Generalities of the Fourth Amendment

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> *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.*
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> THE FOURTH AMENDMENT

The fourth amendment is one of the Constitution's richly generative texts. Its important terms are general. The scope of the main clause is given by a catalogue that reaches for comprehensiveness: "persons, houses, papers, and effects." The amendment invites treatment as a broad statement about the relationship between an individual and the government. When the government can accomplish a social purpose only by limiting the autonomy of some person, there is not simply a current choice to be made between public and private purposes. The value of personal autonomy is given permanence and secured against the changing demands of social policy.

Except in the second clause, which is a rather narrow prescription about the form and content of search warrants,[1] the fourth amendment does not answer specific questions. While its manifest purpose is to restrict searches by the government that invade individual privacy, equally clearly it allows some searches, those that are not "unreasonable." A thoughtful and strict grammarian might conclude from the structure of the amendment that the second clause is a partial explication of the first, so that any search conducted without a warrant is, by that fact alone, unreasonable. But if grammar were followed in that direction, one would have to conclude also that the amendment does not deal at all with, say, an arresting officer's authority to protect himself by removing weapons from an arrested person's pockets; if that is a search, it is obviously not one to which a blanket requirement of a warrant could apply, because arrests must often be made without advance notice. An-

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1. Even this prescription leaves many questions unanswered: who may issue a warrant, how it must be executed, in what circumstances seized property may be retained, and so forth.

other grammarian might conclude that the first clause stated a condition for application of the second, so that there was a requirement that a search not be "unreasonable" independent of the particular requirements of the warrant clause. Before 1967, that view had doctrinal, albeit largely ineffective, support. Since then, interpretation of the warrant clause has not depended at all on the language that precedes it.[2]

The courts have said little of lasting significance about the relationship between the two clauses. In 1948, the Supreme Court said plainly that the warrant clause was central to the constitutional scheme and a primary defense against unreasonable searches. "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible."[3] Twenty months later, the warrant clause was assigned a smaller role:

> A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. . . .
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> . . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case.[4]

More recently, in 1969 the Court declared: "The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no warrants shall issue, but upon probable cause,' plays a crucial part."[5] Presently, the Court has turned again to reasonableness as the "ultimate standard,"[6] and declared "the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable . . . . "[7] Such statements, which casually reject or

2. *See* text and notes at notes 67-69 *infra.*
3. Trupiano v. United States, 334 U.S. 699, 705 (1948).
4. United States v. Rabinowitz, 339 U.S. 56, 65, 66 (1950).
5. Chimel v. California, 395 U.S. 752, 761 (1969) (footnote omitted).
6. Cady v. Dombrowski, 413 U.S. 433, 439 (1973).
7. United States v. Edwards, 415 U.S. 800, 807 (1974).

disregard what was said before and treat the warrant clause either as an insignificant hurdle or as a *deus ex machina* with which to strike down a disfavored search, do no more than announce the latest shift of emphasis to one clause or the other, according to a result reached on other grounds.

We should not regret that the constitutional language does not deal concretely with our current problems, nor be surprised that its accepted interpretation has changed from time to time. It is both regrettable and surprising that the courts have said so little of any substance about the principles of the amendment when they have considered and reconsidered its application in different circumstances. The absence of a continuously developing rationalization of the amendment has enabled the Court to change direction, even to veer rapidly and sharply, without too obvious inconsistency; but the result is a body of doctrine that is unstable and unconvincing.

In the past five years, the Supreme Court has handed down at least sixteen major opinions interpreting the fourth amendment.[8] None of them was decided by a unanimous Court. The Court has had to acknowledge repeatedly that "this branch of the law is something less than a seamless web."[9] So we have the opinions of five Justices in *Coolidge v. New Hampshire,*[10] which occupy eighty-five pages of the United States Reports in lengthy discussions of fourth amendment issues; the only issue about which the Justices could agree was unnecessary to a decision of the case.[11] So we have the *Aguilar-Spinelli-Harris*[12] series dealing with the requirement of probable cause

8. *See* Spinelli v. United States, 393 U.S. 410 (1969); Alderman v. United States, 394 U.S. 165 (1969); Chimel v. California, 395 U.S. 752 (1969); Vale v. Louisiana, 399 U.S. 30 (1970); Chambers v. Maroney, 399 U.S. 42 (1970); United States v. White, 401 U.S. 745 (1971); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Harris, 403 U.S. 573 (1971); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Cupp v. Murphy, 412 U.S. 291 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Robinson, 414 U.S. 218 (1973) (with Gustafson v. Florida, 414 U.S. 260 (1973)); United States v. Calandra, 414 U.S. 338 (1974); United States v. Matlock, 415 U.S. 164 (1974); United States v. Edwards, 415 U.S. 800 (1974).

To these might be added: Frazier v. Cupp, 394 U.S. 731 (1969); Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971); United States v. Biswell, 406 U.S. 311 (1972); Adams v. Williams, 407 U.S. 143 (1972) (stop and frisk); United States v. United States District Court, 407 U.S. 297 (1972); Brown v. United States, 411 U.S. 223 (1973); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border search).

Among the latter cases, *Brown* was decided unanimously. There were no dissenting opinions in *Frazier* or *United States District Court.*

9. Cady v. Dombrowski, 413 U.S. 433, 440 (1973).

10. 403 U.S. 443 (1971).

11. *See id.* at 484-90 (Stewart, J., for the Court). Even on that issue, Justice White concurred only in the result. *Id.* at 510.

12. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). To these might be added, among others:

for issuance of a search warrant, each case reinterpreting what went before. So we have the see-saw between *Rabinowitz* and *Chimel* about the role of the warrant clause.[13] So we have the shifts from *Wolf*[14] to *Mapp*[15] to *Calandra,*[16] in which the exclusionary rule, on which judicial involvement mostly depends, is traded back and forth like a hostage in the substantive dispute.[17] We have less common understanding of the fourth amendment now than there was a hundred years ago, not so much because we have perceived hitherto hidden problems as because we have sought results without attending to the task of understanding.

The first requirement is that we understand what the amendment protects. Rarely have the courts said more than that a search was or was not an "invasion of privacy" that was or was not "reasonable." In *Katz v. United States,*[18] the Supreme Court observed that conclusory references to "governmental intrusion" on a "right to privacy" explain little,[19] and made a start toward unpacking the concrete significance of those phrases; but nothing that the Court has said since has continued along those lines. The second requirement is that we develop an approach to the scheme of the amendment—when a warrant is required and when not—that can be applied consistently in varying circumstances.

I

A

The central theme of the amendment is its prohibition against general searches, the evil that its authors had foremost in mind. The "generality" of a search is not a matter simply of the scope of a search and the size of the area searched, both of which are touched by the warrant clause. Particularity is a function of purpose.[20] The

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Nathanson v. United States, 290 U.S. 41 (1933); Jones v. United States, 362 U.S. 257 (1960); United States v. Ventresca, 380 U.S. 102 (1965).

13. *See* text and notes at notes 3-6 *supra,* 72-95 *infra.*

14. Wolf v. Colorado, 338 U.S. 25 (1949).

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

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

17. This article does not discuss the exclusionary rule, which is a second-order inquiry about what to do in a criminal case if the right protected by the fourth amendment is violated. It is scarcely surprising, however, that the answers that have been given to that inquiry are unpersuasive, since the answers to the primary inquiry are unsatisfactory.

18. 389 U.S. 347 (1967).

19. *Id.* at 350.

20. In other contexts, references to "New York City" and "all items belonging to John Doe" might be regarded as "particularly describing" a place and a set of things, but they do not satisfy the warrant clause.

prohibition is above all a limitation on the occasions when the government may search. Searches of private places are excluded from the government's ordinary powers; the government may intrude on privacy in that way only if there is special need that can be stated with particularity. What the fourth amendment most clearly prohibits are practices like random entries into people's homes or random searches of people on the street for general governmental purposes: to acquire information, or to prevent danger to the public, or to look for evidence of wrongdoing, or simply to remind people that the government is the source of all their blessings. Privacy is not a good that we hold at the pleasure of the government.

We do have security from that kind of intrusion to an extraordinary extent, so much so that it may be difficult to imagine what a "private" place could be if it did not afford at least that much privacy by right (and not merely, by calculated risk, in fact). A right to exclude others, however, need not incorporate a right to exclude public officials. Living together as densely as most of us do, we increasingly entrust tasks of communal living to the government, which strains the assumption that officials also ordinarily may not enter. The strain is evident in cases like *Camara v. Municipal Court,*[21] in which the manifest necessity for social control over certain basic matters of public health led the Supreme Court to accept an attenuated warrant procedure for health inspections that went far toward making government officials' entry into private homes a part of the regular performance of their duties. Stricter adherence to the letter of the fourth amendment would have led to an impractical syllogism: the fourth amendment prohibits searches of this kind; searches of this kind are manifestly necessary given these housing conditions; therefore these housing conditions cannot be allowed to continue. The strain is also evident in *Wyman v. James,*[22] in which the Court held that welfare officials could "visit" the homes of welfare recipients in the course of the welfare program. Notwithstanding all the Court's arguments to the contrary, if the provision of welfare benefits is now an ordinary function of government—as the number of recipients suggests—the holding was contrary to the fourth amendment.[23]

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21. 387 U.S. 523 (1967).

