. In its original opinion, the court of appeals upheld this search and seizure upon the controlling authority of an earlier Fifth Circuit case which, the court said, established that "what 'may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business'" or a motel cabin.³⁸⁴ As in the earlier case, the search here was limited to an area under the building: it was "'confined to the top of a foundation block, only a foot or two removed from the 'open fields' which

are not within the protection of the Fourth Amendment.'"³⁸⁶ Surely, the court of appeals seemed to be saying, so small an incursion in connection with a transiently occupied motel cabin, and upon probable cause, could not be held unreasonable.

In his petition for rehearing, the motel occupant made the troubling point that a Supreme Court decision post-dating the earlier Fifth Circuit case held that any search and seizure of constitutionally protected premises without a warrant was *per se* unreasonable.³⁸⁶ The Fifth Circuit denied rehearing with the observation that "[s]ince we held that the location of the evidence in question was not within the protection of the Fourth Amendment, the reasonableness of the search is not a relevant constitutional consideration."³⁸⁷ Confronted with the necessity of enforcing the warrant requirement all the way to the boundary line of the fourth amendment, the court moved the boundary line over a couple of feet.³⁸⁸

Now there is much to be said, I think, for the approach to the fourth amendment taken in the court of appeals' original opinion. Why should not the protections of the amendment be graduated, imposing lesser or greater restraints upon searches and seizures in proportion to their intrusiveness and to the sanctity of the interests they invade? In two cases the Supreme Court has taken just such a sliding scale approach. The first is *Terry v. Ohio*,³⁸⁹ the major stop-and-frisk decision, in which the Court authorized investigative stops—that is, brief on-the-street detentions accompanied by a frisk or patdown for weapons—upon less than probable cause for arrest. As I mentioned yesterday, the holding in *Terry* was that a stop-and-frisk did amount to a search and seizure and therefore was subject to fourth amendment control; but, because stop-and-frisk was less intrusive than a full-blown arrest and search incident to arrest, less justification would be required for it.³⁹⁰ The second case is *Schmerber v. California*,³⁹¹ where the Supreme Court said that searches which breached the body wall (there, the extraction of blood by means of a hypodermic needle), intruding more upon the "interests in human dignity and privacy"³⁹² than do external body searches, require greater justification.³⁹³ Together, *Terry* and *Schmerber* might support a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification.³⁹⁴ The upshot would be

to recognize that the Fourth Amendment governs all intrusions

by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.³⁹⁵

The implications of this approach can fairly be described as staggering, and some of them even seem to me good. The approach would require an almost complete remapping of fourth amendment doctrine as I described it to you yesterday. Either or both of the requirements of a warrant and of probable cause might be relaxed in some cases: the warrant requirement, for example, in the case of searches at the fringes of the curtilage such as the one in the 1964 Fifth Circuit decision,³⁹⁶ and perhaps in the case of searches of immobile automobiles if we conclude that an automobile is more peripheral to its owner's interests of privacy,³⁹⁷ dignity,³⁹⁸ personal security³⁹⁹ and personal liberty⁴⁰⁰ than is his house.⁴⁰¹ On the other hand, the requirements of a warrant and of probable cause might be supplemented by additional protections in cases of the gravest intrusions upon those interests.⁴⁰² Nighttime search warrants might be constitutionally required to be supported by "positive" affidavits⁴⁰³ or by a "clear indication"⁴⁰⁴ that seizable objects are on the premises. Entries into dwellings might be forbidden except upon the finding of a magistrate that less intrusive methods of investigating the criminal activities or seizing the criminal objects thought to be inside have been tried and failed, or are too dangerous to try.⁴⁰⁵

Or consider the following rules for a range of cases proceeding in a fairly direct line from *Terry*. Police may conduct investigative stops of citizens on the street upon reliable indications of criminal activity.⁴⁰⁶ They may cause summons to be issued for citizens to come to the precinct for fingerprinting, or for lineup identification, or for the taking of handwriting or voice exemplars, upon a showing both that the citizen falls within a restricted group of persons, one of whom is probably guilty of an offense, and that the taking of the particular kind of evidence sought will advance the police investigation of the offense.⁴⁰⁷ They may arrest the citizen upon probable cause. But arrest has traditionally been conceived as a procedure by which persons are to be brought before a magistrate for a preliminary examination in relatively short order:⁴⁰⁸ longer detention to await trial is supposed to rest upon the magistrate's commitment. Since prolongation of detention involves a greater intrusion upon fourth amendment interests than arrest, it should require greater justification: typically, a full preliminary hearing at which probable cause is tested by adversary pro-

cedures, rather than *ex parte* as for arrest. Undue delay of a preliminary examination would therefore render continued detention unconstitutional, just as arrest upon the quantum of suspicion warranting only an investigative stop is unconstitutional. You will recognize, of course, that this model of the fourth amendment might provide the long-missing constitutional basis for the celebrated *McNabb-Mallory* rule—the rule excluding confessions during a period of undue delay in preliminary arraignment—which the Supreme Court announced under its “supervisory power” over federal criminal trials in 1943⁴⁰⁹ and progressively tightened⁴¹⁰ until Congress purported to overrule the rule in 1968.⁴¹¹ A sliding scale model of the fourth amendment would allow extension of the *McNabb-Mallory* principle to the states⁴¹²—hopefully plugging the gap made in *Miranda*⁴¹³ by the habitual patter of police testimony as to warnings and waivers⁴¹⁴—and would also lay the foundation for challenge to the congressional abrogation of the rule in federal criminal trials. It might, in addition, subject magistrates’ probable cause determinations and their preliminary hearing procedures to federal constitutional scrutiny,⁴¹⁵ providing, for example, a basis to challenge magistrates’ curtailment of defense cross examination.⁴¹⁶ Need I speak of extradition? If reliable indications of criminality are required to support a brief on-the-street detention and if probable cause is necessary to support an arrest, how much more than probable cause⁴¹⁷ should be required to rip a man out of the fabric of his life in California and ship him off 3,000 miles to Florida to stand trial upon criminal charges?

I hope you will not misunderstand me. I am not suggesting that all of these issues can be resolved by running up and down the fourth amendment like a step ladder. Each of the procedures I have mentioned—pre-court detention, preliminary examinations, extradition—involves much more than simply increasing degrees of intrusion upon individual liberty. Each is a complex institution with its own particular functions in the criminal justice system, its own demands and problems, dangers and abuses. I have obviously not undertaken here to make the kind of criticism of them that is necessary to formulate constitutional rules for their governance; and the standards that I have suggested are intended only to exemplify the possibilities. My point is to intimate the potentially sweeping impact that the *Terry-Schmerber* sliding scale approach to the fourth amendment could have if it were applied generally. Whatever else they may involve, pre-court detention, bindovers upon preliminary exami-

nation, and extradition do involve intrusions upon an interest classically recognized as entitled to fourth amendment protection: personal security against unjustified detention. Under a thoroughgoing sliding scale approach, the degree of justification constitutionally required for each would have to be reconsidered, with the degree of intrusiveness of each—as *Terry* put it—“a central element in the analysis.”⁴¹⁸

A sliding scale approach would considerably ease the strains that the present monolithic model of the fourth amendment almost everywhere imposes on the process of defining the amendment's outer boundaries. It would obviously be easier and more likely for a court to say that a patrolman's shining of a flashlight into the interior of a parked car was a “search” if that conclusion did not encumber the flashlight with a warrant requirement but simply required, for example, that the patrolman “be able to point to specific and articulable facts”⁴¹⁹ supporting a reasonable inference that something in the car required his attention.⁴²⁰ It would be easier and more sensible for a court to say that some “constitutionally adequate, reasonable grounds”⁴²¹ must exist before a policeman can enter the common hallways of a tenement house and listen at apartment doors, than to say either that this kind of activity is not a search or that it requires a search warrant. As a general matter, courts working with a graduated model of the fourth amendment would and should approach questions of its coverage with the disposition to extend it so as to find in the amendment—as Mr. Justice Brennan once urged in dissent—“nothing less than a comprehensive right of personal liberty in the face of governmental intrusion.”⁴²² The question of what constitutes a covered “search” or “seizure” would and should be viewed with an appreciation that to exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness,⁴²³ whereas to include it is to do no more than say that it must be conducted in a reasonable manner. With the question put in this fashion the answer should seldom be delivered against coverage.

The problem with the graduated model, of course, is the one that I opened yesterday:⁴²⁴ it converts the fourth amendment into one immense Rorschach blot. The complaint is being voiced now that fourth amendment law is too complicated and confused for policemen to understand or to obey.⁴²⁵ Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police be-

havior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale. We would shortly slide back to the prescription stated in a now overruled 1950 decision of the Court which is generally regarded as the nadir of fourth amendment development: that "[t]he recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."⁴²⁶ Under that view, "[r]easonableness is in the first instance for the [trial court] . . . to determine."⁴²⁷ What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.⁴²⁸ The ultimate conclusion is that "the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."⁴²⁹ And as Mr. Justice Jackson reminded us, "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."⁴³⁰

The problem can hardly be solved in the fashion of the Peachy Keen Scale, by multiplying gradations and attempting to imbue each one with a character sufficiently distinct to set it off sharply from its neighbors. There are no sharp lines in the nature of the things that police do or of the requirements that can be imposed upon them. In the real world of the streets and the trial courts, multiplication of gradations means the disappearance of the distinctions that are supposed to separate them. In 1967, when the stop-and-frisk cases were before the Supreme Court, the N.A.A.C.P. Legal Defense Fund filed a brief *amicus curiae* urging the Court not to set its foot upon that primrose path. "There is nothing endemically wrong with the *idea* of stop and frisk," the brief admitted.⁴³¹

Indeed, the mission of stop and frisk theory to establish some third state of police powers, midway between those that can be exercised wholly arbitrarily (such as the power of non-coercive, non-detentive street questioning) and those available only upon probable cause (such as arrest and search), has the allure of sweet reasonableness and compromise. The rub is simply that, in the real world, there is no third state; the reasonableness of theory is paper thin; there can be no compromise. Probable cause is the objective, solid and efficacious method of reasoning—itsself highly approximative and adaptable, but withal tenacious in its insistence that common judgment and detached, autonomous scrutiny fix the limits of police power—which has become, within our system of criminal law

administration, the indispensable condition of non-arbitrariness in police conduct. Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim.⁴³²

Anyone who has witnessed the administration on the streets or in a trial court of the stop-and-frisk powers that the Supreme Court subsequently validated knows that this most dire of predictions proved to be an understatement.

So the Court confronts a dilemma. On the one hand, maintenance of the traditional monolithic model of the fourth amendment makes decisions regarding the boundaries of its coverage excruciatingly difficult. Police practices that cry for some form of constitutional control but not the control of a warrant or a probable cause requirement must be dubbed "searches" and over-restricted or dubbed something other than searches and left completely unrestricted. On the other hand, to subject them to fourth amendment control but exempt them from the warrant or probable cause requirements would threaten the integrity of the structure of internal fourth amendment doctrines. The Court has struggled hard to hammer out a body of fourth amendment law that can now be described with reasonable coherence in terms of a central warrant requirement and delineated (if not always entirely "well-delineated"⁴³³) exceptions to the warrant requirement.⁴³⁴ It has recently striven to give some logical consistency to the exceptions, by confining both the automobile-search and search-incident-to-arrest doctrines to a principle of necessitous haste,⁴³⁵ while simultaneously broadening the consent doctrine beyond ordinary concepts of "consent" to accommodate certain warrantless searches that the Court apparently thought reasonable but was unwilling to label reasonable in the absence of a warrant or a recognized exception.⁴³⁶ Such doctrinal symmetry as these efforts have produced would be considerably shaken if the Court were to extend fourth amendment coverage over police practices that neither lend themselves to regulation by the warrant requirement nor fit any recognized exception to it.

The third and fourth problems in developing a satisfactory general theory of the fourth amendment's scope can be stated in one sentence. Its language is no help and neither is its history.

I hardly need justify the first half of that sentence. As applied to law enforcement activities, the terms "searches," "sei-

zures," "persons," "houses," "papers" and "effects" could not be more capacious or less enlightening. The plain meaning of the English language would surely not be affronted if every police activity that involves seeking out crime or evidence of crime were held to be a search. When the policeman shines his flashlight in the parked car or listens at the tenement door, what else is he doing than searching? When he climbs up a telephone pole and peers beneath a second-story window shade, what on earth is he doing up that pole but searching? What is a police spy used for, but to search out suspected wrongdoing that would otherwise evade the scrutiny of the authorities? Unless history restricts the amplitude of language, no police investigative activity can escape the fourth amendment's grasp.

To Mr. Justice Frankfurter we owe the observation, and the firmest insistence on the principle, that "the meaning of the Fourth Amendment must be distilled from contemporaneous history."⁴³⁷ But Justice Frankfurter looked to the history for a specific purpose, with a keen awareness of its limitations for other purposes. As he saw it—and as I see it—that history teaches three great lessons.

The first is that the amendment is not "a kind of nuisance, a serious impediment in the war against crime" or "an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society."⁴³⁸ The second is that the amendment's basic concern is to protect the people "against search and seizure by the police, except under the closest judicial safeguards."⁴³⁹ "[W]arrants lacking strict particularity as to location to be searched or articles to be seized were deemed obnoxious"⁴⁴⁰ because of the root principle stated by Lord Mansfield: that "[i]t is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."⁴⁴¹ The power asserted by the English messengers and colonial customs officers and condemned by history was "a discretionary power . . . to search wherever their suspicions may chance to fall,"⁴⁴² "a power that places the liberty of every man in the hands of every petty officer."⁴⁴³

The third lesson is that the principal check designed against the arbitrary discretion of executive officers to search and seize was the requirement of a "search warrant exacting in its foundation and limited in scope";⁴⁴⁴ and consequently that "history decidedly does not leave the phrase 'unreasonable searches and seizures' at large,"⁴⁴⁵ but places upon it the "gloss . . . that a

search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."⁴⁴⁶ I mentioned yesterday that Professor Telford Taylor has taken issue with Justice Frankfurter on this last point, and I shall return to their disagreement later.⁴⁴⁷ At this juncture my concern is to make plain that Justice Frankfurter drew from history only the conclusion that the fourth amendment did not license judges to sustain warrantless searches as "reasonable" under a vague and amorphous concept of general reasonableness that ignored the warrant clause. He did not suggest that anything in the history confined the scope of what were to be held "searches and seizures." To the contrary, he approved *Boyd v. United States*⁴⁴⁸ as giving "legal effect to the broad historic policy underlying the Fourth Amendment,"⁴⁴⁹ rejected the notion that the amendment was directed to protecting only against trespasses⁴⁵⁰ and invasions of property rights,⁴⁵¹ urged that *Olmstead* be overruled,⁴⁵² and echoed Mr. Justice Brandeis' dissenting views in *Olmstead*⁴⁵³ that the fourth amendment broadly protected the "right to be let alone."⁴⁵⁴

So Mr. Justice Frankfurter, who more than any other of the Justices sought the fourth amendment's meaning in its history,⁴⁵⁵ found there no limitation of its sweeping term "searches and seizures," nor of the "persons, houses, papers, and effects" that the amendment protects. Ought we nonetheless to do so? We are necessarily brought back to the first of the large questions that I raised yesterday: whether the specific historical experiences that preceded the adoption of the amendment—the conflicts over trespassory ransackings under general warrants in England and writs of assistance in the colonies—ought to be taken as the measure of the evils that the fourth amendment curbs? Or should we say at least that practices such as eavesdropping and the use of spies, known at the time of those conflicts but not implicated in them,⁴⁵⁶ should be held beyond the reach of the amendment?

I think the answer must be no to both forms of the question. I cannot find in the background of the amendment any justification for limiting its reach to the particular "mischief which gave it birth."⁴⁵⁷ Nor do I think that provisions of the Bill of Rights, or the fourth amendment in particular, should be read as containing implied negative covenants running with the Bill.

First, it is important to distinguish—as Justice Frankfurter did—between the use of background history to establish that the framers of the Bill of Rights meant to limit or forbid a particular

evil, and the use of background history to support the negative inference that they did not. Even the former use of background history encounters the objection that it treats the framers as a collection of bodies having but one head;⁴⁵⁸ it assumes that from their common "living experience"⁴⁵⁹ they drew but one conclusion. As soon as the question becomes one of generalizing beyond a particular evil, this hypostatic conception of "the framers" becomes still more dubious; for generalization requires reference to the reasons for a prescription, and a variety of minds may agree upon a common prescription for a variety of reasons. When, in addition, the generalization is negative, the usefulness of seeking to construct the common thought of that variety of minds called "the framers" asymptotically approaches zero. The agreement of many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda.

Indisputably the "searches and seizures" on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what "the framers" thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy.

The absence of controversy over anything else is neither surprising nor significant. Consider, if you will, the rare combination of events that was required in order to bring the controversies over general warrants and writs of assistance to a head: the hassles between Lord Bute and the Whigs, the furor over the cider tax, the battle of the *Monitor* and the *North Briton* against the government newspapers, the government's apoplectic reaction, and the catalytic personality of the fiery Wilkes in England; in America, the uneven and then progressively oppressive enforcement of the customs laws, the expiration of the writs of assistance after the death of George II at a time of stiffening colonial resistance, and Otis' seizing of the opportunity to make a major issue of the writs.⁴⁶⁰ Other practices of law enforcement less immediately linked to the large political movements of the time could hardly have come to the forefront of popular or even legal attention, since there was then no occasion for either public clamor or litigation concerning practices under which, as Telford Taylor justly puts it, "suspected felons were the only victims."⁴⁶¹ May we then conclude that such practices were accepted by the framers?⁴⁶² Or should

we not say of them what Lord Camden said against the argument that general warrants themselves, frequently used but never challenged prior to the great lawsuits of the Grenville Ministry,⁴⁶³ had thereby become accepted:

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute.⁴⁶⁴

What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past. No other view is possible in light of the double-barreled construction of the amendment. The second clause, requiring probable cause and particularity in the issuance of warrants, was alone quite sufficient to forbid the general warrants and the writs of assistance that had been the exclusive focus of the pre-constitutional history. But the framers went further. They added—not to diminish, as Justice Frankfurter reminds us, but to expand the warrant clause—a wide provision that the people should be secure in their persons, houses, papers and effects against unreasonable searches and seizures.⁴⁶⁵ Of course it is impossible to say from this what the axis or the principle of generalization was. Conceivably, “searches and seizures” might have meant warrantless ones having the same physical characteristics as those experienced under general warrants. But there is no evidence to support that conclusion, and I see no reason to draw it. Nor do I see a reason to conclude that the framers intended the fourth amendment, any more than the rest of the Bill of Rights or the Constitution, to state a principle like the dwarf in Gunter Grass’ *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.

Growth is what statesmen expect of a Constitution. Those who wrote and ratified the Bill of Rights had been through a revolution and knew that times change. They were embarked on a perilous course toward an uncertain future and had no comfortable assurance what lay ahead. To suppose they meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems to me implausible in the extreme. I agree, of course, with Henry Friendly, that “[m]aximizing protection to persons suspected of crime was hardly their

sole objective."⁴⁶⁶ But I also agree with Vince Lombardi that, while winning isn't everything, losing is nothing. The revolutionary statesmen were plainly and deeply concerned with losing liberty. That is what the Bill of Rights is all about.

I myself would go a trifle further than this truism. My own view of the "Spirit of the Constitution"⁴⁶⁷ is not that far removed from Charles Beard's. But I think that another spirit, sometimes warring, sometimes interweaving with the first, compelled the Constitution's early amendment by the Bill of Rights. To be sure, the framers appreciated the need for a powerful central government. But they also feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual. When I myself look back into that variegated political landscape which no observer can avoid suffusing with the color of his own concerns, the hues that gleam most keenly to my eye are the hues of an intense sense of danger of oppression of the individual.

I find that sense of danger all the more striking because so many of us in this country today have lost it. It is largely left to "those accused of crime"⁴⁶⁸ and to the dwellers of the ghettos and the barrios of this land to view the policeman as "an occupying soldier in a bitterly hostile country."⁴⁶⁹ For the rest of us, the image of the policeman is the friendly face of the school crossing guard. From childhood we are reared to see government and law and law enforcement as benign. They pose no threat to us. But the authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. And, to this end, it seems to me that the guarantee against unreasonable "searches and seizures" was written and should be read to assure that any and every form of such interference is at least regulated by fundamental law so that it may be "restrained within proper bounds."⁴⁷⁰

But I do not ask that you follow me so far. I concur with Professor Samuel Krislov that the values which one finds in the history of the Bill of Rights are ineluctably one's own:

The Founding Fathers . . . were libertarian, legalistic, conservative, or zealous largely in the image of the chronicler—much as we are told that English experimental psychologists observe matter-of-fact, pragmatic rats; Americans observe bustling rats; and Germans see copiously organized rats.⁴⁷¹

Having shown you my kind of rat, I shall not ask you to prefer

it to the others. I shall conclude only that history is a standoff: there is certainly nothing in it to suggest, let alone require, a narrow or a static view of the fourth amendment's broad language.

And, of course, if we wanted to take exclusive counsel of the framers on the problems of our time, we could not do so. Technological advances—well, let me say technological developments—such as electronic surveillance devices dramatize the point but do not exhaust it. Miniscule microphones are not the only wonder of our lives that the framers did not know.

They did not know the miles on miles of tiny boxes in which millions of our people live, driven to the streets with all the desperation of a prisoner escaping and then dogged down endless, agitated corridors of windows till the human soul cries out for someplace it can breathe and not be stared at. They did not know the vast, stinking slums of Harlem summers where the people boil like eggs if every door and window is not opened, and where to be young and black and take to the streets is to be hassled by the cops.⁴⁷² They did not know the sprawling, mass-producing, self-perpetuating systems of spies and informers spawned by a professional police investigating "vice"⁴⁷³ and supposed subversion,⁴⁷⁴ although of course political espionage was not unknown to them.⁴⁷⁵ They lived for the most part in an open society and thought to perpetuate it; but ours is closing fast.

On the other hand, they also did not know the increased dangers of crime in an automated age: the perils of bombs in buildings and planes, the speed and devastating effect with which modern machinery can bring evil intentions to destructive conclusions, the harms and depredations that a man cloistered in his home can work if he has a telephone. They did not know the oppressions of fear that blight neighborhoods and make citizens afraid to walk abroad by day or night. They did not know, as Henry Friendly says, "the inability of eighteenth century investigative procedures to deal with crime, especially organized crime, in an urbanized and heterogeneous society."⁴⁷⁶ And so, while we may treasure their values, we cannot have the assistance of their wisdom upon our predicaments: we must struggle over those predicaments as best we can by our own lights.

Judge Friendly's reference to "an urbanized and heterogeneous society" serves also as a prelude to the last two problems

that I want to raise with you, on my roster of problems impeding construction of a coherent theory of fourth amendment coverage. In the context of that urbanized and heterogeneous society, decisions regarding the kinds of interests that deserve constitutional protection rest upon value judgments which are exquisitely difficult for the committee of the Supreme Court to make, and even more difficult for it to express in terms of administrable doctrinal concepts. To exemplify these difficulties, let us take a look at only a few issues in three areas of police practices lying closely adjacent to practices that the Court has already brought within the reach of the fourth amendment.

The first area involves snooping activities—or, if you prefer, alert police vigilance—of the sort represented by the hypothetical cases that I gave you earlier of policemen who climb telephone poles to peer in windows and who enter tenement hallways to listen at doors. Although they use no electronic gadgetry, the interests on which their activities intrude appear to be indistinguishable from the interest protected in *Katz*. It is possible to argue, certainly, that the fourth amendment should not be extended to cover “surveillance against which the scrutineer can readily protect himself by closing . . . shutters”⁴⁷⁷ or keeping his voice down. But this approach raises the question of how tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance. Mr. *Katz* could, of course, have protected himself against surveillance by forebearing to use the phone; and—so far as I am presently advised of the state of the mechanical arts—anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment’s benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function. What kind of society is that? Is it one in which a homeowner is put to the choice of shuttering up his windows or of having a policeman look in?

Our thinking about questions of this sort is inevitably distorted by the fact that fourth amendment controversies ordinarily come before courts only in criminal prosecutions where what the policeman sees through the window is a crime or evidence of it. In that setting, it is natural enough to react by saying that anyone who commits a crime or leaves criminal evidence

lying around in front of an open window deserves exactly what he gets. Let him at least have the decency to draw the shade before he commits a crime.

But, unless the fourth amendment controls tom-peeping and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The fourth amendment protects not against incrimination, but against invasions of privacy—or rather, as *Katz* holds, of the right to maintain privacy without giving up too much freedom as the cost of privacy. The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

I have no doubt a court should say that any type of surveillance which can be averted only by this drastic discipline, characteristic of life under totalitarian regimes, is altogether too destructive of privacy and of the “right of the people to be secure in their persons [and] . . . houses” to escape the fourth amendment’s regulation. But where and how is a court to draw the line? How much freedom may the citizen exercise and still retain privacy? May he leave his first-floor street windows open and claim the fourth amendment’s protection against the observant eye of a patrolman on the common sidewalk?

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court’s decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make. But it is a devastating question to put to a committee. And it is a perfectly impossible question for the Supreme Court to put forth as a test of fourth amendment coverage.

It is impossible because, in the first and most important instance, the fourth amendment speaks to the police and must speak to them intelligibly. How in the devil is a policeman engaged in an investigation supposed to decide whether the form

of surveillance that he proposes to use, if not restricted by the fourth amendment, would curtail the liberties of citizens to a compass inconsistent with a free society? And, even if that were a question that a policeman could practicably answer, I would frankly not want the extent of my freedom to be determined by a policeman's answer to it.

So it is understandable that the ultimate question asked and answered in *Katz* should shortly be transmuted into something like the post-*Katz* "reasonable expectation of privacy" formula.⁴⁷⁸ That formula is an inevitable first step in the direction of administrability. But since it is still much too vague to be administered on the streets,⁴⁷⁹ I think we may expect it to undergo a further rapid transmutation into a rule to the effect that if an officer conducts his observations from a vantage point accessible to the general public and uses no artificial aids to vision, he is clear of the amendment; otherwise, he is covered. That would cover our hypothetical officer up a telephone pole, but not the officer in the tenement hallways.

Is this a satisfactory result? It does not seem so to me. The problem began, I think, when the simplification of *Katz* began, in terms of categorical concepts such as "privacy." People who live in single houses or well-insulated apartments tend to take a rather parochial view of privacy. Because we are accustomed to having something approaching absolute privacy when we lock our outer doors, we tend to conceive of privacy as an absolute phenomenon and to denigrate the importance of degrees of privacy. To us it seems intuitively evident that anything a person does within sight or hearing of his neighbors or the general public is not private—and that, as to such things, it makes no difference whether they are observed by a neighbor or a policeman—because *we* retire to our homes when we want *real* privacy. But if you live in a cheap hotel or in a ghetto flat, your neighbors can hear you breathing quietly even in temperate weather when it is possible to keep the windows and the doors closed. For the tenement dweller, the difference between observation by neighbors and visitors who ordinarily use the common hallways and observation by policemen who come into the hallways to "check up" or "look around" is the difference between all the privacy that his condition allows and none. Is that small difference too unimportant to claim fourth amendment protection?

I myself do not think so, but the difficulty of making judgments of this sort and embodying them in administrable rules is evident. Can we turn the coverage of the fourth amendment

upon the question whether, if police are permitted unrestrainedly to enter tenement hallways and listen at tenement doors, the amount of privacy remaining to tenement dwellers is intolerably small? Obviously, a fourth amendment graduated like the income tax is unadministrable in the field. Shall we say, then, for the sake of administrability and because we want a fourth amendment that protects all our people—not just some of them—against diminution of the little privacy which their condition affords, that policemen may not enter the common hallways of apartments at all, except subject to the fourth amendment's constraints? We return, I think, to the question of the relationship between the amendment's coverage and the protections it provides. For while no court is going to say that policemen may not enter apartment hallways without a search warrant, it would be quite possible for a court to say that police entries into apartment hallways are "searches" subject to some lesser form of regulation—for example, as I shall suggest tomorrow, to the requirement of police-made rules judicially reviewable for reasonableness.

A second area presenting similar problems is that of police accosting citizens on the streets. Unless the policeman restrains the liberty of the citizen in some way,⁴⁸⁰ the protective requirements of *Terry v. Ohio*⁴⁸¹ for investigative "stops"⁴⁸² do not come into play. And, if I correctly read the implications of the Supreme Court's recent treatment of "consent" searches,⁴⁸³ the policeman who accosts a citizen probably does not have to tell him that he has a right to move on and refuse to talk to the policeman.⁴⁸⁴ The result is the practice of a kind of hassling, particularly directed against young non-Anglos in the center cities, that is best described in the language of a black man quoted by the National Crime Commission's Task Force on Police in its 1967 report:⁴⁸⁵

When they stop everybody, they say, well, they haven't seen you around, you know, they want to get to know your name, and all this. I can see them stopping you one time, but the same police stopping you every other day, and asking you the same old question.

Unless one takes a very middle-class white⁴⁸⁶ view of life, here is a practice that cries out for some sort of fourth amendment regulation.⁴⁸⁷ But how are administrable rules to be fashioned that protect those who do not want to be hassled by the police from being hassled, while permitting the police sufficient leeway to make contacts with citizens on the streets for all of the numerous purposes for which such contacts may be neces-

sary? The question implicates extraordinarily difficult value judgments whose resolution is further impeded by the difficulty of appreciating the strongly negative attitudes of large classes of our citizens toward the police,⁴⁸⁸ the nature of the police practices in question, and the reasons why the police conduct them,⁴⁸⁹ and, once again, by the doctrinal problem of graduating the fourth amendment without eviscerating it.

Finally, consider the area of police spies and undercover agents. The Supreme Court has steadfastly refused to hold that the fourth amendment imposes any limitations upon the government's insinuation of spies into the counsels or the chambers of citizens. If a policeman secures entry to my house in my absence by fraudulently misrepresenting to my caretaker that he is my friend, his entry is of course covered by the amendment and duly excoriated;⁴⁹⁰ but if he is base enough to inveigle me into a relationship of friendship and trust so that I admit him to my house, his entry is not covered⁴⁹¹ on the theory that every man in society voluntarily assumes the risk of betrayal by his friends.⁴⁹² Only Mr. Justice Douglas has dissented from this result in the case of police spies unequipped with electronic transmitters or recorders.⁴⁹³ However, the Court has been badly divided for twenty years—and recently almost evenly divided—on the question of whether wiring the spy for sound makes a constitutional difference.⁴⁹⁴ During the Court's last pass at the problem, in 1971,⁴⁹⁵ four Justices held that it did not: that we all assume the risk of radiating spies as well as just plain spies. Four Justices would have held that the fourth amendment imposes some restriction upon the government's fastening electronically bugged spies on people. The practice was exempted from constitutional constraint by the Court upon the slim margin of Mr. Justice Black's concurring vote, predicated on his lonely dissent in *Katz v. United States*, where he would have adhered to *Olmstead* and held that no form of non-trespassory electronic surveillance constitutes a fourth amendment search and seizure.⁴⁹⁶

Now, it seems to me that the analysis of these cases in terms of voluntary assumption of risk is wildly beside the point. The fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks. Every person who parks his or her car on a side street in Greenwich Village voluntarily runs the risk that it will be burglarized—a risk, I should add as one who has lived in Green-

wich Village, that is very much higher than the risk of betrayal by your friends even if you happen to choose your friends exclusively from a circle of Machiavellian monsters. Does that mean that government agents can break into your parked car uncontrolled by the fourth amendment? Or pay the junkies to break into it? Here again we have a notion of privacy or security that is entirely unworldly, as though these were absolute instead of relative things. The difference between the risk of faithlessness that we all run when we choose our friends and the risk of faithlessness that we run when government foists a multiplying army of bribed informers on us may well be a matter of degree; but of such degrees is liberty or its destruction engineered.

In any event, it is not betrayal against which the fourth amendment protects us: it is the privacy of a free people living free lives. It is rather too late in the game to dispute that that privacy includes the privacy of communicative relationships with others; Mr. Katz was in a telephone booth, not a water closet. Shall we say that the privacy of those relationships is not invaded when the person with whom we share them has been precommitted by government to use them as a means for searching us out?⁴⁹⁷ And shall we say the same thing when science produces robots in the likenesses of men, and government sends them down on us in droves?

I can see no significant difference between police spies, bugged or unbugged, and electronic surveillance, either in their uses or abuses. Both have long been asserted by law enforcement officers to be indispensable tools in investigating crime, particularly victimless and political crime, precisely because they both search out privacies that government could not otherwise invade. Both tend to repress crime in the same way, by making people distrustful and unwilling to talk to one another. The only difference is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all.

A number of years ago in a place that I shall describe only by saying that it is southward of here, a band of civil rights movement people were engaged in a project of voter registration and political organization. Their office was bugged, their phone was tapped, and so was the pay phone down the street. They got along pretty well, considering this kind of surveillance, and could even joke about it. When they had something really sensitive to share—like the names of local black tenant farmers

who were cooperating but did not want to be identified for fear of reprisals—they went out and walked around the block and talked. One day the police took action evidently based on a piece of information that had been shared within the group but carefully not mentioned in the office or on the phone. Rumors of a spy began.

That night some of the top movement people met and tried to figure out how the police had gotten the information. The movement leader asked a couple of questions and then listened while the others speculated as to who could be the spy. After about a half hour the leader said suddenly: "Tell the people it was the bug. I made a mistake and said it on the pay phone." The others were incredulous. He had never made that kind of a mistake before. And how could he have sat there, letting them spill out every suspicious circumstance they could think up about every movement worker in the place, if it had been him? He listened to their questions and then said to them again simply: "Go and tell the people it was the bug." They understood him and they went and told the people. It had to be the bug. If it was a spy, the movement would have torn itself apart.

The problem of extending fourth amendment control into this area, once again, is where and how to draw an administrable line. Grant that the amendment should cover the dispatching of a police spy to worm his way into people's confidence by professions of friendship. Should it cover the addict spy whose very physical appearance is enough to overcome the caution of a pusher willing to deal with anyone except a narc? What about the extortion victim who is told by the police to play along until they have a case? An electronic device is easy enough to identify as such, but human relationships take myriad forms. Their complexity accounts for some of the difficulty that the courts have had in working out the badly botched law of entrapment.⁴⁰⁸ Because the considerations giving rise to interests that may deserve fourth amendment protection against police spies center in the nature of the interpersonal relationship itself, the difficulty of working out a line of fourth amendment coverage is even greater. Any administrable rule—such as a rule covering all but extortionate relationships, for example⁴⁰⁹—is bound to protect at least some interests that appear unworthy.

Nevertheless, I think that the difficulty must be faced and the line must be drawn because the total exemption of police

espionage from fourth amendment control seems to me destructive of at least some interests of privacy and security that are indispensable to a free society. Whether, in order to protect those interests by an administrable rule, a court is also willing to sweep within the amendment's coverage other interests that are dubious or even plainly unworthy depends, in some part, upon the question I raised yesterday as to whether the fourth amendment should be viewed from an atomistic or a regulatory perspective. I shall return to that one, among others, tomorrow.

IV. THE RULES GOVERNING SEARCHES AND SEIZURES, AND THE EXCLUSIONARY RULE

This afternoon I propose to discuss issues relating to the restrictions that the fourth amendment imposes upon searches and seizures, and to the use of the exclusionary rule to enforce those restrictions. My treatment will be selective: I was going to say "partial," but after hearing me speak for two days you may judge my partiality for yourselves. My attitude toward the fourth amendment is doubtless shaped by the fact that I have seen policemen from the nightstick end. Robert Benchley once made the point that the Great Alaskan Fish Controversy looked very different when it was viewed from the perspective of the fish.

I want first to consider the Supreme Court's development of the warrant requirement as the central tenet of fourth amendment jurisprudence, and Professor Telford Taylor's criticism of that development. I shall disagree with him that the elevation of the search warrant to a position of paramount importance among the safeguards of the amendment is either unsupportable or unwise, but I shall agree with him that the Supreme Court's concentration upon this doctrinal development has distracted the Court's attention from the need for other safeguards.

I shall then propose two safeguards which, I think, would strongly improve the operation of the amendment and could be adopted with a minimum of harmful fall-out from the difficult problems of fourth amendment engineering that I described yesterday and the day before. The first is a requirement that police discretion to conduct search and seizure activity be tolerably confined by either legislation or police-made rules and regulations, subject to judicial review for reasonableness. The second is a flexible administration of the exclusionary rule that would serve to keep the exercise of police search and seizure powers

within the boundaries of the purposes for which the powers are given. These proposals will require me to take up once again two questions that I raised in my first lecture but did not discuss yesterday: whether the fourth amendment should be viewed from an atomistic or a regulatory perspective⁵⁰⁰ and whether an inquiry into police "purpose" has any role in its administration.⁵⁰¹

Professor Taylor, you will recall, observes that the pre-constitutional history of the amendment was concerned exclusively with searches under general warrants and writs of assistance;⁵⁰² he infers from this history that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants";⁵⁰³ and he therefore reasons that "Justice Frankfurter, and others"—now comprising a majority of the Supreme Court⁵⁰⁴—"who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head."⁵⁰⁵ Professor Taylor does not conclude, of course, that warrantless searches are entirely uncovered by the amendment; his view is that they are controlled by the reasonableness requirement of the amendment's first clause;⁵⁰⁶ and his difference from the Court is that he would allow a broader range of generally "reasonable" warrantless searches, including relatively wide-ranging searches incident to arrest,⁵⁰⁷ and perhaps others.⁵⁰⁸

I concur with Professor Taylor about the focus of the pre-constitutional history.⁵⁰⁹ I concur that the framers were "concerned" about general warrants and writs, insofar as "concerned" is used to denote the specific subject that they had under consideration.⁵¹⁰ I concur that the Court has stood the fourth amendment on its head, in the same wise way that the Court has stood the commerce clause on its head in order to allow a collection of states to grow into a nation. From his ultimate conclusion concerning the permissible scope of warrantless searches, I respectfully dissent.

The Court's construction of the amendment as embodying an overriding preference for search warrants is supportable, in my view, because the Court is obliged to give an internally coherent reading to the unreasonableness clause and the warrant clause as expressions of repudiation of the general warrant. In this view, the fourth amendment condemns searches conducted under general warrants and writs of assistance as "unreasonable."⁵¹¹ It also forbids unreasonable warrantless searches.⁵¹² That is all

the amendment says about warrantless searches, and the word "unreasonable" is hardly self-illuminating. Surely then the Court has done right to seek some part of the meaning of an "unreasonable" warrantless search by asking what the condemnation of general warrants and writs implies about the nature of "unreasonable" searches and seizures. This is not to assert that the standards of reasonableness for searches with and without warrants must be the same, but merely that warrantless searches exhibiting the same characteristics as general warrants and writs must be deemed unreasonable if there is no principled basis for distinguishing them from general warrants and writs.

The framers of the fourth amendment accepted specific warrants as reasonable: the second clause of the amendment tells us so. Therefore, the objectionable feature of general warrants and writs must be their indiscriminate character. Warrants are not to issue indiscriminately: that is the office of the probable cause requirement. Nor may indiscriminate searches be made under them: that is why particularity of description of the persons or things to be seized is demanded. The requirement of particularity of description of things is important to note, for it shows that even when there is sufficient cause to intrude upon an individual by a search, the framers decreed that it was unreasonable and should be unconstitutional to subject his premises or possessions to indiscriminate seizure.

Indiscriminate searches or seizures might be thought to be bad for either or both of 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.

Although conceptually severable,⁵¹³ these two concerns are indissolubly linked throughout the preconstitutional history of the fourth amendment in which Professor Taylor finds its "original understanding."⁵¹⁴ Thus, Lord Camden says in *Entick v. Carrington*⁵¹⁵ that, if general warrants are sustainable,

the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author . . . of a seditious libel,

and the person's house will be rifled and his secrets "taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted . . . of . . . being concerned in the paper." Thus Otis argues that the writs of assistance place "the liberty of every man in the hands of every petty officer";⁵¹⁶ that a man in his house, "while he is quiet, . . . is as well guarded as a prince in his castle," but that general writs "totally annihilate this privilege" because "[c]ustom house officers may enter our houses when they please— . . . bare suspicion without oath is sufficient."⁵¹⁷ Thus Thatcher, in the same argument, complains that the writs are "not returnable. If the Seizures were so, before your Honors, and this Court should enquire into them you'd often find a wanton exercise of power."⁵¹⁸ The emphasis placed by both the judgments of Lord Camden⁵¹⁹ and the arguments of the Boston advocates⁵²⁰ upon the lack of a return or inventory underscores the point that the general warrants and writs were thought abusive because they immunized the scope of executive seizure from judicial control. Under the fourth amendment, even where the initial justification for a search was determined by a magistrate, executive discretion in its execution was to be curbed by the requirement of particularity of description in the warrant of the items subject to seizure.

What searches and seizures, if any, can then be exempted from judicial control consistently with a concern against unjustified and arbitrary exercises of the search power? Professor Taylor argues that the common law recognized a right of warrantless search incident to arrest, although he admits that its extent beyond the body of the arrestee is unclear.⁵²¹ I agree that there must have been such a power; and the power to make a felony arrest without warrant was plain. But how far did the power of search incident to arrest go, and what principle does it state that may be generalized to authorize other warrantless searches?⁵²²

It seems to me that warrantless search incident to arrest must rest on one of two justifications. The first is the justification of necessitous haste—the ground on which the Supreme Court has now firmly placed the search-incident-to-arrest ex-

ception to the warrant requirement⁵²³—namely, that immediate search of an arrestee's person must be made before he has a chance to seize a weapon or destroy evidence. The second is that, once a person has been arrested, he has no remaining rights that a peace officer is bound to respect. The latter justification may have been acceptable in the days of the hue-and-cry, when, as Professor Taylor says, "[t]o be a suspected felon was often as good as being a dead one";⁵²⁴ but it cannot be harmonized with the plain prescription of the warrant clause of the fourth amendment that, even when a search has been ordered by a magistrate, goods of the person searched that are not named in the search warrant cannot be seized.

What is the difference between a person validly arrested and one who is not, so that the arrestee should lose all rights he would otherwise have against the indiscriminate seizure of his goods? The difference is that there is probable cause to believe the arrestee guilty of a crime. Necessitous haste may require the judgment of probable cause to be made by an officer because there is no time to seek out a magistrate;⁵²⁵ the same necessitous haste may justify the limited search incident to arrest that the Supreme Court now recognizes; but there is no acceptable general principle which allows search incident to arrest, or any warrantless search, to go further. Is a person to be outlawed from society and denied its rights, in the twentieth century, because a policeman finds probable cause to believe that he has committed an offense?

At most, I think, the history of warrantless searches incident to arrest presented a conflict of principles that the Court was bound to resolve. The warrant clause says that people have a separate and protected interest against judicially uncontrolled seizures, even after a judge has issued a warrant to search them. It may be that the framers assumed an arrested person had no such right, although we cannot be sure because the subject was certainly not before them and the scope of the common-law right of search incident to arrest at that time is unclear. The Supreme Court might have resolved that conflict—as, indeed, it did for a time⁵²⁶—by stretching the ambiguous common law power of search incident to arrest to the utmost and depriving an arrested person of any constitutional protection because, at an early time, a suspected felon was as good as a dead one. That course would have fallen precisely within Mr. Justice Holmes' dictum that "[i]t is revolting to have no better reason

for a rule of law than that so it was laid down in the time of Henry IV."⁵²⁷ The alternative resolution⁵²⁸ which the Court has now adopted is to honor the principle of the warrant clause and accordingly to limit searches incident to arrest to "the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction"⁵²⁹ when they need to act in a hurry. This seems to me the course of practical wisdom as well as sound constitutional logic. For a rule that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure"⁵³⁰ recognizes that, except to the minimum extent required by absolute necessity,⁵³¹ the subjection of a citizen to a search or seizure should not depend on the suspicion-charged judgments of police officers "engaged in the often competitive enterprise of ferreting out crime."⁵³²

But what about searches and seizures that fall within the proper scope of the various exceptions to the warrant requirement: body searches incident to arrest, investigative stops-and-frisks, moving vehicle searches, border searches, driver's license checks, and all the rest?⁵³³ Police make many more searches of these sorts than searches subject to warrants, and I agree entirely with Professor Taylor⁵³⁴ that the Supreme Court's preoccupation with development of the warrant requirement has left the larger part of search-and-seizure practice inadequately regulated. That part would be larger still if the coverage of the amendment were expanded, as I suggested yesterday that it should be, to include such police activities as apartment corridor entries and street interrogations falling short of "stops."⁵³⁵

The problem of devising effective fourth amendment controls in these areas stems partly from a stunted state of doctrinal and conceptual development. Apart from the warrant requirement, the requirement of probable cause for arrest (which has been carried over to a few other areas such as moving vehicle searches), and the pint-sized version of probable cause required for stop-and-frisk, the Supreme Court has never found—nor, so far as I can tell, has it ever been asked to find—any legal mechanisms for controlling police activities. The view prevails that "[t]he Framers of the Fourth Amendment have given us only the general standard of 'unreasonableness' as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required",⁵³⁶ and the "unreasonableness" standard is obviously much too amorphous either to guide or to regulate the po-

lice. Lurking beneath the difficulty, in turn, is the monstrous abyss of a graduated fourth amendment with which I have regaled you,⁵³⁷ splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general ooze.

To cap the difficulty, we are talking here for the most part about police practices that are entirely discretionary in the sense that, even if legal requirements for their employment were established and were met in particular cases, individual policemen would sometimes engage in the practice and sometimes not. A police officer will always arrest a murderer or an armed robber if he sees one, but whether he will arrest and search a brawler or a drunk or a loiterer, or make an investigative stop or a frisk or a street interrogation, or order people to "move on," or shine his flashlight into cars, or enter apartment hallways, depends upon his mood and inclinations. That is why Professor Kenneth Culp Davis says:

The police are among the most important policy-makers of our entire society. . . . [T]hey make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.⁵³⁸

No other federal, state, or local agency, so far as I know, delegates so much power to subordinates. No other agency, so far as I know, does so little supervising of vital policy determinations which directly involve justice or injustice to individuals. And no other agency, so far as I know, makes policy which in such a large degree is illegal or of doubtful legality.⁵³⁹

The pervasiveness and discontrol of police discretion is everywhere acknowledged:⁵⁴⁰ policemen make hundreds of thousands of decisions daily that "can affect in some way someone's dignity, or self-respect, or sense of privacy, or constitutional rights";⁵⁴¹ they make these decisions according to criteria that

emerge largely in response to a variety of pressures . . . and are therefore not carefully developed. . . . And such indefensible criteria as the status or characteristics of the complainant, the victim, or the offender may often be among the most seriously weighed factors, since an officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual or group behavior.⁵⁴²

Little wonder that Judge J. Skelly Wright should describe police as "free to run loose in an Alice-in-Wonderland of unchanneled, unreviewable, untrammelled discretion. The result, unsurprisingly, is a crazy quilt of secret, ad hoc decisions which are essentially lawless, because they are presently beyond the power of law to control."⁵⁴³

Let me give you only the most obvious example. Six weeks

ago, the Supreme Court handed down decisions holding that a police officer who arrests a motorist for a traffic violation may make a full-scale body search incident to the arrest. The holdings were delivered in two cases. In the first case, both the decision of the officer to make a "full custody arrest" rather than to issue a citation and his decision to conduct a full "field type search" in connection with arrests for the particular vehicle code violation in question were apparently dictated by local police regulations.⁵⁴⁴ In the second case, both decisions were left entirely to the discretion of the officer.⁵⁴⁵ If the Court had distinguished the two cases on this ground,⁵⁴⁶ it would, in my judgment, have made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761 and "the child Independence was born."⁵⁴⁷ But it did not. Without evident appreciation of the significance of the issue or the opportunity within its grasp to fashion a solution to a wide array of fourth amendment problems that would otherwise bedevil it forever, the Court kicked the chance away. It thereby held that whether you and I get arrested and subjected to a full-scale body search or are sent upon our respective ways with a pink multi-form and a disapproving cluck when we happen to go for a drive and to leave our operator's licenses on the dressing table depends upon the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.

This seems to me wrong, it seems to me intolerable, and it seems to me unnecessary. The police in this country are no longer ragged bands of volunteers bearing flintlocks, and there is no reason to deal with today's police problems with a flintlock Constitution. I think that the Court should hold that the fourth amendment requires all police search and seizure activity to be regulated by legal directives that confine police discretion within reasonable bounds.

The rule of constitutional law that I urge is simple, having like all Gaul only three parts: (1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment. (2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. (3)

The legislation or rules must, of course, be conformable with all additional requirements imposed by the fourth amendment upon searches and seizures of the sorts that they authorize.

Although this constitutional rule is necessarily couched in terms of either legislation or departmental regulations to permit local autonomy, I do not expect that the response of many states or municipalities to it would be legislation. For the most part, the more flexible and professional technique of rulemaking is likely to be used;⁵⁴⁸ and so I can describe the essential purpose and the probable effect of my constitutional doctrine as employing police rulemaking to control police discretion in the exercise of the search and seizure power.

The legal argument in support of the constitutional rule is also simple and straightforward. In the light of what I have said earlier in these lectures, I can state it in five sentences (with the aid of a few semicolons). A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.⁵⁴⁹ The warrant requirement was the framers' chosen instrument to achieve both purposes, and it should continue to be applied to those ends, as the Supreme Court's present fourth amendment doctrines apply it, so far as it can practicably go. However, the warrant requirement obviously fails to assure against arbitrariness in kinds of searches and seizures that are permitted without warrants, or where police discretion controls the decision to apply for a warrant. The emergence of modern professional police forces and our knowledge of the vast discretion that they exercise demonstrate both the need and the capability to provide an effective safeguard against arbitrariness in these kinds of searches and seizures; and the manifestly serviceable instrument to do it is what Kenneth Culp Davis calls "one of the greatest inventions of modern government,"⁵⁵⁰ unavailable to the framers but perfectly commonplace today: administrative rulemaking. Arbitrary searches and seizures are "unreasonable" searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are "unreasonable" searches and seizures.