22. 400 U.S. 309 (1971).

23. The Court's opinion emphasized the noncriminal nature of the inspection. *Id.* at 322-23. Historically, though not wholly consistently, there has been a distinction between administrative searches of this kind and searches in aid of criminal investigation. The Court has authorized the former more readily than the latter. *See* United States v. Biswell, 406 U.S. 311 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967); Frank v. Maryland, 359 U.S. 360 (1959).

That we do generally protect the security of private places from governmental intrusion is especially worth our attention because in another respect we do not value it so highly. The fourth amendment makes no promise to anyone that he will have a house or effects. Persons are secure in the privacy of their houses if they have houses, secure in the privacy of other private places if they are able to enter them. The amendment rests on the premise that individuals will acquire and hold private property. It does not oblige the government to create private places or confer privacy.[24]

Whether there is inconsistency in the two positions depends on one's starting point. If privacy is the primary value, the positions look in opposite directions. If private property, or more simply property, is primary, the guarantee of its protection from governmental intrusion has no implication (or may even have a negative implication) for the situation of those without property. When the amendment was framed, the difference between the two positions was bridged by a political philosophy and view of the community according to which it was possible for any deserving person to acquire property.

The intrusions that the fourth amendment restricts are paradigmatically physical acts: entering a place, searching it, taking and removing things.[25] The government's agents are not ordinarily to enter private places and surprise us or observe us there. Nor are they to enter private places in our absence and take note of (or just take) what is there. These two aspects of privacy are distinct and protect different features of our lives.

Privacy of Presence. The fourth amendment assures us that when we are in a private place we are, so far as the government is concerned, in private. This assurance is ambulatory; it arises simply from being present in a private place. It is also transient; when we are no longer present in a place, we lose the interest in preventing an intrusion in that place that we held while there.[26] Privacy of presence allows us to keep our conduct of a portion of our lives from public view. It enables us to do the things that we like to do but do

24. *But cf.* text following note 108 *infra.*

25. Of course, to say that physical acts are the paradigm is to indicate that they do not exhaust the category. Refusing at one point to extend the paradigm, the Supreme Court made the rhetorical mistake of asserting that it was really a definition. *See* Olmstead v. United States, 277 U.S. 438, 464-66 (1928).

26. We may have reason to protect the interest of someone else who is still present; but it is the latter's interest in privacy that is or is not protected.

badly, things that we are a bit embarrassed about doing: to meet a friend quietly, to act out love and hate, to do all the things that we should not do in the same way at high noon in Times Square. Because privacy of presence accompanies us wherever we are in private, it preserves the autonomy of a person's life without confining him to a small area that is privately his. It applies the distinction between private conduct and public performance, as a person may choose, over a large portion of his life.

Privacy of Place. The fourth amendment's assurance that a particular place will not be exposed to public view without one's consent is neither ambulatory nor transient.[27] It is not created by entering a place, nor is it lost by leaving. Privacy of place does not protect from exposure a person's conduct so much as what is permanent about him. It allows us to extend our personality by stamping it on a place without displaying it publicly. It allows us to leave our pajamas on the floor, the bed unmade and dishes in the sink, pictures of secret heroes on the wall, a stack of comic books or love letters on the shelf; it allows us to be sloppy or compulsively neat, to enjoy what we have without exposing our tastes to the world.

Ordinarily we need not be careful to distinguish these two kinds of privacy. A person's home is a place that he expects will not be invaded whether he is present or absent. We may have the same expectation about a few other places: an office or shop or car. Although this dual privacy does not cover much of the whole world for any of us, circumstances usually tell us which kind of privacy may be expected. We do not expect to leave our pajamas unobserved in a public restaurant or on a bus; nor do we expect a friend or the proprietor of a restaurant to solicit our approval before he allows someone to enter his premises when we are not there. The difference between privacy of presence and privacy of place is, however, as important as ordinarily it is obvious.

Suppose that you were observed wherever you were except when you were in your own private place, your home. Wherever you went —on the street, in shops, in the home of a friend, in restaurants, theaters, parks—someone watched what you did and heard what you said. Suppose that other persons were similarly observed, so that when they were in your home they were seen and heard. Al-

27. One can, of course, *move* one's private places about; a car, a suitcase, and a trousers pocket are all places where one may have privacy of place, whether or not one is present in the place or has it "on his person." But one cannot acquire privacy of place in another person's pocket by sticking a hand in it. It is in that sense that privacy in unfixed places is "neither ambulatory nor transient." Houses too can be moved from place to place.

ternatively, suppose that your conduct was not observed at all; but that whenever you were not at home, government officials roamed there at will and examined your belongings, without taking anything. In the first case, we should expect the home, its contents, and solitary conduct within it to assume more importance in the preservation and expression of personal identity. In the second, we should expect that the home and what is permanent in it would become less important and that personal identity would be maintained primarily by one's conduct. The two kinds of intrusion overlap; no doubt a society that was prepared to allow one would be more likely to allow the other as well. But they interfere with distinct aspects of autonomy, and threaten our lives in different ways. In circumstances in which only one is involved, the constitutional result may depend on which one it is.

B

Cases in which authority to search is based on consent are usually analyzed as a minor division within the large category of searches without a warrant or as a small category of their own. As a reflection of police conduct, that makes sense. "Consensual searches" do not appear often in the reports, for the obvious reason that consent is not so likely to be asked or given if there is something to be found that will be harmful to the person whose consent is needed. Some other basis for a search—a warrant or one of the doctrines that dispenses with the warrant requirement—is usually available. Those bases do not define the privacies protected by the fourth amendment so much as they specify when and how the protection is overcome. A person's consent, however, is relevant only to the extent that he has a protected interest. Therefore, the scope of a search that consent legitimates is congruent with the realm of privacy that the consent waives. By noting the circumstances in which consent to a search is necessary and sufficient, we can identify the contours of the privacies the fourth amendment protects.[28]

Just as the fourth amendment makes no special provision for those who lack a private place or the means of entry into one, it does not insist that persons preserve a privacy that they are willing to

28. Another group of cases that delineate the protected privacies are those in which official conduct is held to be outside the protected area because the conduct occurred "in public" or "on public property." Until recently, such cases have generally been decided without discussion about what makes a place "public" or "private" for purposes of the fourth amendment. Since I believe, on the basis of the arguments I have just made about privacy of presence and privacy of place, that that distinction may become questionable in this context, I have postponed discussion of it. *See* text and notes at notes 101-08 *infra*.

forego. The amendment does not provide that police and other government officials shall not enter at all; it does not, for example, prevent the owner of a house from inviting a police officer to make an inspection (although there might be such a rule in a paternalistic society that placed a high value on solitude).[29] Since the fourth amendment does not provide a means for obtaining privacy to those who lack it, it would be peculiar if the amendment forced privacy on those who choose to give it up.

A homeowner who invites the police to make a search which turns out to be contrary to his interests will probably regret having made the invitation; and he may slide easily from wishing that he had not done so to believing that he did not. He will slide even more easily if it is not claimed that he invited the inspection but only that he acceded to a request. On the other hand, a police officer who is eager to search may convince himself easily that the homeowner has consented, and even more easily recall the consent after he has found what he was looking for.

When there is a dispute whether a person voluntarily surrendered an interest in privacy that he undoubtedly had, the difficulty is not simply that the only witnesses will probably report (in good faith or not) different recollections of what happened. Often the difficulty would remain even if we had taken a motion picture and sound track of everything that took place. In ordinary discourse we lack a precise understanding of what constitutes "consent." It is a particularly open concept, which refers to both an "internal" state of mind and an "external" performance; consent is unequivocal and unquestioned only when it includes both. Some courts, attending to the state of mind, and reasoning that "no sane man" would consent to a search that was sure to turn up evidence he wanted concealed, have concluded that whatever the appearance of consent from a person's conduct, he did not "in fact" consent unless he did not know that the evidence was there to be found.[30] Other courts have regarded a man's conduct as a sufficient manifestation of his state of mind or, what is the same thing, have con-

29. Invitations to "private" places are not allowed when the value to be served by isolation is not dependent on individuals' choice. Prisoners, for example, are not allowed to invite whom they will to their cell.

30. [N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by denial of guilt, do not show

cluded that his undisclosed "internal" opposition to the search is irrelevant.[31]

The first position goes too far to equate a preference with a lack of consent; we often consent to conduct of another although we wish it would not take place. On the other hand, a rule that words expressing consent are always to be taken at face value exalts the form of consent over its substance. We cannot give much weight to Mr. Jones's invitation to search if he extends the invitation to a policeman sitting on his chest and pounding his head on the steps. (The actual facts, of course, are likely to be more ambiguous.) We cannot specify in advance what constitutes too much or inappropriate pressure (which vitiates consent) and what are merely unpleasant circumstances that make consent relevant. Afterwards, if it turns out that it was unwise to have given consent, the homeowner is likely to conclude that it was pressure and not his own foolishness that led him to act, and he will recall sources of pressure whether or not he felt them at the time.

Potential sources of pressure, real or retrospectively fancied, are abundant in a confrontation between a police officer and an individual. The police are designedly the society's agents for the application of force. The issue came into focus for the courts in cases in which the defendant, following *Miranda's*[32] lead, argued that his apparent consent was not "voluntary" because it was not shown that he had known he could withhold consent. Some courts agreed that consent given ignorantly was not voluntary.[33] But in *Schneckloth v.*

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consent; at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present.

Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954). *See also, e.g.,* United States v. Viale, 312 F.2d 595, 601 (2d Cir. 1963).

31. [The defendant] argues that since it is incredible he would freely have consented to a search which he knew would disclose incriminating evidence, his words of consent should be considered an involuntary submission to authority and therefore insufficient to waive a constitutional right. Acceptance of this contention . . . not only would almost destroy the principle permitting a search on consent but would enable experienced criminals to lay traps for officers who, relying on the words of consent, failed to secure a search warrant that would have been theirs for the asking. Where . . . no force or deception was either used or threatened, we see no reason why a court should disregard a suspect's expression of consent simply because efficient and lawful investigation and his own attempt to avoid apprehension had produced a situation where he could hardly avoid giving it.

United States v. Gorman, 355 F.2d 151, 158-59 (2d Cir. 1965) (footnotes omitted). *See also* Robbins v. MacKenzie, 364 F.2d 45, 50 (1st Cir. 1966): "Bowing to events, even if one is not happy about them, is not the same thing as being coerced."

32. Miranda v. Arizona, 384 U.S. 436 (1966), established elaborate requirements to ensure that an arrested person's confession to the police was given voluntarily.

33. *E.g.,* Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971), *rev'd,* 412 U.S. 218 (1973); United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966).

Bustamonte,[34] the Supreme Court held to the contrary and adopted a rule that "voluntariness"—the absence of undue pressures—involves "a question of fact to be determined from a totality of all the circumstances."[35]

The Court's result is sound enough as abstract doctrine. But in the context of a criminal prosecution, the answer to the question the Court prescribed is not merely a finding of fact to be made as firmly as circumstances allow; the inquiry has functional significance and must be resolved unequivocally. Yet the concept of voluntariness is no more definite than the concept of consent. We lack a firm principle for deciding in varying circumstances whether ignorance of a highly relevant fact deprives consent of voluntariness. The product of *Schneckloth* is likely to be still another series of fourth amendment cases in which the courts provide a lengthy factual description followed by a conclusion (most likely, in the current climate, that consent was voluntarily given), without anything to connect the two.

The beginning of a solution to the problem is to prevent it from arising when one can. When a search pursuant to a warrant would be constitutional, a warrant can almost always be obtained. The wise course for the police is not to rely on the consent of a private person unless they must. When the police do rely on consent, either (1) they could not have obtained a warrant because a constitutional requirement like probable cause was not met; or (2) they could have obtained a warrant but did not; or (3) the constitutional requirements were met, but the police could not obtain a warrant for other reasons, such as the unavailability of a magistrate.

In the first two situations, the courts should place a heavy burden of proving consent on the police: in the first case because the Constitution explicitly prefers the private person's interest to society's and in the second because the police could have avoided the dispute by obtaining a warrant. Also, being professionally involved and having initiated the incident, the police are better able than the private person to plan the encounter so that if consent is given, proof of it will be available. In the third situation, the police stand on firmer ground. They can plausibly argue that if a warrant that would or-

34. 412 U.S. 218 (1973).

35. *Id.* at 227. The majority observed accurately enough that conduct is not ordinarily deemed involuntary just because the actor is not fully aware. *Id.* at 223-34. But if the police must meaningfully advise a person that he can refuse to allow them to search, they may communicate more than the bare information and reduce the coercive element of these situations. That aspect gives added point to Justice Marshall's argument in dissent that the majority's approach confines the fourth amendment's protection "to the sophisticated, the knowledgeable, and . . . the few." *Id.* at 277, 289.

dinarily and properly have been issued was unobtainable, the situation was an emergency.[36] If the police also do what they reasonably can to minimize their use of force and authority, and if consent to the search is not explicitly withheld, the search should be sustained on that basis.

A solution like the one offered in *Schneckloth,* which depends on retrospective determination of the consenting person's state of mind, is unlikely to be satisfactory however ample the facts on which the determination is based. It will not provide a convincing outcome in particular cases nor convincing distinctions among cases that are decided differently. The way out is rather to reformulate the question, within the constitutional framework, in terms of the consenting person's actions and the actions of the police.

The living arrangements of most people are too complex for a person's consent always to be necessary or sufficient to overcome the constitutional protection. We live with our families or roommates; we share our premises for long or short periods, on a more or less equal basis. A search is likely to interrupt the privacy of several people or to invade the privacy of others who are absent. If the person against whom evidence is used has consented to the search, he himself cannot complain even if the rights of others have been violated. Usually the courts have had to deal with the issue of consent to search a common dwelling in situations in which, one person having consented, another person is prosecuted and objects to the introduction of evidence found in the search.

In *United States v. Matlock,*[37] the Supreme Court's fullest and most recent statement about the issue, a woman admitted police officers to a room in which she lived with the defendant; evidence found in a closet of the room was used against him at trial. The Court upheld the search, stating the accepted rule that "consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[38] If "authority" meant simply authority to admit the searchers, the rule would be empty. The Court explained:

36. The police cannot claim that there was an emergency if they simply disregard the warrant procedure whenever a warrant would issue or if there is no reasonable provision for obtaining a warrant in ordinary circumstances. There must, therefore, be some regularly available procedure that is unavailable in the particular case.

37. 415 U.S. 164 (1974).

38. *Id.* at 170. The Court correctly rejected automatic application of concepts of possession borrowed from the law of property, which have different functional significance. Fourth

> [A]uthority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[39]

The Court's conclusion and its reasoning so far as it goes are correct, but more than its brief reference to assumption of a risk is needed to show why.

The explanation requires application of the principle that the fourth amendment protects the privacy one otherwise has without creating or expanding spheres of privacy, and recognition of the difference between privacy of presence and privacy of place. Just as the fourth amendment is uninterested in the lack of privacy of persons who do not have access to private property and the surrender of privacy by one who voluntarily exposes to public view what he might have kept private, so it is uninterested in the partial lack of privacy of one who, by necessity or choice, shares premises on an equal or inferior basis with another. Because we so easily think about privacy concretely as the equivalent of private property, it is easy for us to think that a person who shares private property retains complete privacy of place, just as we may assume that a person who has no property has no privacy of place whatever, even though he retains the capacity to be in private on the property of others. But in the same way that the Constitution does not confer any privacy on persons who wholly lack private property or access to it, the Constitution does not allow persons who have a privacy limited by sharing to claim a privacy beyond that limit.

To recognize limits on a person's privacy in shared living arrangements is not to say that anyone who does not live alone has no protection from the entrance of public officials, any more than the shared arrangement entitles all private persons to enter at will. But if the arrangement includes the authority of either party to admit whom he will and thus expose the premises, that limitation on the privacy of each covers public officials, who also may enter on the authority of either. Ordinarily, if two persons share an apartment on equal terms, either may admit anyone he

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amendment privacies should not depend on ownership arrangements that are made for tax or mortgage or other purposes and that the parties never think about otherwise.

39. *Id.* at 171 n.7.

chooses to the living room; either, then, may admit the police to search the living room.

Reference to the privacy that one has rather than to the property that one owns gives answers which we instinctively feel are correct. We should not be surprised if a homeowner consented to a search of his living room in the absence of a weekend guest; but it would violate our ordinary understanding of their temporary living arrangement if the guest admitted strangers in the absence of his host. It does not startle us that a parent's consent to a search of the living room in the absence of his minor child is given effect; but we should not allow the police to rely on the consent of the child to bind the parent. The common sense of the matter is that the host or parent has not surrendered his privacy of place in the living room to the discretion of the guest or child; rather, the latter have privacy of place there in the discretion of the former.

There are other cases in which instinct fails and analysis is not so easy. Legal rights frequently are a good clue to actual relationships, but frequently they are not. The actual living arrangements that people make are more idiosyncratic and more complex and indefinite than an "ordinary" weekend visit. Explicit definition of a living arrangement is not as common as a process of continued accommodation and forebearance. When an elderly uncle comes to live with his affectionate niece and her husband, for example, the *modus vivendi* is more likely to be a product of trial and error (and some tribulation) than of a carefully elaborated code. Children gradually acquire discretion to admit whom they will on their own authority; elderly parents who live with their children's families gradually lose it. A guest remains, begins to pay a share of the grocery bill, and finally "sends for his things."

Yet another complication is that "premises" are not indivisible. Some portions of premises are shared more than others and in different ways; some are shared wholly and some not at all. Although the uncle may be careful to ask his niece whether he and his cronies can play gin rummy in the living room,[40] he is not so likely to ask whom he may invite into his own room. He may not expect to be consulted about his niece's invitations generally; but he would be startled if she held a meeting of the garden club in his room. It is not always a matter of rooms. His desk may be in the living room. Nor are the labels on "premises" always unequivocal. The niece may regularly enter her uncle's room to clean it and open the drawers

40. To which she may reply: "Of course. You don't have to ask," although she would be surprised and annoyed if they all appeared in the living room without an advance request.

in his dresser to put his clothes away, without having discretion to allow others to rummage through his clothes.