For me, an additional and forceful legal argument in favor of the rulemaking requirement is the way in which it cuts through so many of the problems of fourth amendment doctrine-building that vexed us yesterday and the day before. The doctrinal basis of the requirement itself is solid and produces

no harmful externalities: it involves only the propositions that the fourth amendment is concerned in part with controlling arbitrariness in searches and seizures, and that appropriate methods of control are not necessarily limited to the warrants and the probable cause standard mentioned in the warrant clause. The first proposition contains nothing controversial, controvertible or new,⁵⁵¹ and the second was established by the stop-and-frisk cases.⁵⁵² Consider now the following doctrinal advantages of the requirement:

First, it provides a pervasive safeguard against arbitrary searches and seizures that runs the length and breadth of the amendment and does not require the creation of any new categories which might proliferate in the manner of Jones' easements or the Peachy Keen Scale. To be sure, the Court is still left with the problem of deciding which searches and seizures should be subject to the warrant and probable cause requirements and to other safeguards against unjustified search and seizure.⁵⁵³ But the rulemaking requirement adds nothing to that problem as it presently exists, and we shall shortly see that rulemaking provides the Court with new aids toward its solution. At the same time, rulemaking supplies a needed check against arbitrariness in the conduct of various searches and seizures that presently occupy a troubling fourth amendment limbo. These include border searches, stoppings of automobiles for driver's license checks, inventory searches of impounded vehicles, openings of mail other than first-class mail, inspections of the premises of gun dealers and liquor dealers, and other "routine" law enforcement practices which, for a variety of reasons, have been exempted from the requirements of a warrant or probable cause.⁵⁵⁴ Practices of this sort present a conceptual and doctrinal embarrassment of the first order: palpable "searches and seizures" against which the amendment protects but offers no protection. A requirement that such "routine" searches be governed by administrative rulemaking which assures the regularity of the routine would provide the necessary now-missing safeguard in these cases.

Second, the rulemaking requirement generates none of the problems of unclarity and unintelligibility that are the great vice of a graduated fourth amendment. The rules governing searches and seizures are made in the first instance by the police themselves and can be stated as clearly as the police want to state them, in terms comprehensible to policemen. The nature of any particular search and seizure practice, the conditions un-

der which it may be conducted, the factors influencing whatever discretion is allowed in the decision to conduct or not to conduct it, and the manner in which it should be conducted are all spelled out in advance by police-made rules. Thus the benefit of flexibility is gained without the cost of amorphousness.

In addition, the rulemaking method of providing that flexibility both admits broad local autonomy⁵⁵⁵ and emphasizes the importance of local responsibility as a condition of local autonomy. Pluralism is one of the greatest assets of our federal system of government. But all too often its recognition in constitutional law produces nothing more than anarchy as federal courts defer to supposed local judgments that have either not been made responsibly or not been made at all. A rulemaking requirement would respect local autonomy exactly insofar as it deserves respect: that is, insofar as it is responsibly exercised.

Third, the police-made rules generated by a rulemaking requirement would operate to tame the wild proliferation of police practices that has presented one of the Supreme Court's greatest problems in developing a coherent body of fourth amendment law.⁵⁵⁶ It would reduce the incredible variability of police activities to a more manageable and predictable compass without either restricting innovation or taking the initiative out of the hands of the police. The categories of police activities to be tested by the fourth amendment's requirements of justification for searches and seizures would be created, not by post hoc and often ill-informed pigeon-holing on the part of courts, but by the police themselves. Instances of search and seizure that come before the courts for judgment would be better understood within the framework of the general practice that they exemplify, or from which they deviate. Courts would no longer have to speculate, in the quite unsatisfactory way in which they are now forced to speculate, as to what it was that the police were doing in a particular case,⁵⁵⁷ and why they thought it necessary to do whatever they were doing,⁵⁵⁸ and what are the limitations and extensions in police logic of the claim of necessity that is advanced,⁵⁵⁹ and whether the claim of necessity advanced by the state's lawyers before the court is in fact the claim of necessity upon which the police acted or will ever act again,⁵⁶⁰ and whether the police believe in that claim seriously enough to express it in a general operating procedure.

I probably ought to say a word about the importance of these latter points for the development of a sound body of law. In my experience both as a former prosecutor and as a defense

attorney watching prosecutions develop from the pre-arrest stages through appeal,⁵⁶¹ I can tell you that there is often little relationship between the grounds upon which the police take action and the grounds later put forward to justify their action in the courts. When a prosecuting attorney is assigned a case in which he must defend a particular police action, he hits the law books and determines the best legal grounds upon which the action can be sustained. He then advances such of those grounds as the record does or can be made to support, ordinarily without asking whether the police would or will generally act upon those grounds or did so in his particular case. He advances whatever considerations in support of a police practice seem to him to be likely to persuade the court to adopt a rule sustaining it, without regard to whether the police themselves view the considerations as important or even relevant.

This practice, I should say, is by no means confined to police cases. One striking instance is a case in which I challenged a parole board rule stating flatly that reasons would not be given for denials of parole. The deputy attorney general argued for the state that this rule was defensible because there were many, many cases in which the disclosure to a prisoner of the reasons for denying him parole would be harmful to him or dangerous to others—as, for example, where the reasons rested upon psychologically traumatic indicators or the confidences of an in-house informer. I replied that, if there were sufficient considerations to support non-disclosure in particular classes of cases, they could be accommodated by a narrower parole board rule describing those cases; but that a sweeping refusal to state reasons for any denial of parole could not be justified by considerations applicable to only some cases. The court agreed with me, struck down the flat non-disclosure rule, and ordered the parole board to make a new rule—which, the court's opinion clearly indicated, might provide for non-disclosure in some situations. Some time thereafter, the board announced its new rule, consisting of amendment of the old rule to delete the word "not." The new rule therefore provided flatly that reasons would be given for denials of parole in all cases. All of the subtle and complex considerations advanced in court to support non-disclosure had suddenly vanished in the administrative wash. Those considerations seemed persuasive enough for a lawyer to argue before judges, but they were too inconsequential for the parole board itself to care about when the subject was returned to the board for reconsideration.

I use this example also to point up a qualification that must be made in my general panegyric of rulemaking. The mere existence of rules does not always guarantee that they have been made in a responsible and considered fashion, nor does it always clarify the nature or the force of the policies underlying the rule. The Supreme Court, after all, permitted itself to be persuaded that there were valid secular purposes for the Sunday blue laws,⁵⁶² whereas we all know in fact that their purpose is religious. But particularly in the police context, rules enhance (though they do not assure) considered policymaking: for, as we shall see, rulemaking raises the level of responsibility for policy decisions from the beat patrolman to the police department command and requires the department to commit itself to policies as the basis for its operations generally, not merely on isolated and sporadic occasions. Moreover, the shape of rules often does convey an indication of the judgments underlying them;⁵⁶³ it frequently allows courts to determine at least that certain considerations advanced to support a rule do *not* support the rule;⁵⁶⁴ it invariably provides enlightenment as to how far the police believe that the policy of the rule extends. And when, as in my parole board case, a court does invalidate a rule, the court's decision does not simply get lost or filed in a vice-squad detective's "testimony to avoid" file. It returns the subject of the rule to the police department command level for studied reconsideration and requires the elaboration of a new general policy that may confidently be expected to receive the benefit of more deliberation than its predecessor.

Rulemaking would also tend to tame the welter of police practices that now come before courts for fourth amendment adjudication by preventing some of those practices from being used in the first place. It is a grave mistake, I think, to assume that all of the things that policemen do in a state of rulelessness would continue to be done under a regime of rules. Many practices now tolerated in individual cases—and particularly many of the questionable practices that spawn fourth amendment litigation—would not be approved or authorized by the police command structure itself if it were required to assume responsibility for determining the propriety of those practices as a general mode of departmental operation. As Professor Davis writes: "[E]ven the police themselves need to be educated in the realities of what they are doing; many of them would refuse to participate if they were more sharply aware of the realities."⁵⁶⁵

Police rulemaking would bring these realities to visibility not merely for the police command but also for the community. Departmental rules would be subject to a kind of scrutiny by the community and by local political organs that is impossible in the case of isolated, invisible and haphazard practices. Can there be any doubt that if the police were forced to state their practices in written general directives and to defend them to the community upon that basis, many sorts of search-and-seizure activities that now plague the courts under the fourth amendment would disappear?

Finally, the rulemaking requirement would permit the Court to extend the coverage of the fourth amendment over police activities that demand some control against abuse but do not appear to lend themselves to regulation by warrants or the probable cause standard of justification. In addition to the tenement-hallway "checks" and street interrogations that I discussed yesterday, there is a wide range of law enforcement practices—mail covers, "tailing" and other forms of field surveillance, patrol of public lavatories, police helicopter patrols, "home visits" to parolees, to mention just a few—which pose troublesome questions of coverage because they can neither be excluded from the amendment without licensing arbitrary snoopings and oppressions nor be included in it without disjointing its present doctrinal structure.⁵⁶⁰ The Court could readily characterize these practices as "searches and seizures" of "persons, houses, papers, and effects"—which, in my judgment, they are—if the consequence were to require their governance by rules and regulations rather than by warrants and probable cause. Enforcement of the regulations would provide a safeguard against arbitrariness; review of their substance would permit determination of their reasonableness in the light of the intrusiveness of the practices they authorize and the justifications they require; and, insofar as prudence and the multiplier effects of a rulemaking process cause the police to extend rules over activities not yet judicially determined to be "searches and seizures," the rules would assist the courts in making those determinations without producing consequences harmful to police performance.

Here is a protective procedure which uniquely avoids the Manichean conflict between effective law enforcement and the safeguarding of individual rights. For the present widespread state of uncontrolled police discretion is at war with both the preservation of individual liberties and efficiency in the performance of the law enforcement function. The exercise of

sweeping police powers unguided and unchecked by visible public policies responsibly made and constantly reviewed endangers individual citizens in their basic freedoms *and* is also undemocratic, unprofessional and inefficient. Professor Davis puts it bluntly:

*The system is atrociously unsound under which an individual policeman has unguided discretionary power to weigh social values in an individual case and make a final decision as to governmental policy for that case, despite a statute to the contrary, without review by any other authority, without recording the facts he finds, without stating reasons, and without relating one case to another.*⁵⁶⁷

This is why informed authorities today agree with rare unanimity upon the need to direct and confine police discretion by the same process of rulemaking that has worked excellently to hold various other forms of public agencies to accountability under standards of lawfulness, fairness and efficiency. Increased use of police rulemaking has been recommended by the National Crime Commission, the National Advisory Commission on Civil Disorders, the American Bar Association Project on Minimum Standards for Criminal Justice and others.⁵⁶⁸ Its virtues were canvassed by Judge Carl McGowan in his admirable Holmes Devise Lectures for 1971,⁵⁶⁹ and I do not want to replot the ground that he has so well cultivated. It may be useful, however, to state the four major ways in which, in my judgment, rulemaking improves police performance.⁵⁷⁰

One. Rulemaking enhances the quality of police decisions. Vital police policy decisions are now too often left to be made by the individual officer, who usually lacks the expertise, training, resources, time for reflection, and sometimes the dispassion, to do the job properly. Recognizing the police policymaking function and systematizing it in a rulemaking procedure would assure better police decisions in matters of policy than are now possible, for several reasons:

First, it would focus attention on the fact that policy is to be made: it would put the matter of making policy on the agenda. Presently, the very fact that day-by-day police work raises issues which require determination at the level of policy is commonly ignored. Policy is not really "made" at all; it emerges haphazardly as individual officers somehow muddle through.⁵⁷¹ The first step in making good decisions, obviously, is to become conscious that there are decisions to make.

Second, it would promote the placing of decisionmaking authority in responsible and capable hands, under conditions per-

mitting ample consideration of the problems and interests involved. Once again, the very fact that policy is consciously being made compels attention to the question who should make it; and the answer is likely to be someone with responsibility and proven judgment. It is not imaginable that the work of drafting a Department General Order governing the use of firearms to effect an arrest, for example, would be assigned to an overworked, undertrained motor patrolman—let alone to one who is simultaneously engaged in a high-speed auto chase. Yet today that is frequently the level at which such literally life-or-death decisions are made.

Third, it would increase the seriousness with which the police face up to the vital implications of their various practices for the efficiency of law enforcement and for the liberties of citizens in the communities they serve. The individual police officer himself often fails to appreciate the significance of the issues that he is resolving. An acknowledged decisionmaking authority would be inclined to view his responsibilities more gravely and in broader perspective and to evaluate more thoroughly and thoughtfully the impact and propriety of various courses of action open to him. He would be both more accessible and more receptive to community input—ordinarily an essential ingredient of sound decisionmaking when decision requires value choices; and he would stand to be judged and questioned by the department and the community upon irrefutable evidence of the content of the decision he had made.

Fourth, it would promote decisionmaking efficiency. There is simply no sound reason why individual officers should be compelled to decide afresh, without departmental guidance, what basic policy to adopt in each of the commonly recurring situations that confront them.

Fifth, it would enhance police prestige and morale, hopefully to the point where command personnel would no longer feel obliged to defend indefensible police misconduct in order to "back up" their troops. Refusal to recognize frontally the existence and necessity of police policymaking denigrates the role and capabilities of law enforcement officers. Conversely, acknowledging the important policymaking job that the police perform would increase departmental morale and professional pride, and inform the community of the breadth and gravity of police responsibility. In addition, centralized decisionmaking would take the excessively heavy weight of basic policy judgments off the shoulders of the individual officer. Under a sys-

tem of clearly articulated standards for police behavior, it would not be necessary for police administrators to tolerate and justify poor police work in order to preserve morale.⁵⁷²

Two. Rulemaking tends to ensure the fair and equal treatment of citizens. When unconfined decisionmaking power is placed in the hands of each individual police officer, it is inconceivable that all officers will respond similarly to similar situations. The irregularity of their responses—inevitable in the absence of constant departmental policies—is undesirable for two reasons.

Most important, it violates the fundamental notion that governmental power should be applied evenhandedly. Fairness and justice demand that persons in equivalent situations should be treated alike: that the imposition of state authority should be determined by the characteristics of the incident, not the whimsey or identity of the officer who happens to arrive upon the scene first. Whether an individual is stopped or searched or detained or manhandled or shot cannot, in a society which prizes personal liberty and equality, depend on whether he is confronted with Deputy Smith or Deputy Jones, or whether the deputy is in a good or bad mood at the time, or admires or detests his attitude or the cut of his hair or clothes.

In addition, inconsistent police actions jeopardize relations between the police and the community. Misconduct by a few officers is likely to destroy any good will that other officers have developed among the people they serve. And even permissible conduct, when inconstant, is likely to breed a sense of injustice among those who are less favorably treated. Regulations tend to make police actions fairer and more consistent in a number of ways:

First, they reduce the influence of bias. An official exercising rulemaking authority in a deliberative process involving community consultation and subject to community scrutiny is far less likely than an officer on the street to be actuated by racial or cultural prejudice. The written form and general applicability of his decisions constitute significant safeguards against the exercise of his authority in a manner that reflects his personal biases.

Second, regulations provide uniform standards for use in the training of personnel. Present personnel training fails to give officers guidelines for many of the critical decisions that they will have to make, and actions that they will have to take, in the course of their daily work.

[T]here is a need for training more directly related to the important problems which the officer will face in the field—training which will not only instruct him on the limits of his formal authority, but also inform him of the department's judgment as to what is the most desirable administrative practice to follow in exercising his authority. Carefully developed administrative policies would serve this important function.⁵⁷³

Third, regulations serve both to guide and to control police behavior. They provide a common reference point for all operating members of the department with regard to the issues that they resolve. The same reference point also makes it possible for administrative personnel to require adherence by all officers to predefined levels of competence and standards of conduct.⁵⁷⁴ Perhaps even more important is the point that regulations work effectively in conjunction with positive incentives. Professor Gerald Caplan notes, for example, that knowledge of the rules promulgated by the District of Columbia Metropolitan Police Department is a significant factor in promotion decisions.⁵⁷⁵ Adherence to the rules can similarly be employed as an objective indicator of competence and merit. Such defined criteria enable individual officers to know what is expected of them and to respond accordingly, and allow administrators to evaluate their performance fairly while at the same time insisting upon appropriate standards of behavior.

Three. Rulemaking increases the visibility of police policy decisions. Decisionmaking that is diffuse is also thereby invisible; and those who make invisible decisions cannot be held properly accountable for them. When every officer of a department is left to make his own policies, no one in the command structure of the department—and no one in the community which the department serves—knows how the laws are being administered in fact. Bad practices cannot be identified; good practices cannot be instituted; the entire system remains necessarily unresponsive and irresponsible. Adequate rulemaking processes promote police accountability in three critical ways:

First, they require the departmental command structure to inform itself about what officers are doing in the field and to confront the questions of policy involved in the department's operating practices.

Second, they inform other governmental agencies about what the police are doing. My earlier observation concerning the inability of courts to form a clear picture of police practices in the absence of police-made general rules and published policies is applicable as well to other public bodies. Under a sys-

tem of diffuse and invisible police decisionmaking, no organ of government having power to regulate or review police behavior can understand the nature, shape or significance of that behavior. Nonpolice agencies are not merely unable to oversee the police as they should; they are also unable to predict the likely effects of decisions that they themselves make which are designed to regulate, or must be implemented through, police action. While I have said that I am deeply pessimistic about the likelihood that legislative bodies will exert any significant authority over the police so long as they can evade their responsibility to do so, evasion would be somewhat more difficult if police policies were spelled out publicly. When police practices are experienced by the community simply as something that has happened in this or that particular episode, usually involving a criminal and almost invariably involving a socially marginal type, there is no real focus for complaint. Occasionally a policeman will accidentally gun down a juvenile, and everyone will become terribly upset for a few days; but that was the particular policeman's error, and what can the legislature or the city council *do*? If the policy judgment made by that policeman—for example, that all arrests of two or more suspects will be made with a drawn gun, notwithstanding the dangers of accidental discharge—were announced as a policy of general prospective application by the department, legislators might not find it quite so easy to pass the buck.

Third, police rulemaking procedures inform the public about what the police are doing. "Not only should policemen be guided by departmental policy in the making of . . . delicate decisions, but the people who will be affected by these decisions—the public—have a right to be apprised in advance, rather than *ex post facto*, what police policy is."⁵⁷⁶ Publication of the fact, the agent and the content of decisionmaking tends to ensure that the decisions which are made will conform to the community's standards of justice. As Judge McGowan concludes:

In the last analysis, it is the *visibility* of the administrative rule-making process which is its greatest virtue. Without it, the police have never been compelled to recognize the degree to which their daily operations involve policy decisions of the greatest significance to the community. Nor have they been obliged to reach a conscious decision as to whether familiar ways of doing things, which appeal to them as effective, are compatible with overriding values generally comprehended within our concept of a government of laws. In its absence, there has not been the continuous re-examination of estab-

lished methods, the periodic probing to see if the desired objective can be achieved through new exercises of ingenuity and imagination without sacrifice of other social ends, which are the mark of the true profession. The extension of the administrative process to the police function would markedly advance the achievement of that status.⁵⁷⁷

Four. Rulemaking offers the best hope we have for getting policemen consistently to obey and enforce constitutional norms that guarantee the liberty of the citizen. In particular, the promulgation of police-made rules embodying and conforming to the fourth amendment's guarantees against unreasonable searches and seizures would reinforce those guarantees in two essential ways:

First, rules made by the police are most likely to be obeyed by the police. Police, like everyone else, tend to be resentful of—and to resist—restrictions placed upon them by somebody else. "They too are more likely to want to conform and have an ability to conform if they are part of the process for making important decisions affecting criminal justice administration."⁵⁷⁸ The closer the rulemaker to the officer on the street, the fewer the levels of invariably distorting, and sometimes wholly obstructive, authority through which the rules must pass.

Second, when police-made rules are not obeyed, they are most likely to be effectively enforced against the disobedient. Realistically, no extra-departmental body has the information, resources and direct disciplinary authority necessary to control the police effectively and consistently. Only the police administration itself can make its troops toe the line; and police administrators are understandably quicker to enforce their own edicts than somebody else's.

[P]rimary dependence for the control of police conduct must, under any conditions, continue to be placed upon existing systems of internal discipline. An agency functioning outside a police department simply does not have the capacity to substitute for the numerous echelons of supervisory officers that are required around the clock, twenty-four hours a day, to provide the kind of on-the-spot direction and control that is necessary to assure conformity by hundreds and sometimes thousands of police officers to established standards of conduct. External controls are likely to be effective only if they induce a desire and willingness on the part of police administrators and their supervisors to elicit conformity from their subordinates.⁵⁷⁹

I do not propose, however, as some have suggested, that we rely entirely upon police disciplinary procedures to enforce the fourth amendment, or that we accept the probable improvement of those procedures through rulemaking as a reason for dis-

carding the exclusionary rule in criminal cases. Bringing police disciplinary procedures to the support of the fourth amendment is indispensable, but it is not enough. Judicial review both of the substance of the rules and of police compliance with them in particular cases remains essential.⁵⁸⁰ I have no doubt that courts should entertain affirmative lawsuits against the police both to require the promulgation of rules⁵⁸¹ and to review police rulemaking procedures and the contents of promulgated rules under the fourth amendment and administrative law standards.⁵⁸² But I do not believe that these sorts of lawsuits would suffice to provide the constant judicial scrutiny necessary to keep police-made rules faithful to the Constitution, or police faithful to the rules. Maintenance of the exclusionary sanction would, at the least, provide recurrent occasions for reconsideration of the rules by both the courts and the police themselves⁵⁸³—necessary occasions, I believe, if constitutional deficiencies, administrative problems, and practices of evasion are to be flushed out and corrected. The sanction would also probably provide the only available incentive to the police to make the rules, make them clear⁵⁸⁴ and make them a part of recruit and in-service training.⁵⁸⁵

I do not ignore either the debate over the efficacy of the exclusionary sanction as a method of holding the police in line⁵⁸⁶ or Chief Justice Burger's recent suggestion that the suppression doctrine should be scrapped in favor of a damage remedy against the offending government, to be administered by some sort of special tribunal.⁵⁸⁷ Like the Chief Justice, I have long believed that the exclusion of relevant criminal evidence is a high price to pay for judicial enforcement of the fourth amendment and that the exclusionary sanction is an evil in itself.⁵⁸⁸ I believe, however, that it is a necessary evil because the supposed alternatives to it are pie in the sky.

Chief Justice Burger seems to agree with me that the traditional alternatives, such as criminal prosecutions and tort actions against policemen, do not work.⁵⁸⁹ His faith in a special tribunal for government claims is apparently based upon his belief that "lawyers serving on such a tribunal would [not] be swayed either by undue sympathy for officers or by the prejudice against 'criminals' that has sometimes moved lay jurors to deny claims."⁵⁹⁰ I would welcome the opportunity to put that prognostication and my own contrary prognostication before any randomly selected group of contingent-fee lawyers in the land by offering them a retainer as plaintiffs' counsel in the special

tribunal and letting them vote with their feet.

Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon v. Wainwright*⁵⁹¹ and its progeny⁵⁹² conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on "cover" charges? The opportunity to represent his client without fee in these resulting criminal matters?

Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some resources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police. No, I think we shall have airings of police searches and seizures on suppression motions or not at all.

Admittedly, the scant empirical evidence available does not answer the questions whether and how much the exclusionary sanction reduces instances of unconstitutional search and seizure by the police.⁵⁹³ But several of the major forces that are commonly cited as impeding the effectiveness of the sanction would be considerably abated by the adoption of my view that the fourth amendment requires police rulemaking. It is said that the court-made rules governing searches and seizures are unclear and that the police cannot understand them. Let the police make their own clear rules consistent with the amendment and train officers in their meaning. It is said that there is insufficient communication of court decisions to the police. One of the great assets of a system of police-made rules reviewable by the courts is that police administrators are obliged to respond to court decisions by appropriate amendment of their rules. It is said that the police are in the grip of a law-enforcement ethic which values the good pinch more highly than observance of

court-made rules. Support of that ethic by the police command structure may be somewhat less enthusiastic when the rules flouted are its own.⁵⁹⁴

In any event, it seems to me that we should be very hesitant to abandon the one sanction that has any prospect of enabling courts to insist upon police obedience to the Constitution. The exclusionary sanction may not—indeed, it surely will not—induce policemen to conform their conduct to the fourth amendment on every occasion. But at least it provides a counterweight within the criminal justice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the fourth amendment on every occasion when there is criminal evidence to be gained by doing so.

The common focus on the concept of “deterrence” in the debate over the exclusionary rule can be quite misleading. It suggests that the police have a God-given inclination to commit unconstitutional searches and seizures unless they are “deterred” from that behavior. Once this assumption is indulged, it is easy enough to criticize the rule excluding unconstitutionally obtained evidence on the ground that it “does not apply any direct sanction to the individual officer whose illegal conduct results in the exclusion,”⁵⁹⁵ and so cannot “deter” him. But no one, to my knowledge, has ever urged that the exclusionary rule is supportable on this principle of “deterrence.” It is not supposed to “deter” in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.

Rather, the exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities: branding the social security number of the purchaser into the chassis of new television sets in order to make them less attractive as objects of larceny by diminishing their resale value in the hands of anyone but the true owner. Of course a branded television set may nonetheless be stolen by someone who does not notice it is branded, or who thinks that he can sell it even with the brand, or who simply wants to watch the Superbowl on it. But at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium

prices for evidence branded with the stamp of unconstitutionality.