The most difficult case is also the most common and the one most likely to arouse strong feelings: admission of the police by one spouse, usually the wife, to search premises shared with the spouse who is absent.[41] The intimate relationship between husband and wife makes it difficult to say how far each has preserved a privacy not subject to the discretion of the other. There will be areas in which each has no expectation of privacy with respect to the other but has a full expectation of privacy as to the rest of the world. Such a joint privacy from which everyone else is excluded is a part of intimacy. There are also areas, however, into which each may bring friends and on occasion strangers. The ordinary assumption about a living room, for example, would be that either husband or wife could admit persons in the absence of the other and without prior approval.

If a search is defended on the ground that one spouse consented to it, I see no way to avoid the question whether the consenting person had, in relation to his spouse, enough control over the area searched to make the consent effective. Whose crime the police were investigating cannot be determinative; the amendment secures us against invasions of privacy, not the discovery of incriminating evidence.[42] Nothing in the fourth amendment prohibits a wife from allowing the police to search her handbag, even if they are looking for information against her husband. Equally plainly, her consent would not be a sufficient basis for them to search his briefcase, even if they were looking for evidence against her.

The validity of consent does not depend on a theory of agency, by which the absent spouse is presumed to have conferred authority to admit the police in his behalf. The authority exercised by the present spouse is her own, the same authority with which she admits other people. While there is no reason why one spouse cannot make the other his agent to admit the police (or anyone else) to premises over which the former alone has authority, even a spouse's express instruction or request not to admit the police (or anyone

41. Whether clinging to notions of Southern chivalry or for some other reason, the United States Court of Appeals for the Fifth Circuit held until 1970 that a wife's consent was not effective to bind her husband, although his could bind her. *See* United States v. Thompson, 421 F.2d 373 (5th Cir. 1970), *overruling, e.g.,* Gurleski v. United States, 405 F.2d 253, 261 (5th Cir. 1968).

42. The one point that did unite the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971) (*see* text and note at note 11 *supra*), was that the fourth amendment does not prevent a wife from delivering to the police incriminating items belonging to her husband. 403 U.S. at 484-90.

else) to shared premises would not be effective to invalidate consent that did not depend on his authority in the first place; what does not exist by his dispensation cannot be removed by his command.[43]

Most often, the ordinary living arrangements will be a good guide to particular arrangements—that is part of what it means to say that arrangements are ordinary. So, without special information one would suppose that husband and wife have independent authority to admit persons to the living room and the kitchen, and probably the bathroom and bedroom;[44] neither would have authority to admit persons to the other's study or desk or closet; and so forth. But, by long practice and understanding, the kitchen may be the wife's private place to which no one outside the family is ever admitted without her approval. Or the husband's "study" may be nothing more than a gratifying label for a room that the entire family uses as they will. If people make arrangements that are not ordinary or call rooms by names that do not describe actual use, their own ways of doing things are what count. There is as little reason under the fourth amendment to bind people by "ordinary" arrangements that are not their own as there is to bind those who have a great many houses or none at all by the amount of privacy that people "ordinarily" acquire.

The same approach explains the difference in result if more than one person is present when the police request permission to make a search.[45] Again, certain cases seem clear. Although the patrons of a store or restaurant have an interest in the privacy of their presence there, we should not expect their objection to entry to prevail if the owner gives his consent. Nor could the guests at a party overcome their host's consent to the entry of the police, although if he

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43. Ordinarily, we should expect such an instruction or request to be followed, but not because the spouse who received it had no authority to do otherwise.

Some courts have been troubled by cases in which the consenting spouse has an immediate interest antagonistic to the absent spouse. *See, e.g.,* United States *ex rel.* Cabey v. Mazurkiewicz, 431 F.2d 839, 842-43 (3d Cir. 1970). If the antagonism has not affected their actual living arrangement, it should make no difference. Often, of course, it would produce a harder, clearer division of the premises, and separate control of each spouse over his or her portion; if that happened, the authority of each to admit the police, or other outsiders, would be affected.

44. Almost certainly, guests would be admitted more frequently to the first two rooms than to the second two. Some rooms are used more privately than others, an aspect of living arrangements that the Supreme Court's dealings with the fourth amendment have ignored. *See* text at note 66 *infra.* Usually, the difference merely reflects the varying uses of the rooms rather than a lack of authority to admit for an appropriate use.

45. The holding in *Matlock,* for example, applies only to consent that binds "the *absent,* nonconsenting person." 415 U.S. 164, 170 (1974) (emphasis added).

were a good host he might honor their objection and withhold his consent.

The distinction between privacy of presence and privacy of place is relevant in such cases. If one's privacy while present someplace is derivative of and dependent on the privacy of another, that relationship also determines the former's privacy with respect to an entry by the police. When two or more persons have equal use of a place in which both are present, the consent of one does not normally eliminate the need for the consent of the other(s) before a search is made; ordinarily, persons with equal "rights" in a place would accommodate each other by not admitting persons over another's objection while he was present.[46]

Hard cases arise often, because people living agreeably together usually do not arrive at explicit, regular practices; they proceed by understandings that are most satisfactory if they are imprecise, flexible, and unstated. But there is no other approach that is true to the policy of the fourth amendment. One extreme alternative would be a rule that any person or persons who are alone at premises to be searched can allow the police to enter, notwithstanding the opposition of absent others; but that rule, contrary to common understanding, would allow a babysitter to admit the police for a search while the parents were out.[47] At the other extreme would be a rule that no person or persons who are alone at premises can allow the police to enter if any other person who lives at those premises is absent and has not given his consent; the niece or her husband would not be able to admit the police to their living room without the consent of her absent uncle (or even the absent housekeeper who lives in a room on the third floor and sometimes uses the living-room).[48] The only other alternative within these extremes is a re-

46. One can imagine a living arrangement in which each held his privacy of presence subject to the wishes of the others, so that any one of them could admit whomever he chose at any time. If each indeed regularly admitted persons over the others' objections, the police also would have to be admitted on that basis. That result would stretch the proposed analysis to the limit of its logic; its peculiarity lies in the living pattern itself.

47. The babysitter's consent was relied on in People v. Misquez, 152 Cal. App. 2d 471, 313 P.2d 206 (Dist. Ct. App. 1957), evidently on the mistaken basis of apparent authority. *Cf.* text at notes 42-43 *supra*; People v. Carswell, 149 Cal. App. 2d 395, 308 P.2d 852 (Dist. Ct. App. 1957) (police admitted by housepainter; search invalid).

A still more extreme rule would be that any person who is present, notwithstanding the opposition of any others absent *or present*, could authorize a police entry. This rule would allow the babysitter to admit the police despite the presence of a vociferously objecting homeowner.

48. Still more extreme would be a rule that all persons who live at the premises and all persons who are present at the time must consent to the entry. This rule would require all the guests at a party (or, at the limit, all the patrons of a restaurant) to agree to an entry by the police.

turn to property law concepts of title and possessory interests, which are remote from the purposes of the fourth amendment.

A consequence of this approach is that the police will sometimes obtain evidence against a person that he himself would not have given them. But it is no part of the purpose of the fourth amendment simply to shelter criminals from the discovery of evidence of their crimes. On the other hand, the approach is plainly a poor basis for advising the police when to rely on the cooperation of the lady or man of the house or their elderly uncle or anyone else. That is simply a reflection of the complexity of our patterns of communal living, which in turn determine the kinds and degrees of privacy that we have.

In *United States v. Matlock*, the Supreme Court stated that it did not reach the question whether searching officers' *reasonable belief* that authority to consent was valid was sufficient to uphold a search.[49] The answer to the question is clearly no. "Apparent authority" to consent is not by itself a basis for sustaining a search, although a good faith effort to obtain consent may help to sustain a claim that there was a sufficient emergency to overcome the requirement of a warrant.[50] Except in the emergency situation, when the police mistakenly rely on apparent consent, they are not denied something that the Constitution says they should have, but something that the Constitution says they should not have. Since there is a prescribed procedure—an application for a warrant—for all that they are allowed to do, the police have no reliance interest worthy of protection.[51] The only sensible guide for the police is that they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper.

C

The explanatory value of specific reference to privacy of presence and privacy of place is evident in three situations that have troubled the courts and commentators and that the Supreme Court's general

49. 415 U.S. 164, 177 n.14 (1974).

50. *See* text and note at note 36 *supra*.