Whether you think that courts should buy this kind of merchandise on account of its value to the government depends in part on your view of the obligation that the fourth amendment imposes upon the system of criminal justice. Chief Justice Burger complains that the exclusionary rule treats the government as one piece with the offending officer.⁵⁹⁶ But surely it is unreal to treat the offending officer as a private malefactor who just happens to receive a government paycheck. It is the government that sends him out on the streets with the job of repressing crime and of gathering criminal evidence in order to repress it. It is the government that motivates him to conduct searches and seizures as a part of his job, empowers him and equips him to conduct them. If it also receives the products of those searches and seizures without regard to their constitutionality and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures.

The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely something that happens after "a violation"⁵⁹⁷ of the fourth amendment has occurred, and when it is too late to prevent, impossible to repair, and senseless to punish the government for that violation.⁵⁹⁸ It is the linchpin of a functioning system of criminal law administration that produces incentives to violate the fourth amendment. Attention is distracted from that system,⁵⁹⁹ and the exclusionary rule is talked about as though it were an instrument for "detering" discrete and specific episodes of unconstitutional police behavior,⁶⁰⁰ because of the generally prevailing atomistic conception of the fourth amendment that I questioned in my first lecture.⁶⁰¹ The atomistic conception is, I think too, narrow.

When Otis argued against the writs of assistance in Boston and colonial judges refused them to customs officers in other colonies, the controversies were public in substance as well as in form. What was in question was not isolated acts of oppression but the issuance of process that jeopardized the liberty of every citizen by licensing the officers to summon civil authority at their command in order to search and seize wherever they pleased. The evil was general: it was the creation of an administration of public justice that authorized and supported indis-

criminate searching and seizing. It was against such a regime of public justice that the fourth amendment was set. I do not think that the phraseology of the amendment, akin to that of the first and second amendments and the ninth, is accidental. It speaks of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁶⁰² The vice of a system of criminal justice that relies upon a professional police and admits evidence they obtain by unreasonable searches and seizures is precisely that we are all thereby made less secure in our persons, houses, papers and effects against unreasonable searches and seizures.

I am not suggesting that the exclusionary rule is an explicit command of the Constitution,⁶⁰³ nor do I mean to make more of the fourth amendment's language than the skin of the living thought that dwells within. The rule was fashioned by judges as an expression of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command.

Indeed, the exclusionary sanction as it is presently employed seems to me to fall intolerably short of the mark. I put aside the obvious points that the Supreme Court's "standing" rules constitute an incitement to the police to conduct unconstitutional searches against small fish in order to catch big ones,⁶⁰⁴ and that its treatment of "taint" as a question of fact instead of a question of reasonable anticipation encourages illegalities which the police or prosecution can subsequently "attenuate" by undetectable uses of their own products.⁶⁰⁵ My present concern is for a larger problem that causes me to suggest the need for expansion of the exclusionary rule in a new direction.

In view of the tides of the times running strongly against the exclusionary rule generally, I should make the politic observation that this suggestion is entirely independent of my contention that the fourth amendment requires police rulemaking. While the expansion of the exclusionary rule that I shall urge would be a valuable adjunct of a fourth amendment which demanded and enforced police-made rules, it is far more indispensable to a fourth amendment which attempts to regulate the police in the absence of such rules. The Court's recent treat-

ment of the exclusionary sanction plainly demonstrates its power to mold the sanction flexibly; and while that power is now being used largely to withdraw, I see no reason why it should not equally be used to extend the sanction wherever necessary to enforce the fourth amendment effectively.⁶⁰⁸

Consider with me several common cases:⁶⁰⁷ *First.* A highway patrolman flags down a motorist, asks to see his driver's license and, looking through the windows of the car, perceives recognizable bottles of moonshine on the floor. The officer has no warrant for the car or the driver and no probable cause to believe that the car is carrying moonshine or that its driver has committed or is committing any criminal offense. The officer may or he may not have used his authority to stop drivers for "routine" license checks⁶⁰⁸ as a means of trying out his suspicion (not amounting to probable cause) that the driver is rum-running. *Second.* A postal inspector opens a third-class parcel without a warrant and discovers obscene literature. He may or he may not have used his authority to inspect third-class mail⁶⁰⁹ as a means of verifying his suspicion that obscene mailings are emanating from a particular source. *Third.* A cruising patrolman sees an ill-dressed man pacing back and forth in front of a locked-up store at night in a high-crime area. He stops and frisks the man, feels a hard object in his coat pocket, and removes a plastic toothbrush holder full of heroin. He may or he may not be using the stop-and-frisk power⁶¹⁰ as a means of checking out some vague rumor that a man in the general area has been pushing drugs.

Each of these cases has the following attributes: *First.* A power is claimed by a law enforcement officer to engage in conduct that intrudes upon the privacy or security of a citizen—the power to stop a moving car, to open a mailed parcel, to detain and pat down a pedestrian. *Second.* The allowance of that power consistently with the fourth amendment is sought to be justified by the existence of a specific law enforcement need—to check operators' licenses in order to guard against the dangers of unlicensed drivers; to inspect low-postage mail in order to assure against the use of limited mailing privileges for non-qualifying mail; to make an investigative "stop" in order to anticipate a possible burglary, and an incidental "frisk" in order to protect the officer from concealed weapons. *Third.* The power may in fact be exercised by an officer for some other purpose than the one which is asserted to justify it.

These cases seem to me to raise four questions of doctrinal

formulation: Should the power claimed be allowed at all? If so, under what circumstances? Should the circumstances that condition the allowable exercise of the power include the requirement that it be used for the purpose for which it was given? Should other doctrinal devices be employed to assure that, for the most part, the power will be used only in the service of the purpose for which it was given?

These questions may be made somewhat more concrete by identifying the sorts of possible rules that a court might formulate to deal with one of our hypothetical situations. Take the case of third-class mail. The court might say that although first-class mail may be opened only pursuant to a warrant,⁶¹¹ third-class mail may be opened without a warrant. The justification for such a decision would doubtless be that some sort of warrantless inspection of low-postage mail is necessary to maintain the integrity of the postal rate structure, and that the extent of the intrusion involved in such an inspection is not incommensurate with the regulatory or law enforcement need, particularly since citizens can purchase the protection of the warrant requirement for a few cents more. Having allowed the power to make warrantless searches of third-class mail, the court might hold that that power can be exercised irrespective of the searcher's purpose and that anything found may be used in evidence without restriction. Or it might say that the search power is unlawfully exercised whenever it appears that the searcher's purpose was not rate-control inspection but criminal investigation, since the sole justification for allowing the power is not present in such a case. Alternatively, the court might fashion a rule excluding from evidence anything found in a third-class mail search *except* evidence that non-qualifying mail was sent under third-class rates. The rationale of this last rule, of course, would be to discourage abuse of the rate-control search power by removing the incentive to employ it for ulterior purposes, thus leaving postal inspectors no motive for search except that which supports the search power given.

The dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance. Thus, it is not inconceivable that the Supreme Court might conclude that the intrusiveness of third-class mail inspection, *plus* the possibility of its abuse as a means to conduct criminal investigations free of the usual warrant safeguard, outweigh concerns for the integrity of the postal rate structure and compel the conclusion

that warrantless third-class mail searches should never be allowed. A much more compelling case can be made, obviously, for the rule that motor-vehicle stoppings without probable cause are altogether impermissible because the danger of abuse of the license-check pretext far outweighs the need of the police to apprehend unlicensed drivers not observed to be violating other traffic laws or driving unsafely.⁶¹² Such a total disallowance of a claimed police power on grounds of its potential for abuse is particularly justifiable where the power is extremely intrusive, the potential for abuse is high, and the asserted justificatory need is not particularly weighty even in cases squarely and legitimately within the scope of justification.

But the need for a particular police power may be intense, although narrow. It is upon this basis that the Court apparently sustained the stop-and-frisk power, although the power may be—and, indeed, very frequently is—abused by its employment as an investigative tool. The question remains: should curbs be retained against the likely abuse? Three sorts of curbs seems possible.

The first is to surround the stop-and-frisk power with such objective limitations as are practicable in the light of its purpose, by stipulating the requisite conditions and permissible extent of its exercise. These limitations have been tried⁶¹³ and have expectably failed miserably: how can even the most enlightened and conscientious courts ever fail to detect the presence of the necessary, indefinable less-than-probable-cause probability of a weapon⁶¹⁴ or, having thus justified the frisk, refuse to allow the police to remove anything harder than a damp sponge which they will testify “felt like” a weapon?⁶¹⁵ Restraint of the misuse of stops and frisks to conduct general exploratory body searches for narcotics and other criminal evidence upon mere suspicion might be possible if the conditions and limitations of the frisk power were tightened up considerably, but I see no administrable standard short of probable cause that is tight enough to do the job;⁶¹⁶ and the Supreme Court has rejected the probable cause standard on the ground that it would subject officers to undue risks of deadly attacks with concealed weapons.

The second possible curb against abuse is to inquire into the officer's motive or purpose for conducting the stop and frisk. But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context.⁶¹⁷ A subjective purpose to do something that the ap-

plicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably.⁶¹⁸ Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.

The third possible curb is the one that I believe necessary: a rule excluding from evidence everything that an officer finds in the course of a "frisk" except weapons. I recognize, of course, both the legal and practical objections that will be raised against this suggestion since, from the atomistic point of view that currently pervades thinking about search and seizure, I am talking about excluding *legally* obtained evidence. How can it be possible to justify depriving the government of the use of relevant and reliable evidence found in a search that the officer was constitutionally permitted to make? How can it be possible to justify putting law enforcement to a choice between foregoing investigative stops, together with the attendant frisks that are thought necessary for the officer's safety, and queering the investigation when the frisk discloses evidence of crime?

My legal justification is that, upon a proper regulatory view of the fourth amendment and its implementing exclusionary rule, there is no necessary relationship between the violation of an individual's fourth amendment rights and exclusion of evidence. The exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment's regulatory objective by reducing undesirable incentives to unconstitutional searches and seizures. To be sure, the stop and frisk is not unconstitutional in the sense that the fourth amendment denies power to make it. But the fourth amendment is thought to tolerate that power only as the result of a fine balance between its recognized intrusion upon personal privacy and security and its justification by a specific police need.⁶¹⁹ Exercised in excess of that need, the power makes the intrusion without the justification and destroys the balance. When a frisk power allowed exclusively upon the predicate that the officer needs it to protect himself from deadly assaults by a person he has stopped for questioning becomes a motive to stop and question persons whom the officer would not stop at all except for the opportunity to use a frisk as an evidence-gathering device, surely fourth amendment values are seriously infringed. And surely the exclusionary rule may properly be

used to withdraw incitements of that infringement.

My practical reason for urging this expansion of the exclusionary rule is that without it stop-and-frisk becomes an uncontrollable instrument of police oppression in our center-city ghettos and barrios.⁶²⁰ The pressures upon policemen to use the stop-and-frisk power as a device for exploratory evidence searches in these areas are intense.⁶²¹ Police can justify virtually any exercise of the power because these are "high-crime" areas⁶²² where all young males, at least, are suspect.⁶²³ However, these are also areas, as the National Crime Commission pointed out with conspicuous understatement, "where the housing is dilapidated and overcrowded and where there are few parks or other recreational facilities," with the result that "[s]ome people ordinarily conduct their social lives on the street."⁶²⁴ It is admittedly a question whether, on the one hand, these people should be subjected to a constant and essentially uncontrollable roving power of stop-and-frisk incited on by the prospect that frisks will reveal drugs and other incriminating evidence or whether, on the other hand, an exclusionary rule should be employed to curb abuses of the stop-and-frisk power with the possible double effect of making it more difficult for the police to protect these same people against crime and of increasing the already considerable penchant of the police to turn to vigilante methods to repress addicts and other undesirables.⁶²⁵ But, for me, although the judgment must be made on balance, I do not find the balance very close. I would apply the exclusionary rule as I have suggested to stop-and-frisk, and also to other search-and-seizure practices—such as driver's license checks, if they are to be permitted at all—where the inability of the courts to devise and enforce any other effective constraint against the perversion of limited-purpose police powers into general search warrants leaves—to use James Otis' classic phrase—"the liberty of every man in the hands of every petty officer."⁶²⁶

What distresses me is not that the Supreme Court has failed to strike the balance as I would. Judgments within the Court upon such issues will inevitably fluctuate from time to time. My purpose in these lectures has been principally to show why those judgments are exceedingly difficult; and I should hardly be surprised that some or all of the Justices take a different view of them than I do. What distresses me, rather, is that I think the Court has fallen into much too narrow a conception of the balance to be struck. Beginning with and never question-

ing an atomistic notion of the fourth amendment, the Court has too easily accepted the corollary that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections."⁶²⁷ To the contrary, I would say that it is precisely where police investigative techniques are susceptible of use to make unwarranted intrusions which the courts cannot distinguish from "closely similar" warranted intrusions, that a flexible administration of the exclusionary rule is desperately needed to keep police powers within the confines of their justifications.

The atomistic assumption itself is understandable. Under many of the Bill of Rights guarantees, the Supreme Court honors its traditional and most important function by protecting isolated individuals against specific acts of oppression. When the Court is assailed by strident howls about "policing the police" and afflicted with self-doubts arising from the difficulty of search-and-seizure issues, it is only natural for the Justices to seek comfort in the view that the fourth amendment demands nothing more or less of them than this customary protection of oppressed individual citizens.⁶²⁸ But I suggest that it does demand more. In an age where our shrinking privacy and liberty would otherwise be enjoyable only at the sufferance of expanding, militaristically organized bodies of professional police, the fourth amendment demands that an independent judiciary play a direct, strong role in their regulation.

Mr. Justice Holmes, in whose honor we have assembled during these three days, brought to the interpretation of the Constitution a profound insight into the enduring values of our heritage, together with the greatness of imagination that is needed to preserve them, not as sainted relics, but as principles of growth for the self-government of a free people. "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States," he wrote,

we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁶²⁹

I would beg the grace of that same vision for the fourth amendment.

FOOTNOTES

1. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).
2. LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255.
3. *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971).
4. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).
5. Compare Mr. Justice Clark's bold characterizations of majority opinions—"Chinese puzzle" (*Wong Sun v. United States*, 371 U.S. 471, 498 (1963) (dissenting opinion)), "quagmire" (*Chapman v. United States*, 365 U.S. 610, 622 (1961) (dissenting opinion))—with the back-slidden style of his opinion for a majority of the Court in *Mapp v. Ohio*, 367 U.S. 643, 660 (1961): "Our decision, founded on reason and truth . . ."
6. *Coolidge v. New Hampshire*, 403 U.S. 443, 483 (1971).
7. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Poe v. Ullman*, 367 U.S. 497 (1961).
8. *Street v. New York*, 394 U.S. 576, 581 (1969). For examples of fourth amendment cases following this principle, see, e.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Brown v. United States*, 411 U.S. 223, 228-29 (1973); *Berger v. New York*, 388 U.S. 41, 44 (1967); *Silverman v. United States*, 365 U.S. 505, 512 (1961); *Jones v. United States*, 357 U.S. 493, 499-500 (1958).
9. 297 U.S. 278 (1936).
10. *Haynes v. Washington*, 373 U.S. 503 (1963).
11. *Escobedo v. Illinois*, 378 U.S. 478 (1964).
12. *Miranda v. Arizona*, 384 U.S. 436 (1966).
13. This thesis is developed in Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. Rev. 785, 803-10 (1970).
14. 372 U.S. 293, 318 (1963).
15. *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966).
16. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 950 (1965).
17. *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).
18. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).
19. *McNabb v. United States*, 318 U.S. 332, 347 (1943).
20. *Ker v. California*, 374 U.S. 23 (1963).
21. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).
22. Most of the fourth amendment issues pressed upon the Court have not required its review of legislative judgment. See Amsterdam, *supra* note 13, at 790-91. But see *Coolidge v. New Hampshire*, 403 U.S. 443, 452 (1971); *Berger v. New York*, 388 U.S. 41 (1967).
23. I shall henceforth assume that the fourth amendment imposes the same restrictions upon the states as upon the federal government. See text accompanying note 20 *supra*. This was the conclusion of eight Justices in *Ker v. California*, 374 U.S. 23 (1963); it underlies such landmark decisions as *Chimel v. California*, 395 U.S. 752 (1969); it is the explicit premise of holdings as late as *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973); and even Mr. Justice Powell, who is not wedded to "incorporationist" views, see *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (concurring opinion), has approached state search-and-seizure issues in fourth amendment terms, *Shadwick v. Tampa*, 407 U.S. 345 (1972). As we shall see, the problem of developing a sound body of

fourth amendment principles clear enough for practical application is formidable. The undertaking, at this late date, to reconstruct a second-level "shadow" fourth amendment for the governance of state officers would produce and perpetuate intolerable confusion and, it seems to me, do more damage to the substantial interests of the states than is done by the theoretical trauma of "incorporation." Subjection of state and federal officers to a common body of fourth amendment rules does not preclude a recognition that real and relevant differences between the functions of the two (as between the functions of officers of two different federal agencies, for that matter) may call for differing results in the application of the common rules. See *Cady v. Dombrowski*, 413 U.S. 433, 440-42 (1973). That recognition provides ample leeway for "plural and diverse state activities," *Shadwick v. Tampa*, *supra* at 353, without permitting pluralism to degenerate into chaos.

24. I shall not deal in these lectures with the application of the fourth amendment to governmental activities outside the field of criminal law enforcement.

25. U.S. CONST. amend. IV.
26. *United States v. Dionisio*, 410 U.S. 1, 15 (1973).
27. See *Lanza v. New York*, 370 U.S. 139, 143-44 (1962) (dictum).
28. *E.g.*, *Beck v. Ohio*, 379 U.S. 89, 90 (1964).
29. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (dictum).
30. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (dictum).
31. *Sibron v. New York*, 392 U.S. 40, 63 (1968).
32. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (dictum).
33. *Draper v. United States*, 358 U.S. 307, 309-10 (1959) (by implication).
34. *United States v. Dionisio*, 410 U.S. 1, 13-16 (1973).
35. *United States v. Mara*, 410 U.S. 19, 21 (1973).
36. *E.g.*, *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966); *Kelley v. United States*, 298 F.2d 310 (D.C. Cir. 1961).
37. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).
38. See text accompanying notes 67-74 *infra*.
39. *E.g.*, *Johnson v. United States*, 333 U.S. 10 (1948).
40. *E.g.*, *Silverman v. United States*, 365 U.S. 505 (1961).
41. *E.g.*, *United States v. Devenere*, 332 F.2d 160 (2d Cir. 1964); *Anspach v. United States*, 305 F.2d 48, 960 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962); *Jennings v. United States*, 247 F.2d 784 (D.C. Cir. 1957). See *McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring). However, when the observation was conducted from a post within the "curtilage" of the premises, see text accompanying notes 75-77 *infra*, some courts found a "search." See *California v. Hurst*, 325 F.2d 891, 898 (9th Cir. 1963), *rev'd on other grounds*, 381 U.S. 760 (1965); *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) (dictum). Subsequent developments confirm this result. *Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968).
42. *Goldman v. United States*, 316 U.S. 129 (1942).
43. 389 U.S. 347 (1967).
44. *Id.* at 353.
45. *Id.*
46. In *United States v. Lee*, 274 U.S. 559, 563 (1927), the Court said that the shining of a coast guard searchlight on the open decks of a suspect vessel was not a "search." *Lee* spawned a line of holdings that flashlight-assisted observations into automobiles and buildings were not searches, *e.g.*, *Petteway v. United States*, 261 F.2d 53 (4th Cir. 1958); and the lower courts have continued to follow that line after *Katz*, see, *e.g.*, *United States v. Hanahan*, 442 F.2d 649 (7th Cir. 1971), with occasional rumblings of discomfort, see *Marshall v. United States*, 422 F.2d

185, 189 (5th Cir. 1970).

47. *E.g.*, *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). *See United States v. Van Leeuwen*, 397 U.S. 249 (1970) (dictum).

48. *E.g.*, *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966).

49. This appears to be the view taken in, *e.g.*, *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Canaday v. United States*, 354 F.2d 849, 856 (8th Cir. 1966).

50. *United States v. Blum*, 329 F.2d 49 (2d Cir.), *cert. denied*, 377 U.S. 993 (1964), may rest on this premise. The point is, of course, questionable in the wake of *Katz* if the test of "searches" is the same for "persons" and for "effects." *See United States v. Epperson*, 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972) (dictum), concluding that the use of a magnetometer upon the person of an enplaning airline passenger is a "search."

51. *E.g.*, *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Kremen v. United States*, 353 U.S. 346 (1957).

52. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).

53. *E.g.*, *Henry v. United States*, 361 U.S. 98 (1959). *See Sibron v. New York*, 392 U.S. 40, 67 (1968).

54. *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).

55. *Cupp v. Murphy*, 412 U.S. 291, 294 (1973).

56. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

57. *E.g.*, *Berger v. New York*, 388 U.S. 41, 59 (1967). *See Lanza v. New York*, 370 U.S. 139, 143-44 (1962).

58. *E.g.*, *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *Jones v. United States*, 339 F.2d 419 (5th Cir. 1964), *cert. denied*, 381 U.S. 915 (1965).

59. *Silverman v. United States*, 365 U.S. 505, 512 (1961).

60. *Schmerber v. California*, 384 U.S. 757 (1966) (dictum).

61. *Beck v. Ohio*, 379 U.S. 89 (1964).

62. *Oliver v. United States*, 239 F.2d 818 (8th Cir.), *cert. dismissed*, 353 U.S. 952 (1957). *See Ex parte Jackson*, 96 U.S. 727, 733 (1878) (dictum).

63. *E.g.*, *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). *See United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970) (dictum).

64. *E.g.*, *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955). *See Nugent v. United States*, 409 U.S. 1065 (1972) (White, J., dissenting from denial of certiorari).

65. *E.g.*, *Preston v. United States*, 376 U.S. 364 (1964).

66. *Abel v. United States*, 362 U.S. 217, 241 (1960). *Cf. Rios v. United States*, 364 U.S. 253, 262 n.6 (1960).

67. *See Lanza v. New York*, 370 U.S. 139, 143 (1962) (dictum).

68. *E.g.*, *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam), *rev'g* 204 Va. 275, 130 S.E.2d 437 (1963). *See Jones v. United States*, 362 U.S. 257, 265-67 (1960) (dictum).

69. *E.g.*, *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951).

70. *Taylor v. United States*, 286 U.S. 1 (1932).

71. *E.g.*, *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

72. *Amos v. United States*, 255 U.S. 313 (1921).

73. *See v. Seattle*, 387 U.S. 541 (1967).

74. The fourth amendment was thought not to protect premises that were held open for the conduct of public business, so long as entries and observations by law enforcement officers remained within the bounds permitted to the general public. *E.g.*, *United States v. Williams*, 328 F.2d 887 (2d Cir.), *cert. denied*, 379 U.S. 850 (1964); *Fisher v. United*

States, 205 F.2d 702 (D.C. Cir.), *cert. denied*, 346 U.S. 872 (1953). However, if the officers exceeded those bounds, for example, by entering during non-business hours, *Amos v. United States*, 255 U.S. 313 (1921), or by intruding into parts of the premises that were not held open for public uses, e.g., *Hughes v. Johnson*, 305 F.2d 67 (9th Cir. 1962); *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962); *Baysden v. United States*, 271 F.2d 325 (4th Cir. 1959), their conduct was subjected to the restrictions of the amendment.

75. *Hester v. United States*, 265 U.S. 57, 59 (1924). See, e.g., *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1963), *cert. denied*, 376 U.S. 931 (1964); *Hodges v. United States*, 243 F.2d 281 (5th Cir. 1957).

76. Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

Care v. United States, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956). See, e.g., *Walker v. United States*, 225 F.2d 447 (5th Cir. 1955); *Baxter v. United States*, 188 F.2d 119 (6th Cir. 1951). In urban settings, "curtilage" is generally treated as coextensive with a fenced yard. E.g., *Weaver v. United States*, 295 F.2d 360 (5th Cir. 1961); *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955). But see the caution sounded in *People v. Ring*, 267 Mich. 657, 660, 255 N.W. 373, 374 (1934), where, in holding a nudist colony unprotected by the fourth amendment, the court expressed the view that "[i]n our ever-changing civilization, it is both difficult and unwise to define the term 'curtilage' with exactitude."

77. Protection is given to outbuildings within the "curtilage." E.g., *United States v. Mullin*, 329 F.2d 295 (4th Cir. 1964). It is less clear that open ground areas within the "curtilage" are protected, although some cases appear to so hold. E.g., *Polk v. United States*, 291 F.2d 230 (9th Cir. 1961), *aff'd after remand*, 314 F.2d 837 (9th Cir.), *cert. denied*, 375 U.S. 844 (1963); *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955).

78. 389 U.S. 347, 351 (1967).

79. *Id.* A homeowner does not completely lose the fourth amendment's protection by inviting "a large number of persons" into his home for the transaction of illegal business. *Recznik v. City of Lorain*, 393 U.S. 166, 169 (1968). But the fourth amendment does not protect him against the risk that one of the invitees is an undercover police officer, since "that amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion). See *Lewis v. United States*, 385 U.S. 206 (1966), cited with approval in *Katz*, 389 U.S. at 351.

80. 389 U.S. at 351-52.

81. *Id.* at 353.

82. See *United States v. Dionisio*, 410 U.S. 1, 8, 14-15 (1973); *Couch v. United States*, 409 U.S. 322, 332, 335, 336 n.19 (1973); *United States v. White*, 401 U.S. 745, 751-52 (1971) (plurality opinion); *Alderman v. United States*, 394 U.S. 165, 179 n.11 (1969); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); cf. *Combs v. United States*, 408 U.S. 224, 227 (1972); *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968). (It should be noted that in *Alderman*, *Mancusi* and *Combs*, the Court conceived the issue presented as one of "standing," see text accompanying notes 140-58 *infra*, rather than one of the boundaries of fourth amendment protection.)