51. If the police are instructed to rely on consent, they do have a reliance interest so far as their individual civil liability for an unlawful search is concerned. The law must then provide that they are not civilly liable when they act in good faith, or that the public authority that gives the instruction will protect them from personal liability. Were police held individually liable in such cases, they would surely redefine their duty for themselves accordingly.

discussions of privacy leave obscure. In *Jones v. United States,*[52] the defendant was a casual, occasional user of the apartment of a friend. Narcotics agents executing a search warrant entered the apartment, from which the friend had been gone for some days, and searched it in the defendant's presence. In a bird's nest outside a window, they found narcotics and narcotics paraphernalia, for possession of which the defendant was prosecuted. The Supreme Court held that the government could not convict him by proving his possession and at the same time require him to establish his possession as a basis for challenging the search. "The possession on the basis of which petitioner is to be and was convicted suffices to give him standing [to make the challenge]."[53]

The holding has led to supposition that there is a privacy of *possession* that the fourth amendment protects.[54] As the facts of *Jones* illustrate, the "possession" at stake is not literally having in one's hand or on one's person, in which case the seizure and search of the person would obviate any additional need to establish standing; rather, it is the extended possession of an item that one has nearby and within his control. Jones's privacy of presence was invaded. Privacy of presence does not depend at all on a possessory interest; but in the circumstances of the case, the allegation of possession depended on and therefore established Jones's presence. When, as in *Jones*, a person is arrested for a crime on the

52. 362 U.S. 257 (1960).

53. *Id.* at 264. To some extent, the holding in *Jones* was based on the perceptible unfairness of allowing the government to take contradictory positions in the same case. To that extent, it has been questioned in Brown v. United States, 411 U.S. 223 (1973), where the Court said that since "the self-incrimination dilemma, so central to the *Jones* decision" had been eliminated by Simmons v. United States, 390 U.S. 377 (1968) (which held that a defendant's testimony in support of a motion to suppress evidence could not be admitted against him at trial on the issue of guilt), it was an open question whether the automatic standing rule of *Jones* was needed any longer. 411 U.S. at 228.

54. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice Stewart, writing at that point for three other members of the Court, said that the police could not seize items discovered in plain view during a lawful search if they knew before they searched that the items would be discovered. *Id.* at 470-73. Since the police are lawfully present in such circumstances, it may appear that only possession of the items is protected by this rule. As the discussion in the opinion makes clear, however, Justice Stewart's argument was based on the specific requirement in the second clause of the fourth amendment that items to be seized be particularly described in a warrant. If the police make a lawful arrest that legitimates a search *without* a warrant, they may seize items even though they expect to find them, as, for example, in Draper v. United States, 358 U.S. 307 (1959). At one point, Justice Stewart extended his analysis to legitimate *warrantless* searches, 403 U.S. at 471; but the extension was limited to items that the police expect to find and do find in plain view *outside* the area of legitimate search. *See id.* at 465 n.24, 482. As thus extended, the argument protects privacy of place, not any possessory interest. Justice White discussed the issue at length in his opinion, and disagreed sharply with Justice Stewart's reasoning. *Id.* at 510, 512-20.

basis of current possession, unless the item was actually on his person the charge must rest either on his presence when and where the incriminating object was found or on his relation to the place.[55] Without one or the other there would be no basis for the allegation of possession.

In a situation in which neither privacy of presence nor privacy of place is involved, a person's relationship to a seized item, however incriminating, does not establish any interest in privacy that the fourth amendment protects. The amendment does not prevent the police from seizing a lost or mislaid item that they find on the street or on a bus or in a bank, although it may incriminate the owner and, for some purposes, may still be regarded as "in his possession."[56] Nor does possession confer protection if privacy of presence or privacy of place is overcome by another person's consent. In *Jones*, for example, if the owner of the apartment had been present and given his consent to the search, the defendant's objection would not have made a difference.[57]

The second troublesome situation was presented in *Lewis v. United States*.[58] A police agent posed as a narcotics user to purchase narcotics from the defendant. Had the purchase been made on the street, as is usual, no fourth amendment question would have arisen. In

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55. *Past* possession might of course be proved in a variety of ways. But the *Jones* rule manifestly has no application to a case in which the police seize goods and the defendant is prosecuted on the basis of possession that has terminated by the time of the seizure. *See, e.g.*, United States v. Bozza, 365 F.2d 206, 223 (2d Cir. 1966); People v. Cefaro, 21 N.Y.2d 252, 287 N.Y.S.2d 371, 234 N.E.2d 423 (1967).

In United States v. Jeffers, 342 U.S. 48 (1951), police seized the defendant's narcotics, which he had placed on the top shelf of a closet in his aunts' hotel room. He had a key to the room and permission to use it at will, and he did use it often; but he did not have permission to store narcotics there. The Court summarily rejected the claim that the defendant's privacy had not been invaded. "The search and seizure," it said, "are . . . incapable of being untied." *Id.* at 52. To the extent that the Court's cryptic explanation of defendant's standing indicated more than momentary irritation with the requirement of standing, it rested on the defendant's privacy of place in the premises, created by his access to and use of the room.

56. *See, e.g.*, Long v. State, 33 Ala. App. 334, 33 So. 2d 382 (1948) (larceny of found goods); State v. Courtsol, 89 Conn. 564, 94 A. 973 (1915) (same).

57. The courts have been most troubled by the *Jones* rule in cases in which possession is unlawfully acquired and creates privacy of place. That situation has arisen when the defendant is in possession of a stolen car when he is arrested. *E.g.*, Glisson v. United States, 406 F.2d 423 (5th Cir. 1969) (stolen truck); Simpson v. United States, 346 F.2d 291 (10th Cir. 1965). In such cases, the defendant's standing to object to a search of the car has been upheld. *But see* United States v. Kucinich, 404 F.2d 262 (6th Cir. 1968); *cf.* United States v. Konigsberg, 336 F.2d 844 (3d Cir. 1964) (arrest in a garage). In these cases the significance of privacy of place, albeit unlawfully acquired and temporary, is evident if one contrasts a case in which the defendant is arrested in a car in which he is a hitchhiker. If the car's owner consents to a search of the car, the hitchhiker's "possession" of narcotics that the police find under the seat will not sustain an objection to the search.

58. 385 U.S. 206 (1966).

Lewis, the defendant invited the agent into his home, where the sale was made. The Supreme Court held that no constitutionally protected right was violated. Neither Chief Justice Warren's opinion for the Court nor Justice Brennan's brief concurring opinion is very persuasive. They reflect more than anything else belief that such practices are "essential" police work that must be allowed.

Since *Lewis* is an unusual case and the agent's testimony was not different from what it would have been if the transaction had occurred on the street, the Court's belief is easily accepted. But it is not thinkable that we would allow the police to do the same thing on a large scale. Suppose, for example, that the police deployed a squad of men to pose as gas and electric company inspectors in order to make a general survey of the contents of cellars. Plainly, the fourth amendment would prohibit such a practice, notwithstanding that the "inspector" was invited to enter in each case. We do regard deliberate deception about an obviously material—indeed controlling—fact as inconsistent with voluntariness.

Neither of the majority opinions in *Lewis* uses the word "consent," which would have focused attention on the deceit by which the invitation to enter was obtained; yet it is only on the basis of consent that the agent's entry into the house might be justified.[59] *Lewis* was decided wrongly. The fourth amendment prohibits such an entry whether the agent uncovers evidence or not. It is immaterial that the evidence gathered as a consequence of the entry might have been obtained lawfully outside the house.

The third situation arose in *United States v. White*,[60] in which the Supreme Court upheld the admission in evidence of government agents' testimony about the defendant's conversations with an informer. The conversations took place in the informer's home and car, in a restaurant, and in the defendant's home, and were overheard by the agents mostly by means of a radio transmitter carried by the informer. Both Justice White's plurality opinion and Justice Harlan's forceful dissent focused on the element of electronic eavesdropping. Justice White insisted that if the informer's conduct and

59. Justice Brennan said that a person can "waive his right to privacy in the premises" and does so "to the extent that he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. When his customer turns out to be a government agent, the seller cannot, then, complain that his privacy has been invaded so long as the agent does no more than buy his wares." *Id.* at 212, 213. Obviously, however, the agent does do "more than buy his wares," and the defendant would not have permitted him to do even that but for the deception. Underlying Justice Brennan's view, and also the view of the majority, is the fact that the deception related to the defendant's unlawful purpose in admitting the agent. It was deception nonetheless.

60. 401 U.S. 745 (1971).

revelations without electronic equipment would not have violated the defendant's privacy protected by the fourth amendment, neither did that same conduct accompanied by instantaneous transmission and recording. "If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case."[61] Justice Harlan objected that "third-party bugging" made all the difference.

> Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.[62]

While I agree with Justice Harlan's description of the consequences of too much bugging, I cannot locate the basis for his conclusion in the fourth amendment. Much that is "frivolous, impetuous, sacrilegious, and defiant" is without the amendment's protection. There is, for example, no right under that amendment not to testify about what one has said or heard when it is any or all of those things. The withholding of such information and much else about oneself is indeed an aspect of privacy, and one of great importance. But it is not one that the fourth amendment protects. What is at stake in *White,* except for the conversations in the defendant's home, is related to that privacy which is protected by the privilege against self-incrimination and, for different reasons, by the first amendment. As the Court said elsewhere, "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' . . . Other provisions of the Constitution protect personal privacy from other forms of governmental invasion."[63]

There is, of course, no way of proving that Justice Harlan's appropriate fear of excessive bugging should not be reflected in the

61. *Id.* at 752.
62. *Id.* at 787-89 (footnotes omitted).
63. Katz v. United States, 389 U.S. 347, 350 (1967) (footnotes omitted).

fourth amendment. But there is no stronger argument for his conclusion than simply the importance of controlling bugging. As the plurality opinion to the contrary shows, the opposing view is just as easily supported by the belief that controlling bugging is not so important, at least when those who are bugged are criminals. It is that kind of easy passage from conclusion to argument that has made consistent application of the fourth amendment difficult.[64] Reasoning at large about "privacy," both the plurality and dissenting opinions disregarded the difference between conversations outside the defendant's home and conversations in his home which the informer was able to enter only by calculated deception. After *Lewis*, their disregard is not surprising; but it was mistaken just the same.[65]

II

If the fourth amendment's general requirement of reasonableness were an independent condition for issuance of a search warrant, the grant or denial of a warrant would tell us something about the nature and extent of the protected privacies; the criteria of reasonableness within the protected areas would be an indication of the areas' shape. Interpretation of the warrant clause has not followed that course. According to the established view, the constitutional

64. Richard B. Parker has written critically of the result in *White*. *See* Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974). He provides a definition of privacy that embraces protection against an unwanted auditor whom one reasonably expects not to be there, and concludes that the *White* situation is "in or out" of the fourth amendment according to the Supreme Court's balance between the needs of law enforcement and the loss of privacy. I have no quarrel with Professor Parker's conclusion that *privacy* includes what he says it does. Elsewhere in his article he helpfully indicates the multiformity of privacy. But he offers no justification for his move from privacy as such, or as he defines it, to the fourth amendment. It is just that move that leads to the " 'tis–'tisn't" balancing of interests that characterizes decisions in this area.

65. One might try to bring a prohibition against "wired informers" within the privacies that the fourth amendment protects by treating the situation as an invasion of privacy of presence. The defendant in *White* intended to speak in the presence of one person, not several. That argument fails, however, when applied to conversations in the informer's home and car and in the restaurant, for the same reason that an objection to the informer himself (because of his deceit) would fail. In the defendant's own home, the informer invaded both his privacy of presence and privacy of place—*pace Lewis*—without regard to the eavesdropping.

When a deceitful informer's own conduct is not a violation of privacy, the additional deceit involved in his secret transmission of the conversation is not either. Another way of noticing the same point is to consider whether an unwired informer's subsequent disclosure of a conversation (for example, as a witness in court) is an invasion of fourth amendment privacy independent of whatever invasion may have occurred from his (deceitful) participation in the conversation. All agree that it is not, even if the speaker always intended that his words not be repeated elsewhere. Justice Harlan's emphasis on the "off-handedness" of casual speech rather than the privacy of protected speech was correct.

protection is wholly overcome whenever the express requirements of substance (probable cause and particularity) and form (an oath) are met. Police can obtain a warrant to search as readily to recover the fruits of a petty larceny as to discover a murder weapon, and without regard to the availability of other adequate evidence. Nor is any distinction made, from the individual's perspective, according to the place to be searched; with a warrant, police can search a bedroom or a dresser drawer or a locked desk as readily as a living room or brief case. Constitutionally, there are no degrees of privacy.

Nothing in the language of the fourth amendment requires so unitary a solution. Yet among current and recent members of the Supreme Court, only Justice Douglas seems to have perceived the possibility and value of a more discriminating approach.[66] Part of the explanation for the general failure even to consider that approach is no doubt the constantly shifting relationship between the amendment's two clauses, which has focused attention on when the need for a warrant can be avoided and not on what might be required beyond probable cause when a warrant is obtained.

At one time it appeared that the law might develop differently. The Supreme Court once declared that a search warrant could not be used to gain entry to a man's house "solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . ."[67] Such a search, the Court said, would be unreasonable, although a comparable search to accomplish certain other governmental objectives—to seize contraband or the instrumentalities of crime—would not be. Had that reasoning been pursued, it might readily have developed into more general requirements of reasonableness for issuance of a warrant. If the purpose of a search was relevant generally, so might be the need for evidence in a particular case and the extent of the invasion that would be required.

Almost immediately, however, many courts routinely avoided the prohibition on searches for "mere evidence" by accepting some other governmental objective as a pretext for an evidentiary search. With a little imagination, there is scarcely anything of evidentiary significance that cannot be described as an instrument or fruit of the

66. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting). He argued there that the fourth amendment creates "a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by the magistrates through the issuance of warrants," *id.* at 313, as well as another less sacrosanct zone that is subject to these invasions. In the former category, he said, are "books, pamphlets, papers, letters, documents, and other personal effects." *Id.* at 321. He rejected the notion that the fourth amendment creates *places* that are sanctuaries. *Id.*

67. Gouled v. United States, 255 U.S. 298, 309 (1921).

crime.[68] The "mere evidence" rule, as it was called, was misapplied to searches that were justified without a warrant (as to which, therefore, the rule's limitation of the grounds for issuance of a warrant was irrelevant). In such cases, courts recognized that it made little sense to limit the seizure of evidence; since the search was not thereby limited in any way and there was no protection in the fourth amendment against a seizure of property as such; the government would lose the use of the evidence without any compensating gain of individual privacy. The application of the rule in such cases—largely theoretical, since it was almost always found not to apply to the facts of the case—was the stimulus that led the courts to undervalue and finally to undo it. In 1967, the Supreme Court acknowledged that the rule was honored in form but ignored in practice and, with scant attention to its original purpose, abandoned it.[69]

The requirement that an application for a warrant state particularly the intended scope of a search is just that; one must be particular, but only because general searches are prohibited. There need be no assessment of the worth of the particular search, and ordinarily there is none. While there is nothing reassuring about the Court's failure even to consider constitutional premises that would discriminate among searches, much can be said for uncomplicated insistence on the broad principle prohibiting general searches; much emphasis on particulars might obscure the basic principle in the fourth amendment. Magistrates who issue warrants are not likely to be able or willing to make refined judgments that balance competing public and private needs.

No such doubts could be raised against a nonconstitutional, administrative rule. Whether the Constitution allows them to do so or not, the police should not search unless the public purpose outweighs the private interests. The procedure for obtaining a warrant contains the means for implementing that principle. The value of the procedure is not that we gain the judgment of a "neutral and detached magistrate," as the Supreme Court likes to say.[70] Typically,

68. In one case, for example, a bank robber's shoes were described as an instrumentality of the crime because they facilitated his getaway and because a shod robber "would not attract as much public attention as a robber fleeing barefooted from the scene of the hold-up." United States v. Guido, 251 F.2d 1, 4 (7th Cir. 1958).

69. Warden v. Hayden, 387 U.S. 294 (1967). The Court said, with respect to the distinction among the reasons for a search expressed in *Gouled:* "[T]he prevention of crime is served at least as much by allowing the Government to identify and capture the criminal, as it is by allowing the seizure of his instrumentalities." *Id.* at 306 n.11.

70. The repeatedly quoted phrase is from Johnson v. United States, 333 U.S. 10, 14 (1948). *Johnson* was one of several cases (decided at about the same time) that affirmed the importance of the warrant procedure. *See also* McDonald v. United States, 335 U.S. 451

the magistrate is neither detached nor very competent; and he is dependent for his information and his judgment on the police and the prosecutor. Just the same, adherence to the procedure obliges the police to deliberate before making a search, to determine in advance how wide the search will be, and to articulate the reason for the search with some specificity. The police might be required also, on a nonconstitutional basis, to state in advance their conclusion that the need to search outweighs the intrusion, and to give reasons for the conclusion if they are not obvious. No doubt such statements would often be boilerplate. But sometimes they would not; how seriously the police responded to such a requirement would depend on how seriously we took their responses. In any event, even boilerplate offers some protection.

The remaining questions about searches on a warrant are mostly technical. Although the words of the Constitution make these searches seem the most usual, they are in fact exceptional, because so many occasions in which a search without a warrant is allowed occur in regular police work. The verbal formulation of the test of probable cause has not changed and is probably about as good as we can devise.[71] So long as there is a separation between investigative and prosecutorial (or magisterial) officials, the former deciding what is useful to an investigation and the latter what is proper to it, the warrant procedure is probably about as good as we can have it. Constitutional doctrines that allow the police to search without a warrant even if a warrant could practicably have been obtained—the doctrines discussed in the next section—needlessly deprive us of the benefits of advance determinations. If those doctrines are preserved at the constitutional level, there should be an administrative requirement that warrants be obtained. And when it is not practicable to obtain one in advance, the officer who makes the search should be required to justify it promptly afterwards.

III

The ambiguous relationship between the fourth amendment's two clauses has been resolved largely by creation of a large class of

(1948); Trupiano v. United States, 334 U.S. 699 (1948). The Supreme Court has relied more on what these cases said than on what they did. *See generally* text and notes at notes 72-100 *infra.*

71. The standard formula, derived from Carroll v. United States, 267 U.S. 132, 162 (1925), is that there is probable cause if " 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959).

cases in which a search without a warrant is constitutionally "reasonable" and therefore permitted. The most important category is searches "incident to an arrest." Conceived narrowly as the authority of an arresting police officer to protect himself and prevent an escape, such a search might be considered truly incidental to the arrest and not an event requiring independent justification. Although the "incident" rubric does draw on the close connection with an arrest, it has not been limited by that narrow conception.