83. *Katz* does not completely repudiate the concept of "constitutionally protected areas," although it does insist that "this concept can

[not] serve as a talismanic solution to every Fourth Amendment problem." 389 U.S. at 351 n.9.

84. 389 U.S. at 350.

85. *E.g.*, *Davis v. Mississippi*, 394 U.S. 721, 726 (1969). *See* *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (dictum); *Terry v. Ohio*, 392 U.S. 1, 25 (1968) (dictum).

86. *See* *United States v. Van Leeuwen*, 397 U.S. 249, 251-52 (1970) (dictum); *Alderman v. United States*, 394 U.S. 165, 176-80 (1969); *Spinelli v. United States*, 393 U.S. 410, 412 n.2 (1969).

87. *United States v. Rabinowitz*, 339 U.S. 56, 63-66 (1950).

88. *See* *Almeida-Sanchez v. United States*, 413 U.S. 266, 289 (1973) (White, J., dissenting); *Wyman v. James*, 400 U.S. 309, 318 (1971); *Cooper v. California*, 386 U.S. 58, 59, 62 (1967).

89. *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 315 (1972).

90. *E.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (dictum); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 478-82 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970); *Chimel v. California*, 395 U.S. 752, 762 (1969); *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968); *Katz v. United States*, 389 U.S. 347, 356-57 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Preston v. United States*, 376 U.S. 364, 367 (1964); *Chapman v. United States*, 365 U.S. 610, 613-15 (1961); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Johnson v. United States*, 333 U.S. 10, 13-15 (1948); *Agnello v. United States*, 269 U.S. 20, 32 (1925).

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

92. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968). In *Shadwick v. Tampa*, 407 U.S. 345, 352 (1972), the Court held that a court clerk who was "an employee of the judicial branch . . . , disassociated from the role of law enforcement" met the constitutional requirement, at least for the purpose of issuing arrest warrants for violators of municipal ordinances. *Shadwick* does not resolve whether a law-trained magistrate is required in more serious cases.

93. *E.g.*, *Aguilar v. Texas*, 378 U.S. 108 (1964). *Compare* *United States v. Harris*, 403 U.S. 573 (1971), *with* *Spinelli v. United States*, 393 U.S. 410 (1969). In a limited class of situations, primarily involving regulatory schemes that require periodic inspection, warrants may be issued without probable cause. *See* the cases cited in notes 106, 108 *infra*.

94. This "'substance of all the definitions' of probable cause" was announced by the Court in a case involving one of the few sorts of searches that are constitutionally permitted to be made upon probable cause without a warrant. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). But the *Brinegar* conception of probable cause has since been employed in warrant cases as well. *E.g.*, *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

95. *See, e.g.*, *United States v. Boyd*, 422 F.2d 791 (6th Cir. 1970); *Durham v. United States*, 403 F.2d 190 (9th Cir. 1968), *aff'd after remand*, 419 F.2d 392 (9th Cir. 1969), *vacated*, 401 U.S. 481 (1971); *Rosen-cranz v. United States*, 356 F.2d 310 (1st Cir. 1966); *Schoeneman v. United States*, 317 F.2d 173 (D.C. Cir. 1963).

96. *See, e.g.*, *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955); *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955).

97. *Berger v. New York*, 388 U.S. 41, 55-60 (1967). *See* *Stanford v. Texas*, 379 U.S. 476, 485-86 (1965).

98. *Marron v. United States*, 275 U.S. 192 (1927). *See* *Stanley v. Georgia*, 394 U.S. 557, 570-72 (1969) (Stewart, J., concurring).

99. See *Alderman v. United States*, 394 U.S. 165, 177 n.10 (1969) (dictum).

100. *Rugendorf v. United States*, 376 U.S. 528 (1964), may so hold *sub silentio*.

101. See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971) (plurality opinion).

102. The most obvious theory, that consent is a waiver of fourth amendment rights, appears to have been accepted in *Stoner v. California*, 376 U.S. 483, 489 (1964). However, the Court's recent discussion of consent in *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-46 (1973), throws the subject into doubt. I find it impossible to say whether *Schneckloth* rejects the entire concept of waiver or merely one particular standard for determining the validity of waivers.

103. "[C]onsent [may] not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (dictum). See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921). However, *Schneckloth* holds that neither warning nor knowledge of the rights surrendered is a necessary precondition of valid consent, 412 U.S. at 227-34, except perhaps in the case of persons in police confinement. See 412 U.S. at 240-41 n.29, 247 n.36.

104. E.g., *Davis v. United States*, 328 U.S. 582 (1946).

105. E.g., *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). The nature of the requisite authorization is discussed in *Stoner v. California*, 376 U.S. 483, 488-90 (1964).

106. The doctrine of *Frank v. Maryland*, 359 U.S. 360 (1959), which had been thought to exempt "administrative" searches generally from the warrant requirement, was overturned in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967).

107. E.g., *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966), and cases therein cited. The "border search" exception has been limited by *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973), to "the border itself" and "its functional equivalents."

108. *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (dictum). The limitations of this exception are sharply drawn by *Almeida-Sanchez v. United States*, 413 U.S. 266, 270-72 (1973).

109. See *Harris v. United States*, 390 U.S. 234 (1968), as interpreted by *Cady v. Dombrowski*, 413 U.S. 433, 444-45 (1973).

110. A line of lower-court cases sustains warrantless automobile stops for these purposes, e.g., *United States v. Berry*, 369 F.2d 386 (3d Cir. 1966); *Rodgers v. United States*, 362 F.2d 358 (8th Cir.), cert. denied, 385 U.S. 993 (1966); *Welch v. United States*, 361 F.2d 214 (10th Cir.), cert. denied, 385 U.S. 876 (1966); *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965), although occasionally invalidating them when the purposes are palpably a sham, e.g., *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964). The argument seems forceful, however, that such stops should be subjected to the warrant requirement of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

111. Cf. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (dictum).

112. Cf. *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (dictum).

113. Cf. *Von Cleef v. New Jersey*, 395 U.S. 814 (1969); *Kremen v. United States*, 353 U.S. 346 (1957).

114. The doctrine springs from *Carroll v. United States*, 267 U.S. 132 (1925). It is limited by *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), to vehicles having some substantial degree of mobility. How-

ever, *Chambers v. Maroney*, 399 U.S. 42 (1970), holds that, if a vehicle possesses the requisite degree of mobility at the time when it is initially seized by law enforcement officers, its search may be delayed for some period, see *Coolidge v. New Hampshire*, *supra* at 523 (White, J., dissenting), even though the seizure effectively immobilizes it during that period. Compare *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972), with *Chambers*.

115. Cases sustaining warrantless vehicle searches upon probable cause include, *e.g.*, *Chambers v. Maroney*, 399 U.S. 42 (1970); *Brinegar v. United States*, 338 U.S. 160 (1949). Cases invalidating warrantless vehicle searches in the absence of probable cause include *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Preston v. United States*, 376 U.S. 364 (1964).

116. The line of lower-court cases so holding, *e.g.*, *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); *United States v. Zimmerman*, 326 F.2d 1 (7th Cir. 1963) (alternative ground); *Romero v. United States*, 318 F.2d 530 (5th Cir.), *cert. denied*, 375 U.S. 946 (1963), is somewhat clouded by *Coolidge v. New Hampshire*, 403 U.S. 443, 461 n.18 (1971) (plurality opinion). Even under the doctrine of the lower courts, a showing of likelihood that the particular object will be moved during the period necessary to obtain a warrant appears to be necessary, see *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966), although the cases are differentially exacting on this score.

117. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

118. See *Chapman v. United States*, 365 U.S. 610, 615 (1961); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *McDonald v. United States*, 335 U.S. 451, 454, 456 (1948); *cf.* *United States v. Ventresca*, 380 U.S. 102, 107 n.2 (1965).

119. See *Nugent v. United States*, 409 U.S. 1065, 1066 (1972) (White, J., dissenting from denial of certiorari); *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970).

120. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). The limited reach of the *Hayden* decision is suggested by the Court's delicate treatment of the "hot pursuit" issue in *Gilbert v. California*, 388 U.S. 263, 269 (1967).

121. The fourth amendment requires probable cause to support either the issuance of an arrest warrant, *e.g.*, *Shadwick v. Tampa*, 407 U.S. 345, 350 (1972) (dictum); *Whitely v. Warden*, 401 U.S. 560 (1971), or an arrest without a warrant, *e.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963); *Henry v. United States*, 361 U.S. 98 (1959). At least in felony cases, it permits warrantless arrests upon probable cause, *e.g.*, *Sibron v. New York*, 392 U.S. 40, 66-67 (1968); *Draper v. United States*, 358 U.S. 307 (1959). State law commonly authorizes warrantless arrests upon probable cause only for felonies, and authorizes warrantless misdemeanor arrests (or arrests for misdemeanors constituting a breach of the peace) "on view," *i.e.*, when the misdemeanor is committed in the officer's presence. Whether the fourth amendment *ex proprio vigore* embraces this limitation of misdemeanor arrests is unsettled. But for purposes of the fourth amendment doctrine allowing a search incident to a valid arrest, the arrest is not valid unless authorized by law. See *United States v. Di Re*, 332 U.S. 581 (1948).

122. *E.g.*, *Hill v. California*, 401 U.S. 797 (1971).

123. *Chimel v. California*, 395 U.S. 752, 763 (1969). The body and clothing of a validly arrested person may be thoroughly searched without a warrant even though the arresting officer has no grounds for belief that they conceal weapons or criminally related objects. *Gustafson v.*

Florida, 94 S. Ct. 488 (1973); *United States v. Robinson*, 94 S. Ct. 467 (1973). Whether warrantless searches of the arrestee's effects or premises beyond his person but within his wingspan may be made without such grounds is a question left open by *Robinson*, *supra* at 471, and *Gustafson*.

124. *Sibron v. New York*, 392 U.S. 40, 63, 67 (1968).

125. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

126. *Cupp v. Murphy*, 412 U.S. 291 (1973).

127. The Court's stop-and-frisk decisions imply, although they do not squarely hold, that an investigative stop may be made only when a law enforcement officer has substantial grounds to believe that a person encountered on the streets or in some other public place is presently engaged in criminal activity. The grounds need not amount to probable cause for arrest, but they must consist of "specific and articulable facts which, . . . judged against an objective standard . . . 'warrant a man of reasonable caution in the belief' that the action taken [is] . . . appropriate." *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). The information must have "enough indicia of reliability to justify the officer's forcible stop." *Adams v. Williams*, 407 U.S. 143, 147 (1972) (dictum).

128. *Sibron v. New York*, 392 U.S. 40, 63-64 (1968); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

129. *Sibron v. New York*, 392 U.S. 40, 65-66 (1968). See *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968) (dictum).

130. *E.g.*, *Jackson v. United States*, 354 F.2d 980 (1st Cir. 1965); *United States v. Alexander*, 346 F.2d 561 (6th Cir. 1965), *cert. denied*, 382 U.S. 993 (1966); *Robinson v. United States*, 327 F.2d 618 (8th Cir. 1964).

131. *E.g.*, *United States v. Montcallos*, 349 F.2d 80 (2d Cir. 1965); *United States v. Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965); *Dickey v. United States*, 332 F.2d 773 (9th Cir.), *cert. denied*, 379 U.S. 948 (1964).

132. In the absence of probable cause to believe that the person is on the premises, the entry is held invalid. *E.g.*, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); *Gibson v. United States*, 149 F.2d 381 (D.C. Cir.), *cert. denied*, *O'Kelley v. United States*, 326 U.S. 724 (1945).

133. The doctrine was strongly criticized in *Coolidge v. New Hampshire*, 403 U.S. 443, 473-84 (1971), and its viability is now considered an "open question." *United States v. Davis*, 461 F.2d 1026, 1030 (3d Cir. 1972). See also *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Lankford v. Gelston*, 364 F.2d 197, 205-06 (4th Cir. 1966).

134. See note 120 *supra*. The concept of hot pursuit is strained to tepidness in *Chappell v. United States*, 342 F.2d 935 (D.C. Cir. 1965).

135. See notes 111-13 *supra* and accompanying text.

136. *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (dictum); *Chimel v. California*, 395 U.S. 752, 762-64 (1969). See also note 129 *supra* and accompanying text. But see *United States v. Robinson*, 94 S. Ct. 467 (1973).

137. Federal officers may be sued in the federal courts for damages, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), or for an injunction, *Fifth Ave. Peace Parade Comm. v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971); cf. *Gomez v. Layton*, 394 F.2d 764, 766 (D.C. Cir. 1968) (subsequent history delineated in *Gomez v. Wilson*, 477 F.2d 411 (D.C. Cir. 1973)). The \$10,000 jurisdictional amount required by 28 U.S.C. § 1331(a) (1970) obviously poses difficulties in many search-and-seizure cases, see *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965); but see *Spock v. David*, 469 F.2d 1047, 1050-53 (3d Cir. 1972), and it remains unclear to what extent

the difficulty can be overcome in injunctive matters by resort to 28 U.S.C. § 1361 (1970). Compare *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973), with *Burnett v. Tolson*, 474 F.2d 877 (4th Cir. 1973). Suits against federal officers in the state courts are bedeviled by unsettled issues regarding the competence of those courts to trammel federal agents acting in their official capacities, albeit unconstitutionally. Compare the discussion in *Bivens v. Six Unknown Fed. Narcotics Agents*, *supra* at 390-95, with that in *McGaw v. Farrow*, *supra* at 955, and authorities therein cited. State officers may be sued in the state courts upon such state-law causes of action as trespass and false imprisonment, and the fourth amendment may be invoked to override their defenses of official justification insofar as their conduct violates the amendment. Or they may be sued in the federal courts (and presumably in the state courts as well) for damages, *Monroe v. Pape*, 365 U.S. 167 (1961), or for an injunction, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), on the ground that conduct violative of the plaintiff's fourth amendment rights is actionable under 42 U.S.C. § 1983 (1970). The parallel criminal provision of the federal civil rights acts, 18 U.S.C. § 242 (1970), could be invoked to punish state officers who violate the fourth amendment with the requisite "purpose to deprive a person of a specific constitutional right." *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality opinion). See *United States v. Price*, 383 U.S. 787, 793 (1966) (dictum); *Williams v. United States*, 341 U.S. 97 (1951). Some, but not all, violations of the fourth amendment by federal officers are criminally punishable under 18 U.S.C. §§ 2234-36, 2511 (1970).

138. Such actions encounter not only the assorted legal difficulties suggested in note 137 *supra*, but also a familiar litany of practical impediments. See *People v. Cahan*, 44 Cal. 2d 434, 445-48, 282 P.2d 905, 911-13 (1955); Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 786, 787 (1970); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

139. See note 21 *supra* and accompanying text.

140. *Brown v. United States*, 411 U.S. 223 (1973); *Combs v. United States*, 408 U.S. 224 (1972).

141. *Alderman v. United States*, 394 U.S. 165, 171-72 (1969). See *Wong Sun v. United States*, 371 U.S. 471, 492 (1963).

142. *Jones v. United States*, 362 U.S. 257, 261 (1960). Although this language in *Jones* purported to interpret FED. R. CRIM. P. 41, it has since been taken as fourth amendment lore.

143. *E.g.*, *Diaz-Rosendo v. United States*, 357 F.2d 124 (9th Cir.), *cert. denied*, 385 U.S. 856 (1966); *Tindle v. United States*, 325 F.2d 223 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 883 (1964); *United States v. Serrano*, 317 F.2d 356 (2d Cir. 1963).

144. *E.g.*, *United States v. Jeffers*, 342 U.S. 48, 54 (1951); *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955).

145. See *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967) (dictum).

146. *Brown v. United States*, 411 U.S. 223, 230 n.4 (1973); *Woodring v. United States*, 367 F.2d 968, 970 (10th Cir. 1966) (dictum).

147. *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972); *United States v. Eldridge*, 302 F.2d 463, 464-65 (4th Cir. 1962) (dictum).

148. *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967) (dictum); *Simpson v. United States*, 346 F.2d 291 (10th Cir. 1965).

149. *United States v. Peisner*, 311 F.2d 94 (4th Cir. 1962); *cf.* *Rios v. United States*, 364 U.S. 253 (1960).

150. *Alderman v. United States*, 394 U.S. 165, 176-80 (1969).

151. *Id.* at 176; *Taglianetti v. United States*, 394 U.S. 316, 317 (1969) (dictum).

152. *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966). See *Alderman v. United States*, 394 U.S. 165, 176-77 (1969) (dictum).
153. *Murray v. United States*, 380 U.S. 527 (1965), *vacating* 333 F.2d 409 (10th Cir. 1964); see *Murray v. United States*, 351 F.2d 330, 334 (10th Cir. 1965), *cert. denied*, 383 U.S. 949 (1966).
154. *Jones v. United States*, 362 U.S. 257, 267 (1960) (dictum).
155. *Brown v. United States*, 411 U.S. 223, 229 (1973).
156. *E.g.*, *Katz v. United States*, 389 U.S. 347 (1967); *Jones v. United States*, 362 U.S. 257 (1960).
157. *Mancusi v. DeForte*, 392 U.S. 364 (1968).
158. *Combs v. United States*, 408 U.S. 224, 227 (1972).
159. Physical objects found during an unconstitutional search, *e.g.*, *United States v. Jeffers*, 342 U.S. 48 (1951), or unconstitutionally seized, *e.g.*, *Roaden v. Kentucky*, 413 U.S. 496 (1973), are, of course, excluded, as is testimony relating the incriminating circumstances of their discovery, *e.g.*, *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). Testimony relating the contents of an unconstitutionally monitored conversation is excluded, *e.g.*, *Katz v. United States*, 389 U.S. 347 (1967). Following an unconstitutional entry into premises, objects seized on the premises, *e.g.*, *Chapman v. United States*, 365 U.S. 610 (1961), objects which the occupants attempt to throw away or to secrete in response to the entry, *e.g.*, *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 560 (1968); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961); *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957) (alternative ground), and testimony relating to anything that the entering officers observe on the premises, *e.g.*, *McGinnis v. United States*, 227 F.2d 598 (1st Cir. 1955); see *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (dictum), are all excluded. Following an unconstitutional arrest, not only objects found in a search of the arrestee's person, *e.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964), but also objects that he attempts to jettison or conceal, *e.g.*, *Rios v. United States*, 364 U.S. 253 (1960); *Williams v. United States*, 237 F.2d 789 (D.C. Cir. 1956), are excluded, as well as any fingerprints, *Davis v. Mississippi*, 394 U.S. 721 (1969), and confessions, *Wong Sun v. United States*, 371 U.S. 471 (1963); see *Traub v. Connecticut*, 374 U.S. 493 (1963) (per curiam), *vacating* 150 Conn. 169, 187 A.2d 230 (1962), that are "the product of [his] illegal detention," *Morales v. New York*, 396 U.S. 102, 105 (1969).
160. *E.g.*, *Alderman v. United States*, 394 U.S. 165, 171, 180-81 (1969); *Gouled v. United States*, 255 U.S. 298, 307 (1921), *overruled on other grounds in* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920); *Takahashi v. United States*, 143 F.2d 118, 122 (9th Cir. 1944), *quoted with approval in* *Wong Sun v. United States*, 371 U.S. 471, 487 n.12 (1963).
161. The famous phrase was coined in a case, *Nardone v. United States*, 308 U.S. 338, 341 (1939), arising under former § 605 of the Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (1934), but has since become a fourth amendment fixture. *E.g.*, *Alderman v. United States*, 394 U.S. 165, 171, 183 (1969); *Wong Sun v. United States*, 371 U.S. 471, 484-85, 488 (1963).
162. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); see also *Alderman v. United States*, 394 U.S. 165, 180-81 (1969).
163. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963); *United States v. Paroutian*, 299 F.2d 486, 488-89 (2d Cir. 1962), *aff'd after remand*, 319 F.2d 661 (2d Cir. 1963), *cert. denied*, 375 U.S. 981 (1964); *Somer v. United States*, 138 F.2d 790, 791-92 (2d Cir. 1943).

See *Davis v. Mississippi*, 394 U.S. 721, 725-26 and n.4 (1969).

The Supreme Court has also focused upon factual causation in determining issues of taint arising from wiretapping in violation of former § 605 of the Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (1934), see *Costello v. United States*, 365 U.S. 265, 278-80 (1961), from lineups conducted in violation of a suspect's sixth amendment right to counsel, *United States v. Wade*, 388 U.S. 218, 239-42 (1967), from confessions obtained during a period of delay in bringing the arrestee before a magistrate, in violation of Fed. R. Crim. P. 5(a), *Harrison v. United States*, 392 U.S. 219, 223-25 (1968), and from testimony compelled under a grant of immunity after a witness's claim of the privilege against self-incrimination, *Kastigar v. United States*, 406 U.S. 441, 459-62 (1972). The first three cases cited use language of "fruits" and "attenuation" borrowed from fourth amendment decisions, which in turn borrowed that language from an earlier § 605 opinion. See note 161 *supra*, note 167 *infra*. It is not, however, clear that this common language implies the use of identical principles to determine taint in the differing contexts. See *Hoffa v. United States*, 385 U.S. 293, 309 (1966).

164. It is to permit the pursuit of this inquiry that *Alderman v. United States*, 394 U.S. 165 (1969), requires the disclosure of the records of unconstitutional surveillance to a criminal defendant who has standing to challenge the surveillance.

165. Three chains of connection exemplify, but do not exhaust, the principle: (1) If information obtained in an initial unconstitutional search or seizure is used to make the factual showing required to support further searches or seizures—if it is used, for example, to supply probable cause for the issuance of a search warrant, *e.g.*, *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961), or probable cause for a warrantless arrest, *e.g.*, *Johnson v. United States*, 333 U.S. 10 (1948)—the products of the latter searches and seizures are tainted. See *Alderman v. United States*, 394 U.S. 165, 177 (1969) (dictum). (2) If the police confront a suspect with information obtained in an unconstitutional search or seizure and thereby induce him to confess, the confession is tainted. *Fahy v. Connecticut*, 375 U.S. 85, 90-91 (1963). (3) If a line of police investigation is prompted entirely by leads discovered in an unconstitutional search or seizure, the products of the investigation are tainted. *Wong Sun v. United States*, 371 U.S. 471 (1963).

166. Supreme Court opinions tend to juxtapose formulations of the taint principle with formulations centering on the phrase "an independent source," so as to suggest that the benchmark of taint is non-independence. See *Alderman v. United States*, 394 U.S. 165, 183 (1969); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

167. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (unconstitutional arrest does not require exclusion of a confession made following the defendant's release on recognizance at preliminary arraignment). See *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972) (unconstitutional arrest does not require exclusion of evidence concerning a lineup identification made in the presence of defense counsel following the defendant's commitment at preliminary examination where the defendant is advised of his rights and bail is set). The quotation within the quotation is from *Nardone v. United States*, 308 U.S. 338, 341 (1939).

168. The history is canvassed in J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT 19-42* (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966) [hereinafter cited as LANDYNSKI]; N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-105* (Johns

Hopkins University Studies in Historical and Political Science, Ser. 55, No. 2, 1937] [hereinafter cited as LASSON]; T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24-46 (1969) [hereinafter cited as TAYLOR]; Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361-66 (1921). J. QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, 1761-1772, at 395-540 (App. I, Horace Gray's notes) (1865) [hereinafter cited as QUINCY], is the best source of information concerning the history of the struggle over the writs of assistance in Massachusetts. See also *id.* at 51-57; W. TUDOR, THE LIFE OF JAMES OTIS (repl. 1970); 2 L. WROTH & H. ZOBEL (eds.), LEGAL PAPERS OF JOHN ADAMS 106-47 (1965) [hereinafter cited as ADAMS]. The history of other colonies is discussed in QUINCY, *supra* at 500-11, and in more detail in Dickerson, *Writs of Assistance as a Cause of the Revolution*, in R. MORRIS (ed.), THE ERA OF THE AMERICAN REVOLUTION 40-75 (1939).

Additional discussion of the English history is found in 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 658-72 (1938) [hereinafter cited as HOLDSWORTH]; 2 T. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 245-52 (3d ed. 1889) [hereinafter cited as MAY]; F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 374-80 (1952).

169. *Boyd v. United States*, 116 U.S. 616, 630 (1886).
170. *Id.*
171. TAYLOR, *supra* note 168, at 19.
172. *Id.*
173. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).
174. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921).
175. *Weems v. United States*, 217 U.S. 349, 373 (1910).
176. See *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (dictum).
177. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); *Brown v. Board of Education*, 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted . . ."); *Ex parte Wilson*, 114 U.S. 417, 427 (1885) ("What punishments shall be considered as infamous [within the fifth amendment's indictment clause] may be affected by the changes of public opinion from one age to another."). See also note 629 *infra* and accompanying text.
178. 116 U.S. 616 (1886).
179. *Id.* at 639.
180. *Id.* at 622.
181. *Id.* at 630.
182. *Hale v. Henkel*, 201 U.S. 43, 70-77 (1906); cf. *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 307 (1924). The holding appears to remain viable today, see *United States v. Calandra*, 94 S. Ct. 613, 619 (1974) (dictum); *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973) (dictum), although the nature of the restraints imposed by the amendment upon subpoenas have been watered down. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).
183. 277 U.S. 438 (1928).
184. *Id.* at 463.
185. *Katz v. United States*, 389 U.S. 347 (1967). See text accompanying notes 43-45, 78-81 *supra*.
186. See text accompanying notes 321-50 *infra*.
187. See 389 U.S. at 350-51.
188. See notes 34-35 *supra* and accompanying text.
189. *United States v. White*, 401 U.S. 745 (1971). See note 79 *su-*

pra. Cf. *United States v. Russell*, 411 U.S. 423, 430 (1973).