Until recently, the leading case was *United States v. Rabinowitz,*[72] in which the Supreme Court held that, after arresting the defendant in his office on a charge of dealing in forged stamps, the police could search his office, desk, safe, and filing cabinets for one and a half hours to find the stamps. Since the search was for particular items in a particular place, and the police presumably had probable cause to believe that the stamps were there, the search was not the kind of general search that the amendment prohibits. But it was also just the sort of search for which a warrant is typically required. Had Rabinowitz not been present when the police arrived, they could not have made the same search without a warrant. As Justice Frankfurter pointed out in dissent, simply labeling the search an "incident" of an arrest to which it was functionally unrelated did not overcome the difficulty.[73] In the wake of *Rabinowitz,* some lower courts all but ignored the warrant clause whenever the police had made a related arrest.[74]

Nineteen years after *Rabinowitz,* in 1969, the Supreme Court turned the tide, but weakly. In *Chimel v. California,*[75] it declared that after a person was arrested, the arresting officer could search him for weapons or means of escape. "Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."[76] The Court went on:

> In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested

72. 339 U.S. 56 (1950).

73. *Id.* at 68.

74. *E.g.,* Robinson v. United States, 327 F.2d 618 (8th Cir. 1964) (search of four-room apartment, including suitcases, drawers, etc.); Leahy v. United States, 272 F.2d 487 (9th Cir. 1959) (search of entire house).

75. 395 U.S. 752 (1969).

76. *Id.* at 763.

> can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.[77]

The Court's functional connection between an arrest and an incidental search for weapons and means of escape was not maintained when the Court considered searches for evidence. The danger that evidence might be destroyed is not ordinarily a basis for dispensing with a search warrant; indeed, in *Chimel* itself, the Supreme Court rejected Justice White's argument in dissent that police must be allowed to search the premises thoroughly because confederates—Chimel's wife was at home when the arrest occurred—might destroy evidence.[78] Why should an arrest make all the difference for evidence that the arrested person himself might destroy? More generally, the police do not obviously need unrestricted authority to search the area within a person's "immediate control" in order to arrest him. To conduct the search, they will have to control the man; and if they do, why do they need to search? So far as "the area" is concerned, why can't the police often just remove the man?

Nevertheless, *Chimel* did impose some limitations on an "incidental" search. In *Vale v. Louisiana,*[79] decided the following year, the police arrested the defendant in front of his home. Fearing that members of his family would destroy evidence, they entered the house and seized narcotics they found there. Relying on *Chimel,* the Supreme Court reversed the conviction. The matter was muddied considerably by *Chambers v. Maroney,*[80] decided with *Vale.* Responding to the radio report of a robbery, police stopped a car and arrested the occupants. They searched the car after it had been removed to police headquarters. Plainly, the justifications for a search given in *Chimel* were inapplicable. But the Court concluded that the police

77. *Id.*

78. Justice White's argument is at 395 U.S. 770, 774-75, to which the Court responded (summarily) at 764-65.

79. 399 U.S. 30 (1970).

80. 399 U.S. 42 (1970).

could have searched the car on the spot; and, having probable cause to believe that there was seizable evidence in it, they could have impounded it at the police station until a warrant was obtained. The Court said there was little difference between impounding the car till a warrant was obtained and searching it immediately without a warrant.[81] The conviction was affirmed.

Could the police have "impounded" Chimel's house or Vale's house until a warrant was obtained, lest evidence be destroyed in the meantime? The danger was greater in those cases than in *Chambers,* since there were members of the arrested person's family on the premises; in *Chambers,* all the persons in the car were in custody, the car had been impounded, and no one had appeared to claim it. There is no suggestion in the two house cases that "securing" the houses temporarily would have been proper; indeed, there is a suggestion in *Chambers* that it would not, even if an unforeseeable need had arisen.[82] Yet, aside from the observation that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars,"[83] the Court did not distinguish the two situations.

If one took seriously the Court's statement that there is a "constitutional difference between houses and cars" that does not depend on the functional necessities of police work, that would support the otherwise rejected doctrine of degrees of privacies.[84] The lesser constitutional protection of cars would reflect the fact that they are less private places than houses. Many people resort to their cars, how-

81. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Id.* at 52. In his dissent, *id.* at 64, Justice Harlan observed:

> Even where no arrests are made, persons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. To be sure, one can conceive of instances in which the occupant, having nothing to hide and lacking concern for the privacy of the automobile, would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. . . . The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of " 'adherence to judicial processes.' " *E.g., Katz v. United States,* 389 U.S. at 357.

82. "The same consequences may not follow where there is unforeseeable cause to search a house." 399 U.S. at 52.

83. *Id.*

84. *See* text and note at note 66 *supra.*

ever, for a privacy of presence and a privacy of place that they lack in crowded living conditions. Nothing that the Court said in *Chambers* overcomes that fact.

More recently, the Court has offered a different reason why searches of cars may be allowed without warrants: "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office."[85] Although the Court mentioned that the noncriminal "police-citizen contact" involving automobiles may bring evidence of crime into police officers' "plain view,"[86] in the actual case the police found evidence by searching the locked trunk of a car after it had been towed to a privately owned service station, while the defendant who had been driving the car was in the hospital. There was no indication that anyone would try to enter the car before a warrant could be obtained or that the police thought about obtaining a warrant at all. The Court finally defended its conclusion that the search was reasonable in another way:

> The 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. Very little that has been said in our previous decisions . . . and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.[87]

Given the Court's approach to the problem, its despair of convincing anyone who disagreed with the result was justified.

In 1973, *Chimel*'s would-be functional approach to searches accompanying an arrest was undermined openly in two traffic-arrest cases, *United States v. Robinson*[88] and *Gustafson v. Florida.*[89] In both, the defendant was arrested for driving without a license and was searched thoroughly. The Court upheld the searches without any showing that the arresting officers thought a search was necessary to effect

85. Cady v. Dombrowski, 413 U.S. 433, 441 (1973).
86. *Id.* at 442.
87. *Id.* at 448.
88. 414 U.S. 218 (1973).
89. 414 U.S. 260 (1973).

the arrest safely; there plainly was no evidence of the crime for which they were arrested that might be destroyed, nor was there an indication that they might destroy evidence of other crimes. The connection that the Court had made in *Chimel* between the arrest and the search was discarded: "This general exception [to the warrant requirement] has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee."[90] Only the second proposition, the Court said, had ever been "subject to differing interpretations."[91] Although the reasonableness of a search of the person derived generally from the need to effect the arrest, the assumed connection did not have to be present in a particular case or even class of cases, like traffic arrests. "[A]ll custodial arrests [are] alike for purposes of search justification."[92]

Given the ambiguities, not to say casual shifts, in the Supreme Court's doctrinal announcements, it is not surprising that lower courts take their directions from above less than seriously. *Chimel* deflated *Rabinowitz,* but it has not been immune from being inflated and devalued itself. Purporting to rely on *Chimel,* the United States Court of Appeals for the Fifth Circuit held that FBI agents who had arrested a person lying on a mattress in his apartment could search a wallet inside a cigar box on a table next to the mattress.[93] The Sixth Circuit held that after about eight narcotics agents had arrested a man in his apartment, ordered him to stand against a wall, and "secured" him with a belt, one of the agents could search a closed drawer in a table "three to five feet" from where the man had been *directed* to stand.[94] And the New York Court of Appeals, concluding that the "grabbable area" under *Chimel* did not really depend on the arrested person's ability to grab anything, held that the area included a closet in which the arrested person had been hiding, after he had been taken out of the closet, handcuffed, and removed from the room.[95] And so forth. For all its statements, and there have been many, the Supreme Court has not advanced on the issue that divided the Court in *Rabinowitz.* All one can say is that, for the moment, the see-saw between the two clauses of the amendment is tilted away from the warrant clause.

90. United States v. Robinson, 414 U.S. 218, 224 (1973).
91. *Id.*
92. *Id.* at 235.
93. United States v. Harrison, 461 F.2d 1127 (5th Cir. 1972).
94. United States v. Becker, 485 F.2d 51, 53 (6th Cir. 1973).
95. People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139 (1973).

Last term the Supreme Court marked out another large category of searches that are reasonable and constitutionally permitted without a warrant. Once a person "is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing on the one hand and the taking of property for use as evidence on the other."[96] In the actual case, *United States v. Edwards,* the defendant had been arrested at around 11:00 p.m. for an attempt to break into a post office. The next morning, he was given other clothes and his own clothes were taken as evidence; his clothing, which had on it paint chips that matched the paint on the post office, was admitted in evidence. The majority insisted that the police, who had probable cause to examine the clothing, had acted reasonably; four dissenting Justices insisted that no warrant had been obtained. Both propositions were correct. The opinion of the Court resolved the issue, but only by a headcount—and that, indeed, by only one vote.