190. 116 U.S. at 622. See text accompanying note 180 *supra*.

191. See *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763); Otis' argument against the writs of assistance, as reported in Adams' abstract, ADAMS, *supra* note 168, at 142. See also the article in the Boston Gazette of January 4, 1762, set forth by Gray in QUINCY, *supra* note 168, at 488-89. Even warrants that were specific as to the person had this indiscriminate quality, of course, when issued without probable cause. See *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1063 (1765).

192. MAY, *supra* note 168, at 247.

193. See note 107 *supra* and accompanying text.

194. *Camara v. Municipal Court*, 387 U.S. 523 (1967); See *v. Seattle*, 387 U.S. 541 (1967). See note 549 *infra*.

195. According to John Adams' abstract, Otis' celebrated argument against the issuance of new writs of assistance by the Superior Court of Massachusetts Bay Province in 1761 included the criticism that, under the writs, "[c]ustom house officers may enter our houses when they please . . . —their menial servants may enter . . . —and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient." ADAMS, *supra* note 168, at 142. Otis, indeed, recounted an episode in which a customs officer, brought before Mr. Justice Wally [*sic*: Walley] by a constable and charged with an offense, retaliated by searching the homes of both the Justice and the constable. *Id.* at 143.

196. There are, of course, the cases involving breaking of doors without prior announcement, discussed in Mr. Justice Brennan's dissenting opinion in *Ker v. California*, 374 U.S. 23, 47-54 (1963), but the announcement issue does not appear to have figured in the major controversies over the search power that immediately preceded the adoption of the amendment. See note 168 *supra*.

197. *Schmerber v. California*, 384 U.S. 757, 771-72 (1966).

198. *Jones v. United States*, 357 U.S. 493, 499 (1958). See text accompanying notes 87-136 *supra*.

199. See the writings cited in note 168 *supra*. But see notes 502-32 *infra* and accompanying text.

200. TAYLOR, *supra* note 168, at 23-24. Speaking in 1967, Professor Taylor attributed the head-standing to "Mr. Justice Frankfurter and the others of like mind." *Id.* at 23. I have taken the liberty of substituting "the Justices" because, since that date, Mr. Justice Frankfurter's view has become the prevailing law of the fourth amendment. See, e.g., *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 309-10, 314-18 (1972); *Chimel v. California*, 395 U.S. 752, 755-65 (1969).

201. See notes 140-58 *supra* and accompanying text.

202. *Alderman v. United States*, 394 U.S. 165, 174 (1969). See *Brown v. United States*, 411 U.S. 223, 230 (1973).

203. See text accompanying notes 580-627 *infra*.

204. See *Abel v. United States*, 362 U.S. 217 (1960).

205. See *Feguer v. United States*, 302 F.2d 214, 248-50 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962), where, upon facts substantially similar to those of my hypothetical case, suppression was denied on this ground.

206. This is that "intrusion *en masse*, by dark, by force, unauthorized by warrant, into an occupied private home, without even the asserted justification of belief by the intruders that the inhabitants were presently committing some criminal act within" —and with no probable cause to believe that the inhabitants of room 212 had ever committed any criminal act—that Mr. Justice Frankfurter excoriated, even under a duly processed version of the fourth amendment, in *Monroe v. Pape*,

365 U.S. 167, 210 (1961) (dissenting opinion). The night manager's consent to the entry, of course, does not save it. *Stoner v. California*, 376 U.S. 483 (1964).

207. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 412-15 (1971) (Burger, C.J., dissenting); *Linkletter v. Walker*, 381 U.S. 618, 633, 636-37 (1965); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Elkins v. United States*, 364 U.S. 206, 217 (1960).

208. See *Amsterdam, Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-92 (1964).

209. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

210. *Id.*

211. For the moment, I am not questioning the empirical validity of the assumptions upon which this sort of armchair reasoning rests. See notes 593-603 *infra* and accompanying text.

212. Cf. text accompanying notes 604-05 *infra*.

213. See text accompanying notes 75-77 *supra*.

214. See note 76 *supra*.

215. See note 121 *supra*.

216. See note 127 *supra*.

217. See notes 53-56 *supra* and accompanying text. The formula quoted in text accompanying note 56 is used by the Court in *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), to mark the line between police questioning or other investigative activity that depends "solely upon the voluntary cooperation of the citizen," *id.* at 11; see also *Sibron v. New York*, 392 U.S. 40, 63 (1968), and the sort of "stop" that the fourth amendment forbids in the absence of reliable indications of criminality. See also *Terry v. Ohio*, *supra* at 16: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." The line between a "stop" and the sort of "arrest" that requires probable cause is left unclear in the wake of *Terry* and *Sibron*. See *Morales v. New York*, 396 U.S. 102, 104-05 (1969). Presumably an arrest is any restriction of a citizen's freedom of movement, see *Rios v. United States*, 364 U.S. 253, 261-62 (1960); *Henry v. United States*, 361 U.S. 98, 103 (1959), which is more than "brief," see *Terry v. Ohio*, *supra* at 26; cf. *id.* at 10. The *Terry* opinion appears to go out of its way to avoid defining an arrest in terms which include the traditional element of a purpose to charge, see *id.* at 16, 26; and the Court has subsequently held that charging purpose is not necessary to constitute the species of arrest or "seizure" of the person that the fourth amendment prohibits except upon probable cause. *Davis v. Mississippi*, 394 U.S. 721 (1969).

218. *Carroll v. United States*, 267 U.S. 132, 153 (1925). See notes 114-15 *supra* and accompanying text.

219. See, e.g., *Inbau, The Social and Ethical Requirements of Criminal Prosecution*, 52 J. CRIM. L.C. & P.S. 209, 212 (1961).

220. *Spencer v. Texas*, 385 U.S. 554, 569 (1967) (Stewart, J., concurring).

221. Friendly, *supra* note 16, at 950.

222. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

223. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of Warren, C.J.).

224. See pages 354-55 *supra*.

225. See, e.g., *United States v. Russell*, 411 U.S. 423, 430, 435 (1973); *Terry v. Ohio*, 392 U.S. 1, 11-15 (1968).

226. Compare, e.g., *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), with *Stein v. New York*, 346 U.S. 156 (1953), or compare *Sims v. Georgia*, 389 U.S. 404 (1967), with *Stroble v. California*, 343 U.S. 181 (1952).

See note 13 *supra*.

227. *E.g.*, *Gallegos v. Nebraska*, 342 U.S. 55, 63-68 (1951) (plurality opinion); *Lyons v. Oklahoma*, 322 U.S. 596, 601-05 (1944); *Lisenba v. California*, 314 U.S. 219, 234-41 (1941).

228. *Spano v. New York*, 360 U.S. 315, 320 (1959).

229. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Brooks v. Florida*, 389 U.S. 413, 415 (1967); *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960).

230. A shift from concern about the impact of police practices upon the accused to concern about the character of the police practices themselves would increase the likelihood of a finding of unconstitutional coercion in a great many cases for no other reason than that it takes the focus off the powers of resistance of the accused. The Supreme Court has tended, for reasons that are obvious although probably groundless in fact, to attribute strong powers of resistance to any accused who is "not inexperienced in the ways of crime or its detection," *Stein v. New York*, 346 U.S. 156, 185-86 (1953), a characterization that can be applied to a large percentage of the subjects of police interrogation.

231. 384 U.S. 436 (1966).

232. *Id.* at 467.

233. *Id.*

234. *Gustafson v. Florida*, 94 S. Ct. 488 (1973); *United States v. Robinson*, 94 S. Ct. 467 (1973).

235. *See* notes 121-25 *supra* and accompanying text.

236. *See* notes 124-25 *supra* and accompanying text; *Preston v. United States*, 376 U.S. 364, 367-68 (1964). The *Robinson* opinion rehearses these justifications in 94 S. Ct. at 471-77.

237. *Gustafson v. Florida*, 94 S. Ct. 488, 491-92 (1973); *United States v. Robinson*, 94 S. Ct. 467, 477 (1973).

238. *United States v. Robinson*, 94 S. Ct. 467, 470 n.1 (1973).

239. *Gustafson v. Florida*, 94 S. Ct. 488, 494 n.2 (1973).

240. *E.g.*, *Amador-Gonzales v. United States*, 391 F.2d 308 (5th Cir. 1968); *Ortiz v. United States*, 317 F.2d 277 (5th Cir. 1963); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (alternative ground); *cf. Application of Tomich*, 221 F. Supp. 500, 502 (D. Mont. 1963), *aff'd sub nom. Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964).

241. *E.g.*, *United States v. Harris*, 321 F.2d 739 (6th Cir. 1963); *Gilbert v. United States*, 291 F.2d 586 (9th Cir. 1961) (alternative ground), *vacated on other grounds*, 370 U.S. 650 (1962); *McKnight v. United States*, 183 F.2d 977 (D.C. Cir. 1950).

242. The word is frequently quoted by the lower courts from *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), where, however, it was used in a different context. The Supreme Court strongly suggested in dictum in *Abel v. United States*, 362 U.S. 217 (1960), that a "bad faith" arrest, *id.* at 226, made with a "purpose of amassing evidence in the prosecution for crime," *id.* at 230, could not be sustained.

243. It was precisely the latter proposition that I would have thought foreclosed prior to the *Robinson* and *Gustafson* opinions by *United States v. Lefkowitz*, 285 U.S. 452 (1932), discussed in note 242 *supra*. As indicated in note 123 *supra*, there is some hope that *Robinson* and *Gustafson* are limited to search of the person and do not govern the broader range of wingspan searches authorized by *Chimel v. California*, 395 U.S. 752 (1969).

244. *See* note 136 *supra* and accompanying text.

245. *See, e.g.*, *Sirimarco v. United States*, 315 F.2d 699 (10th Cir.), *cert. denied*, 374 U.S. 807 (1963); *United States v. Lee*, 308 F.2d 715, 717 (4th Cir. 1962). In other decisions, courts do not entirely disavow

inquiry into the policeman's motive, but display credulity bordering upon a *credo quia absurdum* in accepting his protestations that he did not have motives which he obviously had. *E.g.*, *United States v. Horton*, 328 F.2d 132 (3d Cir. 1964); *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964).

246. *Jones v. United States*, 357 U.S. 493, 499-500 (1958), seems to so hold, although the holding has been ignored by the lower courts. *See also Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), cert. dismissed as improvidently granted, 389 U.S. 560 (1968); cf. *Staples v. United States*, 320 F.2d 817 (5th Cir. 1963) (alternative ground).

247. *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting from the dismissal of certiorari as improvidently granted).

248. *Id.*

249. *Harris v. United States*, 390 U.S. 234, 236 (1968).

250. *Id.* Consider also the treatment of "intent" in connection with two distinct issues in *Coolidge v. New Hampshire*, 403 U.S. 443, 469-72, 487-90 (1971).

251. *See notes 607-27 infra* and accompanying text.

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

253. *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 316 (1972).

254. *Jones v. United States*, 357 U.S. 493, 499 (1958). *See notes 89-91 supra* and accompanying text.

255. *Katz v. United States*, 389 U.S. 347, 357 (1967). *See also, e.g.*, *Schnecko v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 318 (1972); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).

256. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (automobile searches); *Vale v. Louisiana*, 399 U.S. 30 (1970) (exigent circumstances); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest).

257. *Coolidge v. New Hampshire*, 403 U.S. 443, 473-84 (1971); *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970).

258. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973).

259. *See note 126 supra* and accompanying text.

260. *United States v. Robinson*, 94 S. Ct. 467, 485 (1973) (Marshall, J., dissenting).

261. I borrow a phrase that Mr. Justice Frankfurter used in another context. *See Griffin v. United States*, 336 U.S. 704, 709 (1949).

262. *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

263. *See notes 127-29, 216-17 supra* and accompanying text.

264. *E.g.*, *Kunz v. New York*, 340 U.S. 290 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

265. *E.g.*, *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Gregory v. Chicago*, 394 U.S. 111 (1969).

266. *E.g.*, *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

267. The enforcement of these first amendment limitations as controls upon police interference with free speech is very far from effective, particularly since the Supreme Court's decisions in *Boyle v. Landry*, 401 U.S. 77 (1971); *Younger v. Harris*, 401 U.S. 37 (1971); and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), drastically restricting access to the lower federal courts for the vindication of first amendment claims. *See Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). That is beside my present point, however, since fourth amendment

rights are equally difficult to enforce, see text accompanying notes 578-625 *infra*, and the obstacles to the enforcement of both, while difficult to surmount, are not entirely insurmountable, see text accompanying notes 533-627 *infra*.

268. Problems of proving police motivation make it exceedingly difficult to bring the first amendment into play even in cases where police practices are directed to the harassment of political undesirables. See, e.g., *Henry v. Mississippi*, 379 U.S. 443 (1965); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

269. Whatever the force of arguments that would exclude the fifth amendment from the police station by rolling it back to its historical origins, see 3 J. WIGMORE, *EVIDENCE* §§ 817-23 (3d ed. 1940); but see L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 325-32, 495-97 (1968); *Culombe v. Connecticut*, 367 U.S. 568, 583-84 n.25 (1961) (plurality opinion of Frankfurter, J.); *De Luna v. United States*, 308 F.2d 140, 144-50 (5th Cir. 1962), *rehearing denied*, 324 F.2d 375 (5th Cir. 1963) (Wisdom, J.), the Supreme Court has early and late applied the amendment as a restraint upon the police. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Ziang Sung Wan v. United States*, 266 U.S. 1, 14-15 (1924); *Bram v. United States*, 168 U.S. 532, 542-45 (1897). The sixth amendment was so applied in the line of cases from *Massiah v. United States*, 377 U.S. 201 (1964), to *United States v. Wade*, 388 U.S. 218 (1967), later limited as described in note 270 *infra*. See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000 (1964).

270. The fifth amendment has been limited to cases of the compulsion of "testimonial" disclosures, *United States v. Mara*, 410 U.S. 19 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966), and then only when the compulsion is exerted against the individual who will be incriminated by the disclosure, *Couch v. United States*, 409 U.S. 322 (1973). The sixth amendment has been restricted to stages of a criminal case "at or after the time that adversary judicial proceedings have been initiated against" an individual, *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion of Stewart, J.), "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," *id.* at 689. The right to counsel during police interrogation prior to this stage, apparently vouchsafed by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), is, according to *Kirby*, not a creature of the sixth amendment, but a necessary safeguard of the fifth. See 406 U.S. at 688-89. Even after the sixth amendment right to counsel has attached, it requires the presence of a lawyer only during certain sorts of prosecutorial proceedings, apparently limited to face-to-face confrontations between an accused and his prosecutors, *United States v. Ash*, 413 U.S. 300 (1973), but not including all such confrontations, *Gilbert v. California*, *supra* at 267.

271. This is the principle that emerges from Mr. Justice Marshall's dissenting opinion in *United States v. Mara*, 410 U.S. 19, 31 (1973). It seems to be the correct view of a constitutional guarantee fundamentally concerned with protecting the individual from being "made the deluded instrument of his own conviction." 2 W. HAWKINS, *PLEAS OF THE CROWN* 595 (8th ed. 1824).

272. Cf. *Schmerber v. California*, 384 U.S. 757, 765-66 (1966).

273. M. MELTSNER, *CRUEL AND UNUSUAL* 36 (1973).

274. For present purposes, it will do no harm to assume that the federal suspension clause, U.S. CONST. art. I, § 9, cl. 2, requires that the writ be made available to persons restrained of their liberty by

state officials, both in the federal courts, see *Fay v. Noia*, 372 U.S. 391, 405-06 (1963) (dictum); *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (dictum), and in the state courts, cf. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961), although both points are far from obvious.

275. See *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (dictum).

276. See Z. CHAFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 72-73 (1952).

277. See, e.g., *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806).

278. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). I say "might" because the current state of the sparse law on the subject is an abomination; see W. LAFAVE, *ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 161-64 (1965) [hereinafter cited as LAFAVE], and authorities cited therein. The law is retarded, I suspect, largely because problems of proof have made it impossible to impress upon courts the enormity of the problem of discrimination in the exercise of police powers. See note 279 *infra*.

279. See *Lankford v. Gelston*, 364 F.2d 197, 203-04 (4th Cir. 1966); cf. *Edelman v. California*, 344 U.S. 357 (1953). See also LAFAVE, *supra* note 278, at 163-64.

280. This is precisely what the Supreme Court did in *Rochin v. California*, 342 U.S. 165 (1952), prior to the application of the fourth amendment to the states through the fourteenth.

281. See, e.g., *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *Schmerber v. California*, 384 U.S. 757, 759-60 (1966); *Hoffa v. United States*, 385 U.S. 293, 310-12 (1966). The Court's single post-*Rochin* venture in the control of police practices by the due process clause, *Foster v. California*, 394 U.S. 440 (1969), seems to have been stillborn. See *Neil v. Biggers*, 409 U.S. 188 (1972).

282. See Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 31-45 (1970).

283. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE POLICE* 19 (1967) [hereinafter cited as *POLICE TASK FORCE REPORT*]. See also PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY* 94 (1967) [hereinafter cited as *CRIME COMMISSION REPORT*]; LAFAVE, *supra* note 278, at 490, 521-23; L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 6-7, 87, 97, 210-11, 265-72 (1967) [hereinafter cited as *TIFFANY, MCINTYRE & ROTENBERG*]; LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, 566, 568-70 (1965).

284. The accident, from a legislative point of view, has been occasional judicial construction of statutes to provide restrictions upon police practices that were rather plainly outside the legislative contemplation. See *McNabb v. United States*, 318 U.S. 332 (1943); *Nardone v. United States*, 302 U.S. 379 (1937).

285. For legislators and judges the police are a godsend, because all the acts of oppression that must be performed in this society to keep it running smoothly are pushed upon the police. The police get the blame, and the officials stay free of the stigma of approving their highhanded acts. The police have become the repository of all the illiberal impulses in this liberal society; they are under heavy fire because most of us no longer admit so readily to our illiberal impulses as we once did.

P. CHEVIGNY, *POLICE POWER* 280 (1969).

286. See, e.g., *Omnibus Crime Control and Safe Streets Act of 1968*, Title III, § 802, 82 Stat. 212, as amended, 18 U.S.C. §§ 2510-20 (1970).

287. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966).

288. *Johnson v. New Jersey*, 384 U.S. 719 (1966).

289. See text accompanying notes 533-94 *infra*.
290. K. DAVIS, DISCRETIONARY JUSTICE 94-95 (1969) [hereinafter cited as DAVIS]. Cf. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 578-82 (1972). The New York stop-and-frisk regulations, which have become something of a model for police rulemaking, were drafted against a background of concern that the stop-and-frisk power "was vulnerable to attack on constitutional grounds." POLICE TASK FORCE REPORT, *supra* note 283, at 17.
291. *United States v. Russell*, 411 U.S. 423 (1973).
292. See text accompanying notes 533-627 *infra*.
293. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 421 (1971) (dissenting opinion).
294. See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 46-78 (Tent. Draft, March 1972) [hereinafter cited as URBAN POLICE FUNCTION]; CRIME COMMISSION REPORT, *supra* note 283, at 91-99; POLICE TASK FORCE REPORT, *supra* note 283, at 13-16; J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968).
295. See, e.g., URBAN POLICE FUNCTION, *supra* note 294, at 91-93; POLICE TASK FORCE REPORT, *supra* note 283, at 21-24; J. SKOLNICK, JUSTICE WITHOUT TRIAL—LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966) [hereinafter cited as SKOLNICK]; TIFFANY, MCINTYRE & ROTENBERG, *supra* note 283.
296. Fourth amendment problems that arise in what my colleague Richard Danzig calls the "order maintenance" role of the police, Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 27-37 (1973), have not generally come before the courts because the obstacles to litigation over police practices in other forums than exclusionary-rule proceedings have limited "[j]udicial control . . . to the review of only those aspects of police functioning that relate to acquiring evidence in cases in which there is an intention to initiate a prosecution." Goldstein, *Administrative Problems in Controlling [sic] the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. 160, 168 (1967). See notes 137-38 *supra* and accompanying text; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 786-88 (1970).
297. See notes 26, 28-56 *supra* and accompanying text.
298. See notes 27, 57-86 *supra* and accompanying text.
299. Prior to its adoption of the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), the Court had few occasions to decide fourth amendment questions. Its major doctrinal development of the amendment follows *Weeks*.
300. *United States v. Lee*, 274 U.S. 559, 563 (1927).
301. The government's argument in *McDonald v. United States*, 335 U.S. 451, 454 (1948), was, for example, based upon this maxim.
302. See *On Lee v. United States*, 343 U.S. 747, 754 (1952).
303. I borrow the phrase from opinions written after the demise of the doctrine it describes. *Alderman v. United States*, 394 U.S. 165, 171 (1969); *Katz v. United States*, 389 U.S. 347, 352 (1967).
304. See generally *Silverman v. United States*, 365 U.S. 505, 508-12 (1961).
305. 19 Howell St. Tr. 1029 (1765):
Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more

considerable damages in that respect.

Id. at 1066.

306. The role of Lord Camden's judgment in the history of the fourth amendment is discussed in the works cited in note 168 *supra*.

307. *E.g.*, *Marcus v. Search Warrant*, 367 U.S. 717, 728-29 (1961); *Boyd v. United States*, 116 U.S. 616, 625-30 (1886).

308. *Hester v. United States*, 265 U.S. 57, 59 (1924).

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

310. *Lanza v. New York*, 370 U.S. 139, 144 (1962). See *id.* at 142-43.

311. *Olmstead v. United States*, 277 U.S. 438 (1928).

312. *Id.* at 464-66.

313. *Id.* at 465.

314. *Goldman v. United States*, 316 U.S. 129, 135-36 (1942).

315. *On Lee v. United States*, 343 U.S. 747, 751-53 (1952) (alternative ground).

316. See, *e.g.*, *Lopez v. United States*, 373 U.S. 427, 457-63 (1963) (Brennan, Douglas & Goldberg, JJ., dissenting); *Schwartz v. Texas*, 344 U.S. 199, 204-05 (1952) (Frankfurter, J., concurring; Douglas, J., dissenting); *On Lee v. United States*, 343 U.S. 747, 761-62 (1952) (Frankfurter & Douglas, JJ., dissenting separately); *Goldman v. United States*, 316 U.S. 129, 136, 141 (1942) (separate opinion of Stone, C.J., & Frankfurter, J.; Murphy, J., dissenting).

317. *Silverman v. United States*, 365 U.S. 505 (1961).

318. *Id.* at 509.

319. *Id.* at 512.

320. The anticipation was heightened by *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam), *rev'g* 204 Va. 275, 130 S.E.2d 437 (1963), in which the Supreme Court extended its 1961 spike-mike decision to a case where a small tacking device was used to attach an amplifier to the outside of a party wall; *Regalado v. California*, 374 U.S. 497 (1963) (per curiam), *vacating* 193 Cal. App. 2d 437, 14 Cal. Rptr. 217 (1961), which involved police observation into a hotel room through a peep-hole in the door, apparently drilled pursuant to a cooperative arrangement between the police and hotel management sometime before the rental of the room by Regalado; *Berger v. New York*, 385 U.S. 967 (1966), *granting cert. to* 18 N.Y.2d 638, 219 N.E.2d 295, 272 N.Y.S.2d 782 (1966), which was eventually reversed on the unexpected ground that the challenged electronic surveillance devices had been planted by physical trespass. *Berger v. New York*, 388 U.S. 41 (1967).

321. 389 U.S. 347 (1967).

322. *Id.* at 349-50.

323. *Id.* at 351.

324. *Id.*

325. *Id.*

326. *Id.* at 353.

327. *Id.*

328. *Id.*

329. *Id.* The Court quotes *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967), which in turn relied upon the spike-mike case, *Silverman v. United States*, 365 U.S. 505, 511 (1961); upon *Jones v. United States*, 362 U.S. 257, 266 (1960), a standing case; and to some extent upon *Wong Sun v. United States*, 371 U.S. 471 (1963), a case involving the extent of exclusion of derivative evidence obtained following an unconstitutional arrest.

330. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

331. See cases cited in note 82 *supra*. Cf. *California v. Krivda*, 409 U.S. 33, 34 (1972).

332. See *United States v. Dionisio*, 410 U.S. 1, 8 (1973).
333. See text accompanying note 326 *supra*.
334. 389 U.S. at 353.
335. Thus in *United States v. Dionisio*, 410 U.S. 1, 10 (1973), we find the Supreme Court approving the conclusion of a lower court that a grand jury subpoena *ad testificandum* "is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection . . .," because the "compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative 'stop' . . ."
336. See text accompanying note 326 *supra*.
337. See text accompanying note 313 *supra*. "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects." *Olmstead v. United States*, 277 U.S. 438, 464 (1928).
338. See notes 327-29 *supra* and accompanying text.
339. 116 U.S. 616 (1886).
340. *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion).
341. See text accompanying notes 183-84 *supra*.
342. See text accompanying note 180 *supra*.
343. The lift began in *Terry v. Ohio*, 392 U.S. 1, 9 (1968).
344. 389 U.S. at 361.
345. *United States v. White*, 401 U.S. 745, 786 (1971) (dissenting opinion): "The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of the laws that translate into rules the customs and values of the past and present."
346. Mr. Justice Douglas has recently written that he is "morally certain that the Conference Room of this Court has been 'bugged' . . ." *Heutsche v. United States*, 94 S. Ct. 204 (1973) (denial of bail motion) (dissenting opinion). Concerning surveillance in lower places see A. WESTIN, *PRIVACY AND FREEDOM* (1967).
347. 389 U.S. at 350.
348. *Id.* at 351 n.9.
349. Cf. *Alderman v. United States*, 394 U.S. 165, 176-80 (1969). So far as I can tell, the Supreme Court has not applied *Katz* to refuse fourth amendment protection in any case in which protection would have been afforded under pre-*Katz* standards. Insofar as it is treated as establishing a general formula of fourth amendment coverage, however, *Katz* might have that effect in some cases. If, for example, the formula stated in *Combs v. United States*, 408 U.S. 224 (1972), is employed to determine coverage as well as standing, it is possible that protection might be withdrawn from some areas that would traditionally have been held to lie within the "curtilage" of a dwelling, at the same time that protection is extended to other areas beyond the "curtilage" where there exists "a reasonable expectation . . . of freedom from governmental intrusion." *Id.* at 227.
350. 389 U.S. at 353.
351. *Olmstead v. United States*, 277 U.S. 438, 465 (1928).
352. See note 305 *supra*.
353. See 4 W. BLACKSTONE, *COMMENTARIES* 168 (11th ed. 1791); 1 W. HAWKINS, *PLEAS OF THE CROWN* 695 (8th ed. 1824).
354. *Jones v. United States*, 362 U.S. 257, 266 (1960). See notes 327-29 *supra* and accompanying text.
355. *McGuire v. United States*, 273 U.S. 95 (1927).
356. See notes 294-95 *supra* and accompanying text.

357. By "limit," I do not necessarily mean to imply any specific method of limitation, still less the obvious but often ineffectual method of prescribing a canon of rules to be imposed and enforced upon the police by external authority. See notes 565-94 *infra* and accompanying text. I mean merely that we would provide some institutional mechanism, which might or might not involve a code of rules, for the control of powers thought susceptible of abuse.

358. See, e.g., CRIME COMMISSION REPORT, *supra* note 283, at 93-94; TIFFANY, McINTYRE & ROTENBERG, *supra* note 283, at 265-72.

359. See, e.g., URBAN POLICE FUNCTION, *supra* note 294, at 47-49.

360. McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 667 (1972). Judge McGowan used the phrase to describe the state of administrative regulation of the police, but it applies equally to legislative regulation. See note 283 *supra*.

361. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 790-91 (1970). My point here is merely descriptive. The text accompanying notes 283-92 *supra* states my own view that the fourth amendment should be kept in the breach.

362. *Silverman v. United States*, 365 U.S. 505, 509 (1961). See *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

363. It does not require a crystal ball to foresee that moves will sooner or later be made toward a practice of presenting juries with videotaped versions of the testimony of witnesses after deletion of objectionable material. Of course this development could not have been foreseen decades ago, but it has been evident during the past decade at least, and the major move has yet to begin.

364. *Katz v. United States*, 389 U.S. 347, 354 (1967). This "strong probability" apparently amounted to probable cause, since the Court assumes in the following paragraphs that it would have supported issuance of a search warrant.

365. See notes 89-91 *supra* and accompanying text.

366. We Americans who have not been exposed to the worst outrages of search and seizure in our time ought not measure the limits of atrocity by our own experience. See, e.g., A. SCHWARZ-BART, *LE DERNIER DES JUSTES* 289, 304 (1959).

367. *Monroe v. Pape*, 365 U.S. 167, 209 (1961) (Frankfurter, J., dissenting).

368. *Taylor v. United States*, 286 U.S. 1 (1932). See also the "curtilage" cases in notes 76-77 *supra*.

369. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). See also *Preston v. United States*, 376 U.S. 364, 367 (1964), later explained on different grounds in *Chambers v. Maroney*, 399 U.S. 42, 47 (1970).

370. The Court has occasionally chipped away at this monolithic model, but the model remains substantially intact. For example, the statement in *Chambers v. Maroney*, 399 U.S. 42, 52 (1970), that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars," must be read in the light of prior and subsequent cases, note 369 *supra*, as restricted to an expression of the "mobility" doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), see note 114 *supra*. Immobile cars are subject to the same constitutional protections as houses, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), while considerations akin to "mobility" may also strip a house of the protection of the warrant requirement, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). The sense of the cases that a less intense need for speed is sufficient to trigger the *Carroll* doctrine than would be required to constitute "exceptional circumstances" justifying a war-

rantless building entry under *Hayden*, see notes 117-20 *supra*, may or may not have survived *Coolidge*. If it did, it represents an uncommon chink in the monolith of fourth amendment doctrine.

One might also see such chinks in *Cady v. Dombrowski*, 413 U.S. 433 (1973), see note 109 *supra*, and the *Camara-See* doctrine, notes 93, 106 *supra*, although I do not. *Cady* seems to me to turn upon the fact that the searched car was in lawful police custody: I cannot read it as authorizing warrantless searches of unimpounded immobile vehicles upon probable cause to believe that they contain dangerous objects. *Camara* and *See* adjust the fourth amendment probable cause requirement, but not the warrant requirement, to accommodate compelling needs for areal searches (*i.e.*, searches made without individualized judgments of probability that the objects of search will be found in any particular location) in connection with certain regulatory programs. Both their attenuation of probable cause and their warrant requirement have been applied to other sorts of areal searches than dwelling entries. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 275 (1973) (concurring but controlling opinion of Powell, J.). It may be that a particular regulatory need would be found sufficient to justify attenuation of the probable cause requirement for some sorts of searches and not for others. But the Court has not so held, and its similar treatment of homes and commercial warehouses in *Camara* and *See* does not look in this direction.

371. See note 281 *supra* and accompanying text. I put aside, of course, the relatively circumscribed fields of restriction of the other constitutional provisions discussed in text accompanying notes 264-70 *supra*.

372. See *United States v. Dionisio*, 410 U.S. 1, 15 (1973):

Since neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.

373. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

374. *McDonald v. United States*, 335 U.S. 451 (1948).

375. See text accompanying notes 140-58 *supra*.

376. See note 74 *supra*.

377. See notes 41-42, 300-05 *supra* and accompanying text.

378. See note 121 *supra*.

379. See notes 130-34 *supra* and accompanying text.

380. See notes 121-23 *supra* and accompanying text; *Ker v. California*, 374 U.S. 23 (1963).

381. *McDonald v. United States*, 335 U.S. 451, 454 (1948).

382. Mr. Justice Jackson, joined by Mr. Justice Frankfurter, undertook to state in a concurring opinion "what appears to some of us as the reason this search is bad." 335 U.S. at 457. The major premise of the concurrence is that

each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry.

Id. at 458. By "unlawful breaking and entry," Justice Jackson seems to suggest that the result would have been different if the officers had simply walked into the boarding house through an untended front door, for here,

[i]n prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing.

Id. at 458-59. Yet the fourth amendment cases have not generally distinguished between "means that were forbidden by law and denounced as criminal" and means that were "merely unauthorized," *id.* at 458. See, e.g., *Recznik v. City of Lorain*, 393 U.S. 166 (1968); and see *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 418-19 (1971) (Burger, C.J., dissenting). Since Justice Jackson plainly would not have drawn that distinction at the door to McDonald's room, see *Johnson v. United States*, 333 U.S. 10 (1948), his apparent willingness to entertain it at the outer wall of the boarding house suggests, but does not develop, novel relationships between the concepts of fourth amendment coverage, reasonableness and standing. See text accompanying notes 384-436 *infra*. Justice Jackson's logic apparently would have conferred standing on McDonald to complain even if the materials incriminating him had been found in his landlady's room, a result that raises the question why one who places goods on another's premises does not always have standing to complain of their unconstitutional seizure. But see *Combs v. United States*, 408 U.S. 224 (1972). Perhaps the answer lies, once again, in the untraditional notion that standing depends upon the nature of the violation complained of or the sanctity of the interest invaded, cf. note 370 *supra* and accompanying text; or perhaps Justice Jackson is wavering somewhat from an atomistic to a regulatory conception of the fourth amendment, see text accompanying notes 201-33 *supra*, notes 596-629 *infra*.

383. Cf. F. NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 91 (Modern Library ed., undated).

384. *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir.), *reh. denied*, 330 F.2d 609 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964). The earlier opinion quoted is *Giacona v. United States*, 257 F.2d 450 (5th Cir.), *cert. denied*, 358 U.S. 873 (1958).

385. 328 F.2d at 363.

386. *Chapman v. United States*, 365 U.S. 610 (1961). *Dictum* in *Chapman* recognized the usual roster of exceptions to the warrant requirement, but the *Marullo* case involved none of them.

387. *Marullo v. United States*, 330 F.2d 609 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964).

388. In fairness to the court of appeals, I should say that its original opinion may be read to state, as an alternative ground of decision, the theory upon which its later opinion rests denial of rehearing. I hope it will be clear also that I have not discussed the *Marullo* case in a spirit of criticism, but rather because the case perfectly exemplifies the problem of choice between two alternative models of the fourth amendment. I would make these points in any event; but I make them with the greater emphasis because the author of the first *Marullo* opinion is Judge John Minor Wisdom, a jurist who has placed the stamp of his enlightenment and learning upon this nation and its laws to the enduring betterment of both.

389. 392 U.S. 1 (1968). The companion case is *Sibron v. New York*, 392 U.S. 40 (1968).

390. The justifications required for stops and frisks are described in text accompanying notes 127-29 *supra*. The line between a stop and an arrest is discussed in note 217 *supra*. The line between a frisk and a "full search incident to . . . arrest," *United States v. Robinson*, 94 S. Ct. 467, 476 (1973), is staked out in *Sibron v. New York*, 392 U.S. 40, 65-66 (1968).

391. 384 U.S. 757 (1966).

392. *Id.* at 769-70.

393. Briefly, *Schmerber* says that, while a warrantless external body search may be made incident to an arrest, searches invading the body wall of the arrestee may not be made without a warrant except when

the delay necessary to obtain a warrant would frustrate the purpose of the search. There is also an intimation in the opinion that body-breaching searches, presumably whether made with or without a warrant, are allowable only upon "a clear indication that . . . evidence will be found," 384 U.S. at 770—a requirement that seems to be more rigorous than the traditional probable cause standard. But all of this is considered dictum: in Schmerber's case, the "indication" was palpably clear, and the prospect of rapid changes in blood alcohol level was held to justify extraction of a sample of his blood without a warrant.

394. See also the discussion in *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969), leading to the suggestion that the fourth amendment might permit "narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728.

395. *Terry v. Ohio*, 392 U.S. 1, 18 n.15 (1968).

396. *Marullo v. United States*, 328 F.2d 361 (5th Cir.), *reh. denied*, 330 F.2d 609 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964). See text accompanying notes 384-88 *supra*.

397. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

398. See *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

399. See *Davis v. Mississippi*, 394 U.S. 721, 726 (1969).

400. See *Lopez v. United States*, 373 U.S. 427, 455 (1963) (Brennan, J., dissenting). I shall assume for present purposes that the amendment protects all of these interests in some measure. See text accompanying notes 465-99 *infra*.

401. This conclusion is probably sound in the case of most citizens but unsound in the case of many. If drawn, it would support the constitutional distinction between automobiles and closed private premises that judicial opinions have suggested upon other grounds. See *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973) (state regulation and variety of official contacts); *Coolidge v. New Hampshire*, 403 U.S. 443, 523-25 (1971) (White, J., dissenting) (mobility).

402. See notes 551-52 *infra* and accompanying text.

403. Cf. FED. R. CRIM. P. 41(c).

404. Cf. note 393 *supra*.

405. Cf. 18 U.S.C. § 2518(3)(c) (1970).

406. See note 127 *supra*.

407. The summons procedure would take up the suggestion in *Davis v. Mississippi*, 394 U.S. 721, 728 (1969), concerning fingerprinting without probable cause to arrest. It would, however, overrule the holdings in *United States v. Dionisio*, 410 U.S. 1 (1973), and *United States v. Mara*, 410 U.S. 19 (1973), that the detention incidental to provision of voice and handwriting exemplars is not required to be constitutionally justified. I can see no conceivable distinction between summoning a citizen to come to public offices for fingerprinting and summoning him to the same quarters for the other purposes described in text. Nor, in view of the flexibility provided by a sliding scale model of the fourth amendment, do I think that summons of this character ought to be entirely relieved from the amendment's control.

408. *E.g.*, 4 W. BLACKSTONE, COMMENTARIES 296 (11th ed. 1791); 1 J. CHITTY, CRIMINAL LAW *59 (Riley's ed. 1819); J. CROCKER, THE DUTIES OF SHERIFFS, CORONERS AND CONSTABLES 41-44 (1855); 2 M. HALE, PLEAS OF THE CROWN 77, 81, 95-96, 119-20 (1736); L. HITCHCOCK, POWERS AND DUTIES OF SHERIFFS, CONSTABLES, TAX COLLECTORS, AND OTHER OFFICERS IN THE NEW ENGLAND STATES 274 (1889); W. MURFREE, A TREATISE ON THE LAW OF SHERIFFS AND OTHER MINISTERIAL OFFICERS 635 (1884); Bohlen & Shulman, *Effect of Subsequent Misconduct Upon a Lawful Arrest*, 28 COLUM. L. REV. 841, 852 (1928). I do not ignore the debate over

the propriety of post-arrest investigative detention. See, e.g., LAFAYE, *supra* note 278, at 300-406; American Law Institute, Model Code of Pre-Arrest Procedure, April 25, 1968 (Study Draft No. 1); American Law Institute, Model Code of Pre-Arrest Procedure, Commentary on Article 4, at 132-65, March 1, 1966 (Tent. Draft No. 1). I merely make the point that the "arrest" which *Terry* distinguished from a "stop" was not historically considered, and could not have been conceived by the Court in *Terry*, as the basis for an arrestee's detention throughout the time prior to trial.

409. *McNabb v. United States*, 318 U.S. 332 (1943).

410. See *Mallory v. United States*, 354 U.S. 449 (1957); *Upshaw v. United States*, 335 U.S. 410 (1948).

411. Omnibus Crime Control and Safe Streets Act of 1968, Title II, § 701, 82 Stat. 210, as amended, 18 U.S.C. § 3501 (1970).

412. The Court's repeated refusal to apply the principle to the states, e.g., *Stein v. New York*, 346 U.S. 156, 187-88 (1953); *Gallegos v. Nebraska*, 342 U.S. 55, 63-64 (1951) (plurality opinion); see *Culombe v. Connecticut*, 367 U.S. 568, 599-601 (1961) (plurality opinion), has had two evident bases. The first is the supposition that the Constitution, unlike the federal statute and the superseding federal rule involved in *McNabb* and *Mallory*, contains no prohibition against protracted pre-court confinement as such. The second is that, prior to 1961, even if a federal constitutional right against protracted pretrial confinement had been found, its violation would not have required the exclusion of resulting evidence in state criminal trials. See *Wolf v. Colorado*, 338 U.S. 25 (1949). If a sliding scale approach to the fourth amendment shakes the first basis, the second falls under force of *Wong Sun v. United States*, 371 U.S. 471 (1963), and *Mapp v. Ohio*, 367 U.S. 643 (1961). See *Traub v. Connecticut*, 374 U.S. 493 (1963); cf. *Morales v. New York*, 396 U.S. 102, 104-05 (1969).

413. *Miranda v. Arizona*, 384 U.S. 436 (1966).

414. Police would be reduced to testifying that station-house visits were voluntary affairs, not detentions. But see *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 964 (1964).

415. Federal habeas corpus would be available to state prisoners, following their exhaustion of state pretrial remedies, see *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), in its traditional office as the procedure for challenging unlawful commitment, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

416. Abrupt curtailment of defense cross examination at preliminary hearings is more common in my experience than the literature makes it appear. See, e.g., F. MILLER, PROSECUTION—THE DECISION TO CHARGE A SUSPECT WITH A CRIME 64-82 (1970). At present, the assumption seems to be made that such curtailment infringes upon no federal constitutional rights. See *Adams v. Illinois*, 405 U.S. 278, 282 (1972) (plurality opinion). But if, as the text suggests, the substance of the fourth amendment's protection at the preliminary hearing stage were held to be an adequate adversary determination of probable cause, then undue limitations upon cross examination should be constitutionally assailable.

417. See *Kirkland v. Preston*, 385 F.2d 670, 676 (D.C. Cir. 1967); *United States ex rel. Grano v. Anderson*, 318 F. Supp. 263, 266, 269 (D. Del. 1970), *aff'd*, 446 F.2d 272 (3d Cir. 1971).

418. See text accompanying note 395 *supra*.

419. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

420. This standard would take account of the numerous legitimate concerns that a patrolman might have in regard to an automobile, see *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973), but would preclude

indiscriminate snooping.

421. *Sibron v. New York*, 392 U.S. 40, 64 (1968).
422. *Lopez v. United States*, 373 U.S. 427, 455 (1963) (dissenting opinion).
423. See notes 281, 372, 387 *supra* and accompanying text.
424. See pp. 374-77 *supra*.
425. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 527 (1971) (White, J., dissenting); *Chapman v. United States*, 365 U.S. 610, 622-23 (1961) (Clark, J., dissenting).
426. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950), *overruled by* *Chimel v. California*, 395 U.S. 752, 768 (1969). Mr. Justice Frankfurter's dissenting opinion in *Rabinowitz* is now treated as the lore of the fourth amendment, e.g., *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 315-16 (1972).
427. 339 U.S. at 63.
428. Cf. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 418-19 (1971) (Burger, C.J., dissenting). Compare *Katz v. United States*, 389 U.S. 347, 356-59 (1967), and *Chimel v. California*, 395 U.S. 752, 764-65 (1969), with *Dombrowski* and the *Bivens* dissent.
429. *Beck v. Ohio*, 379 U.S. 89, 97 (1964).
430. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (dissenting opinion).
431. Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc. as Amicus Curiae at 56, *Terry v. Ohio*, 392 U.S. 1 (1968).
432. *Id.* at 56-57.
433. See note 255 *supra* and accompanying text.
434. See notes 89-91, 102-36 *supra* and accompanying text.
435. *Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971) (plurality opinion); *Chimel v. California*, 395 U.S. 752, 762-64 (1969). See generally, *Coolidge v. New Hampshire*, *supra* at 473-84.
436. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). See particularly *id.* at 231-32.
437. *Davis v. United States*, 328 U.S. 582, 605 (1946) (dissenting opinion). See also *Chapman v. United States*, 365 U.S. 610, 619 (1961) (concurring opinion); *United States v. Rabinowitz*, 339 U.S. 56, 69-70 (1950) (dissenting opinion); *Harris v. United States*, 331 U.S. 145, 157-64 (1947) (dissenting opinion).
438. *Harris v. United States*, 331 U.S. 145, 157, 161 (1947) (dissenting opinion).
439. *Id.* at 161.
440. *Davis v. United States*, 328 U.S. 582, 604 (1946) (dissenting opinion).
441. *Leach v. Money*, 19 Howell St. Tr. 1001, 1027 (1765). This opinion was expressed by Lord Mansfield before ordering that the case stand over for further argument; the final judgment in the case rests on a narrower ground.
442. *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763) (Pratt, C.J., summing up to the jury).
443. Otis' argument against the writs of assistance, as reported in Adams' abstract, ADAMS, *supra* note 168, at 141-42. The history of the struggles against the general warrants in England and against the writs of assistance in the colonies, and the roles of the *Leach* case, of Pratt (later Lord Camden) and of Otis in those struggles, is discussed in the works cited in note 168 *supra*.
444. *Davis v. United States*, 328 U.S. 582, 605 (1946) (dissenting opinion).

445. *Chapman v. United States*, 365 U.S. 610, 619 (1961) (concurring opinion).

446. *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (dissenting opinion).

447. See text accompanying notes 502-32 *infra*.

448. 116 U.S. 616 (1886). See text accompanying notes 178-81, 339-41, 351-52 *supra*.

449. *Harris v. United States*, 331 U.S. 145, 160 (1947) (dissenting opinion); see *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (dissenting opinion).

450. *Harris v. United States*, 331 U.S. 145, 164 (1947) (dissenting opinion).

451. *Jones v. United States*, 362 U.S. 257, 266 (1960).

452. *E.g.*, *On Lee v. United States*, 343 U.S. 747, 758-62 (1952) (dissenting opinion).

453. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion), quoted in *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting).

454. *Davis v. United States*, 328 U.S. 582, 596 (1946) (dissenting opinion).

455. Cf. LANDYNSKI, *supra* note 168, at 20.

456. See MAY, *supra* note 168, at 275-78.

457. *Weems v. United States*, 217 U.S. 349, 373 (1910). See text accompanying note 175 *supra*.

458. Cf. TAYLOR, *supra* note 168, at 12.

459. *Davis v. United States*, 328 U.S. 582, 604 (1946) (Frankfurter, J., dissenting).

460. See note 168 *supra*.

461. TAYLOR, *supra* note 168, at 28. Cf. Professor Taylor's discussion of the lack of litigation over warrantless searches incident to arrest at an even later time: "The reason for the paucity of judicial treatment is not far to seek; there was as yet no exclusionary rule, and arrestees were more likely than not to be guilty, and most unlikely to be in a position to sue the arresting officer in trespass." *Id.* at 45.

462. Cf. *United States v. Robinson*, 94 S. Ct. 467, 475-76 and 476 n.3 (1973); TAYLOR, *supra* note 168, at 27-29, 38-46.

463. See HOLDSWORTH, *supra* note 168, at 515, 664-70.

464. *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1068 (1765). Lord Camden has three additional answers whose benefit I do not claim. *Id.* at 1067-68.

I cannot find in the pre-constitutional history any affirmative evidence that the framers intended to make law enforcement practices commonly used in their time, or even such practices as had then been judicially approved, the measure of the amendment. Surely, the observation that "in London and Boston, the opponents of the [general] warrants [and writs of assistance] based their attack primarily on unfavorable comparisons with the [common-law] stolen goods warrants," TAYLOR, *supra* note 168, at 40, will not support so broad a conclusion. First, the comparisons made by Lords Camden and Mansfield and by Otis and Thatcher, to which Professor Taylor refers, were to specific features of the common-law practice regarding warrants for the taking of stolen goods—their specificity, the requirement of probable cause for their issuance, and their return to the issuing court with an inventory—and do not imply acceptance of extant common-law practices in any wider regard. Second, as I read the judgments of Camden and Mansfield and the arguments of Otis and Thatcher, the comparisons were *not* the primary grounds of their attacks upon the general warrants and the writs of assistance. They were merely responses to arguments

that common-law practice supported the general warrants and writs by analogy. Third, the English judges and the colonial lawyers made the comparisons because both were bound by the common law. To the extent it supported them, common-law authority was the natural material of a common-law judge's argument disallowing assertions of power by the government, and of a common-law advocate's argument against procedures claimed to be authorized by ambiguous statutes, in the days before a written constitution. It does not follow that the framers of a constitution, agreeing with Camden and Mansfield and Otis and Thatcher in what they condemned, necessarily limited that condemnation to what a common-law judge or advocate could distinguish from common-law practice.

465. The choice of the amendment's double-barreled form was advertent. As Lasson shows, the draftsmen of the fourth amendment had available competing models among the bills and declarations of rights of the several states: the Virginia-Maryland-North Carolina model, forbidding only general warrants, the Massachusetts-New Hampshire model, forbidding both unreasonable searches and seizures and general warrants, and the Pennsylvania-Vermont model, which can fairly be described as splitting the difference. LASSON, *supra* note 168, at 79-82. Madison's original proposal in the House is ambiguous, but appears to be aimed primarily if not exclusively against general warrants; its transition into the present form of the amendment, without any recorded vote of the House approving the change and despite a contrary vote, is described in LASSON, *supra* note 168, at 98-103. Lasson concludes that "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment was thus intentionally given a broader scope." *Id.* at 103. Professor Taylor's conclusion is that

[n]othing in the legislative or other history of the fourth amendment sheds much light on the purpose of the first clause. Quite possibly it was to cover shortcomings in warrants other than those specified in the second clause; quite possibly it was to cover other unforeseeable contingencies.

TAYLOR, *supra* note 168, at 43. However, his construction of the amendment in various applications makes plain that he sees the first clause as having more than technical or marginal significance. See *id.* at 67, 84, 99.

466. Friendly, *supra* note 16, at 948.

467. C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 74 (1912).

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

469. J. BALDWIN, *NOBODY KNOWS MY NAME* 62 (Dell ed. 1963).

470. I borrow the phrase from Patrick Henry's well-known speech in the Virginia Convention, 3 J. ELLIOT, *DEBATES* 448-49 (2d ed. 1891):

The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds.

471. S. KRISLOV, *THE SUPREME COURT AND POLITICAL FREEDOM* 55-56 (1968).

472. See, e.g., *POLICE TASK FORCE REPORT*, *supra* note 283, at 183-85; 2 *STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS* (Field Surveys III) 82-108 (Report of a Research Study Sub-

mitted to the President's Comm. on Law Enforcement and Administration of Justice, 1967); TIFFANY, MCINTYRE & ROTENBERG, *supra* note 283, at 20-23.

473. See, e.g., SKOLNICK, *supra* note 295, at 112-38.

474. See P. CHEVIGNY, COPS & REBELS 249-76 (1972).

475. See note 456 *supra*. And see Livingston's celebrated speech against the Alien and Sedition Acts, 8 ANNALS OF CONG. 2014 (1798) (5th Cong., 2d Sess.):

But, should the evil proceed no further than the execution of the present law [i.e., the Acts], what a fearful picture will our country present! The system of espionage being thus established, the country will swarm with informers, spies, delators, and all that odious reptile tribe that breed in the sunshine of despotic power; that suck the blood of the unfortunate, and creep into the bosom of sleeping innocence, only to awake it with a burning wound. The hours of the most unsuspecting confidence, the intimacies of friendship, or the recesses of domestic retirement, afford no security. The companion whom you must trust, the friend in whom you must confide, the domestic who waits in your chamber, are all tempted to betray your imprudence or unguarded follies; to misrepresent your words; to convey them, distorted by calumny, to the secret tribunal where jealousy presides—where fear officiates as accuser, and suspicion is the only evidence that is heard.

476. Friendly, *supra* note 16, at 947.

477. TAYLOR, *supra* note 168, at 75.

478. See notes 330-48 *supra* and accompanying text.

479. See Dworkin, *supra* note 4, at 334-36.

480. See text accompanying note 56 *supra*.

481. 392 U.S. 1 (1968).

482. See note 127 *supra*; notes 216-17 *supra* and accompanying text.

483. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See note 103 *supra*.

484. However, it is arguable—and I myself would argue—that any accosting unaccompanied by this advice conveys the impression of restraint, cf. Johnson v. United States, 333 U.S. 10, 13 (1948), and thereby triggers the protection of Terry. The question is not easily resolved under current doctrine because of the perspective problem described in text accompanying notes 215-18 *supra*.

485. POLICE TASK FORCE REPORT, *supra* note 283, at 184.

486. Police tend not to draw the same class distinctions among minorities that they draw among Anglos. See, e.g., TIFFANY, MCINTYRE & ROTENBERG, *supra* note 283, at 20-21.

487. See Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

488. "The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." AMERICAN CIVIL LIBERTIES UNION, POLICE POWER AND CITIZENS' RIGHTS 11 (1967). See also, e.g., NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 93 (1968); POLICE TASK FORCE REPORT, *supra* note 283, at 146-48; PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT ON THE METROPOLITAN POLICE DEPARTMENT 62-65 (1966); Cross, *The Negro, Prejudice and the Police*, 55 J. CRIM. L.C. & P.S. 405, 407 (1964).

489. See, e.g., CRIME COMMISSION REPORT, *supra* note 283, at 94; McGowan, *supra* note 360, at 678-79.

490. Gouled v. United States, 255 U.S. 298, 305-06 (1921), overruled on another ground in Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967), excoriated entry by a lesser deception.

491. Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United

States, 385 U.S. 206 (1966). Cf. *United States v. Russell*, 411 U.S. 423 (1973).

492. See *Hoffa v. United States*, 385 U.S. 293, 302 (1966). The proposition is frequently stated by saying that a *criminal* runs the risk of betrayal by his confederates, e.g., *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion). But this form of the statement obviously involves the distortion noted at pp. 402-03 *supra*. The question is whether the fourth amendment regulates the activity of the police in dispatching spies to insinuate themselves into people's confidences and homes. If it does, and if it requires probable cause or some other satisfactory anterior showing of criminality before the spy can be dispatched, then it is perfectly proper to talk about criminals assuming risks. If it does not, 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.

493. *Osborn v. United States*, 385 U.S. 323, 340 (1966) (opinion dissenting from *Lewis v. United States*, 385 U.S. 206 (1966)).

494. *United States v. White*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952). In 1966, it appeared that a majority of the Court was prepared to subject electronically equipped spies to the same fourth amendment constraints that governed other forms of electronic surveillance. Compare the grounds of decision in *Osborn v. United States*, 385 U.S. 323 (1966), with those in the companion cases of *Lewis v. United States*, 385 U.S. 206 (1966), and *Hoffa v. United States*, 385 U.S. 293 (1966).

495. *United States v. White*, 401 U.S. 745 (1971).

496. 389 U.S. 347, 364 (1967). Mr. Justice Black's notation of his views in *White* does not deal with the fact that there was at least one physical entry by the bugged informer into White's home.

497. The distinction between a private renegade and a precommitted government spy presents no greater difficulties than the cognate distinction drawn in *Burdeau v. McDowell*, 256 U.S. 465 (1921). Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971).

498. See *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

499. Of course, an alternative approach would be to extend the fourth amendment to cover all espionage, and to align the internal rules of the amendment so as to allow espionage to be justified as "reasonable" with little or no procedural restraint in some classes of cases. This approach raises the problem discussed in text accompanying notes 364-436 *supra*.

500. See text accompanying notes 201-33 *supra*.

501. See text accompanying notes 234-50 *supra*.

502. TAYLOR, *supra* note 168, at 24-41.

503. TAYLOR, *supra* note 168, at 41. See *id.* at 41-44.

504. See notes 89-91, 198-200, 433-36 *supra* and accompanying text.

505. TAYLOR, *supra* note 168, at 46-47. See *id.* at 23-24.

506. See TAYLOR, *supra* note 168, at 98-100.

507. Professor Taylor's major concern appears to be directed against taking too narrow a view of the power of search incident to arrest. See TAYLOR, *supra* note 168, at 27-29, 39, 43-50, 56-61.

508. See TAYLOR, *supra* note 168, at 98-100.

509. See notes 168, 191-92, 456-64 *supra* and accompanying text.

510. See text accompanying notes 457-65 *supra*.

511. See TAYLOR, *supra* note 168, at 42-44.

512. See TAYLOR, *supra* note 168, at 98-100; text accompanying notes 437-76 *supra*.

513. The first concern might theoretically be satisfied by rules which establish minimum standards of justification for searches and the limits of search permissible when those standards are satisfied, but which leave administration of the rules to the unreviewed judgment of executive officers. The second concern might theoretically be satisfied by prior judicial supervision of searches or some other procedure assuring their regularity, even in the absence of a requirement that any particular minimum standard of justification be met to authorize the search. Cf. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

514. TAYLOR, *supra* note 168, at 38-44.

515. 19 Howell St. Tr. 1029, 1063-64 (1765).

516. As reported in Adams' abstract, ADAMS, *supra* note 168, at 142.

517. *Id.*

518. *Id.* at 139.

519. *Entick v. Carrington*, 19 Howell St. Tr. 1029, 1067 (1765); *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763).

520. As reported in Adams' abstract, ADAMS, *supra* note 168, at 139, 142-43.

521. TAYLOR, *supra* note 168, at 27-29.

522. Professor Taylor does not suggest that there was any other power of warrantless search recognized at common law, and I have seen no evidence of any.

523. See note 435 *supra* and accompanying text.

524. TAYLOR, *supra* note 168, at 28.

525. "Apparently, exigent circumstances are so often present in arrest situations that it has been deemed improvident to litigate the issue in every case." *Coolidge v. New Hampshire*, 403 U.S. 443, 523-24 (1971) (White, J., dissenting).

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

527. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

528. The decisions of the lower courts following *United States v. Rabinowitz*, 339 U.S. 56 (1950), and preceding *Chimel v. California*, 395 U.S. 752 (1969), amply justify the conclusion in the latter case, *id.* at 766, that there is no administrable middle ground, no "point of rational limitation, once the search is allowed to go beyond" the arrestee's wing-span—short of giving arresting officers carte blanche to rummage through an arrestee's premises and possessions entirely at will. See, e.g., *United States v. Nicholas*, 319 F.2d 697 (2d Cir. 1963) (alternative ground); *United States v. Frierson*, 299 F.2d 763 (7th Cir. 1962); *Carlo v. United States*, 286 F.2d 841 (2d Cir. 1961); *United States v. Garnes*, 258 F.2d 530 (2d Cir. 1958); *Smith v. United States*, 254 F.2d 751 (D.C. Cir. 1958) (alternative ground).

529. *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 318 (1972).

530. *Chimel v. California*, 395 U.S. 752, 762 (1969), quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

531. The work of subordinating arrest-entries to this principle remains to be done. See text accompanying notes 130-34 *supra*.

532. *Johnson v. United States*, 333 U.S. 10, 14 (1948). Of course I am troubled, as Professor Taylor is, by the pervasive tendency of magistrates to rubber-stamp police warrant applications without adequate independent inquiry. See TAYLOR, *supra* note 168, at 48. See also LAFAVE, *supra* note 278, at 30-36; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 907 (1960); LAFAVE, *supra* note 283, at 411-15; LAFAVE & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 991-95 (1965); Remington, *The Law Relating to 'On the Street' Detention, Questioning and Frisking of*

Suspected Persons and Police Arrest Privileges in General, 51 J. CRIM. L.C. & P.S. 386, 388 (1960); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1183 (1952); but see TIFFANY, MCINTYRE & ROTENBERG, *supra* note 283, at 119-20. However, trial judges generally perform equally badly when they review warrantless police actions, such as searches incident to arrest, on suppression motions. At least a pre-search affidavit in support of a warrant application ordinarily deprives the officer of the benefit of hindsight after the search produces evidence in support of itself. *But see* Christofferson v. Washington, 393 U.S. 1090 (1969) (Brennan, J., dissenting from the denial of certiorari). Compare *United States v. Hatcher*, 473 F.2d 321 (6th Cir. 1973), and *United States v. Anderson*, 453 F.2d 174 (9th Cir. 1971), with *Lopez v. United States*, 370 F.2d 8 (5th Cir. 1966), and *Miller v. Sigler*, 353 F.2d 424 (8th Cir. 1965).

533. See notes 102-36 *supra* and accompanying text.

534. TAYLOR, *supra* note 168, at 47-49.

535. See text accompanying notes 477-89 *supra*.

536. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973).

537. See text accompanying notes 251-63, 364-436 *supra*.

538. DAVIS, *supra* note 290, at 222.

539. DAVIS, *supra* note 290, at 88.

540. See, e.g., CRIME COMMISSION REPORT, *supra* note 283, at 103-06; POLICE TASK FORCE REPORT, *supra* note 283, at 16-18; URBAN POLICE FUNCTION, *supra* note 294, at 116-31 and authorities collected at 119 nn. 117-19; Goldstein, *supra* note 296; Igleburger & Schubert, *Policy Making for the Police*, 58 A.B.A.J. 307 (1972).

541. CRIME COMMISSION REPORT, *supra* note 283, at 91.

542. Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1127-28 (1967).

543. Wright, *supra* note 290, at 576. This is a statement of Judge Wright's concurrence with Professor Davis' views, and it includes prosecutors and "petty bureaucrats" together with police.

544. *United States v. Robinson*, 94 S. Ct. 467, 470, 470-71 n.2 (1973).

545. *Gustafson v. Florida*, 94 S. Ct. 488, 491-92 (1973).

546. I am assuming that the regulations in the *Robinson* case, which I have not seen, were clear, published and binding on the individual officer.

547. I quote John Adams' well-known description of the Otis argument in the form in which it appears in ADAMS, *supra* note 168, at 107.

548. See POLICE TASK FORCE REPORT, *supra* note 283, at 32.

549. See note 195 *supra* and text accompanying notes 441-43, 513-20 *supra*. I believe that *Camara v. Municipal Court*, 387 U.S. 523 (1967), stands squarely for this proposition. The sort of warrant authorized and required by that decision does not serve to provide a judicial determination of the adequacy of justification for conducting particular searches and seizures; it serves primarily, and perhaps exclusively, to prevent arbitrariness on the part of the searching officials.

550. DAVIS, *supra* note 290, at 65.

551. See note 549 *supra*.

552. See notes 127-28, 216-17, 263, 389-90 *supra* and accompanying text. See also the discussion of *Schmerber v. California*, 384 U.S. 757 (1966), in note 393 *supra* and the discussion of *Camara v. Municipal Court*, 387 U.S. 523 (1967), in note 549 *supra*.

553. See p. 411 *supra*.

554. See notes 106-13 *supra* and accompanying text.

555. See *Cady v. Dombrowski*, 413 U.S. 433, 440-43, 447 (1973); *Shadwick v. Tampa*, 407 U.S. 345, 353-54 (1972); Weinstein, *Local Re-*

sponsibility for Improvement of Search and Seizure Practices, 34 U. COLO. L. REV. 150 (1962).

556. See text accompanying notes 356-63 *supra*.

557. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 791 (1970).

558. See CRIME COMMISSION REPORT, *supra* note 283, at 94:

[M]any . . . court decisions [are] . . . made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs against human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire Nation.

559. See Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROB. 500, 505-06 (1971).

560. See McGowan, *supra* note 360, at 678-79.

561. While it is not common for defense lawyers to be at the scene of the police actions that they later challenge, or to negotiate with the police about those actions in advance, it was unfortunately common in the case of civil rights movement attorneys during the 1960's.

562. McGowan v. Maryland, 366 U.S. 420 (1961).

563. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 510-11 (1969).

564. See Johnson v. Avery, 393 U.S. 483 (1969); cf. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carrington v. Rash, 380 U.S. 89 (1965).

565. DAVIS, *supra* note 290, at 95.

566. See text accompanying notes 364-436, 477-89 *supra*.

567. DAVIS, *supra* note 290, at 88.

568. CALIFORNIA ATTORNEY GENERAL'S ADVISORY COMMISSION ON COMMUNITY-POLICE RELATIONS, REPORT: THE POLICE IN THE CALIFORNIA COMMUNITY 1-12 to 1-13, 8-1 to 8-15 (March 31, 1973); CRIME COMMISSION REPORT, *supra* note 283, at 103-06; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 164-65 (1968); POLICE TASK FORCE REPORT, *supra* note 283, at 13-41; URBAN POLICE FUNCTION, *supra* note 294, at 121-44; AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 7-9 (Approved Draft, June 1973); DAVIS, *supra* note 290, at 80-96; Caplan, *supra* note 559; Goldstein, *supra* note 542; Igleburger & Schubert, *supra* note 540.

Considerable efforts have recently been made to increase police rulemaking capabilities. Under a substantial grant from the Police Foundation and the directorship of Professor Gerald Caplan, a Project on Law Enforcement Policy and Rulemaking has been established at the Arizona State University College of Law, and has produced model rules in several areas. (Professor Caplan was formerly General Counsel of the Metropolitan Police Department of Washington, D.C., which has pioneered in the rulemaking field.) A major Policy-Making Program has also been inaugurated by the Dayton, Ohio Department of Police, which has demonstrated the feasibility of community participation in police rulemaking through the device of citizen-police task forces. Some such form of citizen involvement in the establishment of rules and policies for the police seems to me indispensable for the reasons set forth in URBAN POLICE FUNCTION, *supra* note 294, at 139-43, and in McGowan, *supra* note 360.

569. McGowan, *supra* note 360.

570. The following summary bears internal testimony to my heavy and gratefully acknowledged reliance upon Judge McGowan and Professors Kenneth Culp Davis and Herman Goldstein.

571. Goldstein, *supra* note 542, at 1127.

572. See Caplan, *supra* note 559, at 503.

573. Goldstein, *supra* note 542, at 1134.

574. See POLICE TASK FORCE REPORT, *supra* note 283, at 20:

Lacking a formulated policy and thus a preannounced basis for internal disciplinary action, the police administrator is hesitant to impose sanctions upon the individual police officer who acts improperly but whose conduct does not violate the law or departmental regulations.

The police administrator finds himself caught in a conflict between his desire to be responsive to a citizen who has reason to complain about a policeman's behavior and his fear of the reaction of his force to seemingly arbitrary discipline where there is no clear breach of a preannounced standard of proper conduct.

575. See Caplan, *supra* note 559, at 511.

576. CRIME COMMISSION REPORT, *supra* note 283, at 104.

577. McGowan, *supra* note 360, at 681.

578. POLICE TASK FORCE REPORT, *supra* note 283, at 21.

579. Goldstein, *supra* note 296, at 161-62.

580. I incline to agree with the view that, if police rulemaking is not compelled by the Constitution or otherwise legally required, courts should be hesitant to apply the exclusionary sanction to violations of police-made regulations. Such use of the sanction simply discourages the making of regulations, or of clear regulations. See URBAN POLICE FUNCTION, *supra* note 294, at 137-38; McGowan, *supra* note 360, at 688-89. But the objection fails if the Constitution does compel rulemaking and if the unclarity of regulations is constitutionally assailable.

581. See URBAN POLICE FUNCTION, *supra* note 294, at 135-37; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 813-14 (1970). Federal jurisdiction and some of its problems are discussed briefly in note 137 *supra*. State-court taxpayers' actions for mandamus or a mandatory injunction would also seem appropriate in states that recognize these forms.

582. See McGowan, *supra* note 360, at 685-88.

583. See LaFave, *supra* note 283, at 580-82.

584. I do not think we can realistically expect the police to perform better than any other bureaucracy in these regards. See Wright, *supra* note 290, at 578-79.

585. See LaFave, *supra* note 283, at 593-609; Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 287.

586. See note 593 *infra*.

587. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 420-24 (1971) (dissenting opinion).

588. See Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964).

589. See note 138 *supra*. See also, e.g., NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 146 (1969); POLICE TASK FORCE REPORT, *supra* note 283, at 198-200; P. CHEVIGNY, POLICE POWER 248-66 (1969); LAFAVE, *supra* note 278, at 412-27; Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUDIES 243, 269-72 (1973).

Chief Justice Burger notes the deficiencies of tort remedies, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 421-22 (1971) (dissenting opinion); and I take his silence on the subject of criminal prosecutions of policemen as an indication that he believes them too implausible to warrant discussion.

590. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 423 (1971) (dissenting opinion).

591. 372 U.S. 335 (1963).

592. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

593. Professor Oaks' comprehensive survey indicates to me nothing more than that the evidence so far gathered is a standoff, and that the hopes of gathering better evidence in the future are very slim. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CH. L. REV. 665 (1970). The fact that a considerable amount of illegal search-and-seizure activity persists despite the exclusionary sanction, see Oaks, *supra* at 683-85; Spiotto, *supra* note 589, at 246-48; Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, 1 J. POLICE SCI. & AD. 36, 37-38, 49 (1973); Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 NW. U.L. REV. 493, 497-99 (1952), certainly does not demonstrate its inefficacy as a control. A lot of people go out in the rain, even though the rain prevents many others from going out. Comparisons of the volume of suppression motions over time, such as Spiotto makes, do not take into account the many factors that affect filing of such motions, including the progressive development of search-and-seizure rules by judicial decisions, the differing attitudes of private defense lawyers and public defenders regarding their responsibilities for filing motions, the stimulus provided to the filing of suppression motions (particularly in possession cases) by the unavailability of other adequate pretrial discovery devices in criminal cases, and the increasing demands of clients themselves that motions be filed as knowledge of the exclusionary sanction increasingly pervades the community. Nor does it take account of the fact that some judges "acquit" sympathetic defendants by granting the motions. Continuity of arrest and seizure rates relating to some offenses before and after the advent of the exclusionary sanction, see Oaks, *supra* at 689-96, also shows little, unless it is assumed that the police cannot achieve by legal methods what they achieve by illegal ones and that the exclusionary sanction is the only significant determiner of the police enforcement efforts reflected in arrest and seizure rates. The fact that police evade the exclusionary sanction by perjury, see Oaks, *supra* at 696-99; Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87, 94-96 (1968), unquestionably impedes the effectiveness of the sanction; but it is impossible to say to what extent perjury is practiced or to what degree it could be detected if judges were somewhat more critical in regard to the credibility of police testimony. Tipovers and other vigilante activity by the police, see TIFFANY, MCINTYRE & ROTENBERG, *supra* note 283, at 183-99; LaFave, *supra* note 283, at 421-55; LaFave & Remington, *supra* note 532, at 1008-11; Oaks, *supra* at 720-24, assuredly demonstrate the obvious point that the exclusionary sanction does not prevent police practices that are not directed toward prosecution, but says nothing about its effect on police practices that are. The variety of other factors that impede the impact of the exclusionary sanction—the police law-enforcement ethic, unclarity of rules regarding search and seizure, poor communication between courts and the police, see LaFave, *supra* note 283, at 398-411; LaFave & Remington, *supra* note 532, at 1003-08; Oaks, *supra* at 700-01, 724-

32—would be markedly affected by the recognition of the constitutional requirement of police rulemaking that I suggest in these lectures. On the other hand, I am also disposed to view with skepticism the responses to questionnaires that show belief on the part of some judges, lawyers and law enforcement officials that the exclusionary sanction *does* deter unconstitutional police searches and seizures. See Katz, *The Supreme Court and the States: An Inquiry into Mapp V. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C.L. REV. 119, 134 (1966); Nagel, *supra* note 585, at 285-88. Professor LaFave seems to me to sum it up when he says that the exclusionary sanction's "deterrent efficacy defies precise measurement," LaFave, *supra* note 283, at 395, and that

[i]t is clear that the rule does have a significant impact upon police practice in some situations. It is equally clear that it does not produce police conformity with the requirements of law in all cases. The extent to which the exclusionary rule does achieve its objective depends upon a number of factors, which may vary from case to case

LaFAVE, *supra* note 278, at 428.

594. For discussion of the forces mentioned in this paragraph see the works cited in note 593 *supra*, which identifies the relevant pages of each, and see SKOLNICK, *supra* note 295, at 204-29.

595. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

596. *Id.* at 416-17.

597. *Irvine v. California*, 347 U.S. 128, 136 (1954) (plurality opinion).

598. Cf. *United States v. Calandra*, 94 S. Ct. 613, 619, 621-23 (1974). The assumption underlies the school of criticism of the exclusionary rule that takes as its motto Mr. Justice Cardozo's phrase, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). I confess to having made it myself, see *Amsterdam, Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964); but I now repent me of those views.

599. See *Mapp v. Ohio*, 367 U.S. 643, 679 (1961) (Harlan, J., dissenting): "[T]here is not the slightest suggestion that Ohio's policy is 'affirmatively to sanction . . . police incursion into privacy'"

600. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 413-21 (1971) (Burger, C.J., dissenting). The literature on deterrence, see note 593 *supra*, appears uniformly to take this approach.

601. See text accompanying notes 201-33 *supra*.

602. Article XIV of the Massachusetts Declaration of Rights of 1780, upon which the fourth amendment appears to have been most immediately modeled, provided that: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." 3 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 1891 (1909).

603. See McGowan, *supra* note 360, at 689-94.

604. See text accompanying notes 140-58 *supra*.

605. See text accompanying notes 159-67 *supra*.

606. See *United States v. Calandra*, 94 S. Ct. 613 (1974).

607. The following analysis is based substantially on one that I advanced several years ago in the Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as *Amici Curiae*, *Massachusetts v. Painten*, 389 U.S. 560 (1968).

608. See note 110 *supra* and accompanying text.

609. See, e.g., *Santana v. United States*, 329 F.2d 854 (1st Cir.), *cert. denied*, 377 U.S. 990 (1964).

610. See notes 127-29, 389-90, *supra* and accompanying text.
611. See note 62 *supra* and accompanying text.
612. "It would be intolerable and unreasonable if [officers] . . . were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), as quoted in *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973).
613. See notes 127-29, 217 *supra* and accompanying text.
614. See, e.g., *Ballou v. Massachusetts*, 403 F.2d 982 (1st Cir. 1968), *cert. denied*, 394 U.S. 909 (1969); *People v. Holloman*, 46 Ill. 2d 311, 263 N.E.2d 7 (1970) (suspect is arrested for a traffic offense, but such an arrest alone will not support an incidental search under the Illinois authorities, and the court relies upon *Terry v. Ohio*, 392 U.S. 1 (1968)).
615. See *People v. Mosher*, 1 Cal. 3d 379, 394-95, 82 Cal. Rptr. 379, 388-89, 461 P.2d 659, 668-69 (1969) (woman's wristwatch felt like knife blade); *State v. Thomas*, 205 Kan. 442, 469 P.2d 279 (1970) (rolled-up manila envelope containing marijuana felt like weapon).
616. See text accompanying note 432 *supra*.
617. See text accompanying note 247 *supra*.
618. Concerning police fabrication, see *P. CHEVIGNY, POLICE POWER* 183-92 (1969); *SKOLNICK, supra* note 295, at 212-28; the writings cited in *Oaks, supra* note 593, at 696-99.
619. See *Terry v. Ohio*, 392 U.S. 1, 8-27 (1968).
620. See note 472 *supra* and accompanying text; NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 159-61 (1968).
621. See *SKOLNICK, supra* note 295, at 213-14, 220.
622. See *TIFFANY, McINTYRE & ROTENBERG, supra* note 283, at 22-23.
623. See *SKOLNICK, supra* note 295, at 217-18; *TIFFANY, McINTYRE & ROTENBERG, supra* note 283, at 19-27.
624. CRIME COMMISSION REPORT, *supra* note 283, at 104.
625. See note 593 *supra*.
626. As reported in Adams' abstract, *ADAMS, supra* note 168, at 142.
627. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).
628. Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638-40 (1943).
629. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