The apparent conclusion of the majority in *Edwards* is that a "jailhouse search" is lawful, at least unless there are peculiar aggravating circumstances.[97] More is involved in the question than appears from the Court's rather casual conclusion that it is reasonable to search a person in jail. The "search" of possessions that a person carries with him can be a means for imposing one's will on him and making it clear to him that he is not in control. The contents of a wallet can be spread out on a table, handled, commented on ("Who's this babe?" "Whatcha got his picture for?"), and sullied. Items that are intimate not intrinsically but because of long, familiar association can be exposed. Nothing about an arrest makes such an exercise of authority incidental or reasonable; the need to inventory personal property or maintain security in cells requires only that the property be placed in a locker by the person himself. Given that a jailed person is already profoundly subject to the state's exercise of authority and often force, it is particularly important to avoid needless additional subjection.

Searches incident to an arrest, and other searches based on exceptions to the warrant clause, are typically threats to privacy of place; one way or another, the police are legitimately present. In *Robinson,*

96. United States v. Edwards, 415 U.S. 800, 807 (1974).
97. *See id.* at 808 n.9.

Justice Powell demonstrated how devastating the failure to distinguish the two kinds of privacy can be. He observed:

> I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.[98]

Even though privacy of presence is "legitimately abated," the items carried on one's person may reveal an important aspect of privacy that the arrest itself left untouched.

It is well known that in practice searches on a warrant are the exception rather than the rule. The extent to which the Court has made the warrant procedure exceptional even doctrinally is obscured by its unwillingness or inability to frame and test any general principles. The tendency has been to treat each situation in which the police are lawfully present for some reason other than to search as a separate category, which is exempt from the warrant clause if there is a general likelihood that something will be found. That approach limits the requirement of a warrant to the small number of cases in which government officials plan to initiate contact with the person for the primary purpose of making a search.

When contact is unplanned, as in many police encounters, there may be strong reasons to make some kind of search and no opportunity to obtain a warrant. An arresting officer's responsibility to protect himself and effect the arrest often gives such reasons. So also there are circumstances in which a search of an automobile or a search of possessions at a jail or some other search without a warrant is manifestly necessary. But legitimation of broad categories of warrantless search, unrelated either to the circumstances that make a

98. 414 U.S. 218, 237-38 (1973) (concurring opinion) (footnotes omitted).

search necessary or to the opportunity to obtain a warrant, violates the fourth amendment's basic prohibition against general searches. Situations like "arrest," "contact with automobiles," and "detention in jail" are far too common, more so for some portions of the population than others, for us to exempt them wholesale from the requirement of a warrant. Of course, we cannot ask that policemen calibrate their conduct with precision if circumstances require them to act swiftly, forcefully, and often dangerously; but that hard reality does not justify broad rules that make it immaterial whether such circumstances are present or not.

The current approach of the Court separates the two clauses of the fourth amendment and treats the warrant clause as a narrow, isolated prescription. The link between the clauses, however, is that they share and work together toward the common purpose of prohibiting general searches. Warrantless searches in the criminal context should be permitted if (1) a search is manifestly necessary to accomplish a legitimate governmental objective other than criminal investigation; *and* (2) the definition of the necessity serves the main purpose of the warrant procedure, to avoid general searches; *and* (3) the search is strictly limited to the necessity; *and* (4) a warrant could not reasonably have been obtained.

In *Warden v. Hayden,*[99] police received a report minutes after an armed robbery that the robber had been followed and seen entering a house. They went directly to the house and knocked. They told the woman who answered the door why they were there and asked to search. She did not object. The police spread through the house and found the robber in a bedroom on the second floor. In such a situation, the first concern of the police is not criminal investigation as such but, as keepers of the peace, to take control of the situation, apprehend the robber, prevent harm to others, and restore order. The urgency of those tasks did not permit them to wait to enter until a warrant could be obtained; but reference to the necessity for the search accomplishes the purpose of the warrant clause. The Supreme Court concluded correctly that in the "exigencies of the situation" the warrantless entry and search for the robber and weapons or means of escape did not violate the fourth amendment.[100]

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99. 387 U.S. 294 (1967).

100. *Id.* at 298. Since the search for weapons and means of escape preceded the robber's arrest, it could not have been justified as simply an incident of the arrest, even if that exception were given broad scope. But if the search for the man is justified by the need to arrest, so is the search for weapons and means of escape by which the arrest could be prevented.

On the other hand, a search for evidence cannot be regarded as a means of controlling the

IV

The structure of the fourth amendment depends on individual access to or possession of private property, from which privacy of presence and privacy of place arise. Up to now, we have considered only the division of property between "mine and thine" and nobody's (or everybody's)—between private and public property. In everyday life there is no such clear division. We are accustomed to being "in public" while on private property: in a supermarket, in a moviehouse, or at a baseball game. Such privately owned places must admit all persons under equal conditions and pursue a rational and socially acceptable policy of admission and exclusion, which makes them "private" in a sense very different from, say, the privacy of one's home. We are accustomed also to being "partly" in public—in a telephone booth, for example, where we can be seen but not easily heard. In *Katz v. United States,*[101] the Supreme Court confirmed the constitutional relevance of such incomplete privacies.

Increasingly, we are accustomed to being private in public places. In urban areas, in which people spend large portions of time moving in crowds from one more or less private place to another, and many people are more or less in public most of the day—in offices, stores, and so forth—one becomes accustomed to substituting anonymity for privacy. In those conditions, the preservation of autonomy does not depend on being unobserved, which is impossible, but on being an unidentified member of a large mass. One is ob-

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actions of a man who has not yet been apprehended. On that score, the Court was disingenuous and unpersuasive. A police officer who found incriminating clothing in a washing machine in the basement—the robber was later arrested on the second floor—testified that he was looking for the "man or the money." Just the same (!), the Court said, it would infer that he was "also looking for weapons," *id.* at 299-300, and therefore it need not decide whether an evidentiary search would have been proper. A more straightforward approach would be to acknowledge that when police are making a rapid search of strange premises in pursuit of an armed robber, they cannot be expected to measure their actions very finely; so long as there is no indication that they are deliberately taking advantage of the situation to carry out a search that they otherwise could not make, the fruits of their action are properly obtained. In retrospect, it may have been foolish for the police officer to look in the washing machine for the man or weapons; but unreflective actions of that kind are typical of hasty conduct in dangerous circumstances.

Whether *Hayden* established a general principle for searches in "exigent circumstances" or is limited to cases of hot pursuit is unclear. One year earlier, the Court had upheld compulsory blood tests of drivers arrested without a warrant, where there was a clear indication that evidence of drunk driving would be found but would vanish before a warrant could be obtained. Schmerber v. California, 384 U.S. 757 (1966). The Court has not otherwise progressed towards a general principle, but lower courts have done so, mostly on the authority of *Hayden. See, e.g.,* United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

101. 389 U.S. 347 (1967).

served, but the observation is fleeting and unrecorded; and it is not attached to one's identity and made part of his history.

Too rigid reliance on the distinction between private and public places may serve us poorly in this context. Local officials have occasionally used "monitoring" devices like closed-circuit television to maintain surveillance over a large area like a public square—temporarily when a disturbance is expected or permanently if disturbances are frequent.[102] It is easy to regard such strategies as no more than the efficient use of technology; what two-hundred men could do by swamping the area is done more safely and less obtrusively by ten men with a few cameras and police cars. Since the fourth amendment appears not to prohibit the police from sending in lots of men, there appears to be no objection to doing the same thing with technology. Suppose, however, that in an attempt finally to end muggings in Central Park, New York City put the whole park "on television" from dusk to dawn, with radio-advised troopers ready to swoop down on signal. The park might be abandoned not only by the muggers, but also by lovers holding hands in secret or just in private, friends wanting to talk intimately with one another, an artist wanting to paint or think "to himself," people doing all sorts of innocent things they would not do on television.[103] Were this practice extended to other parks, all parks, and finally all public streets, the quality of life in the city would be profoundly affected, albeit without invasion of private property. Occasional technological surveillance of public places for a specific purpose is less threatening precisely because it is occasional; but privacy has temporal and circumstantial as well as geographic dimensions.

A comparable problem arises from another source. It is increasingly common for television cameras to observe and record everyone who enters private places like apartment houses or office buildings, and for cameras to record everyday transactions in banks, at supermarket checkout counters, and so forth.[104] Some department stores apparently use cameras to prevent thefts by observing people in dressing rooms. It is easy again to regard these devices simply as

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102. The New York Times reported, for example, that New York was using a closed-circuit television system to monitor the Times Square area. N.Y. Times, Sept. 26, 1973, at 37, col. 1. The Valley News (Lebanon, N.H.) reported that the Chief of Police of Windsor, Vermont, had made his second (unsuccessful) bid for funds to monitor the streets by closed-circuit television. Valley News, July 13, 1972, at 1.

103. Of course, the same people may avoid the park now for a different reason: fear of being mugged.

104. The New York City Police Department established a program to subsidize the installation of surveillance cameras in 3600 stores on major thoroughfares. N.Y. Times, Oct. 10, 1973, at 1, col. 1.

technological advances over "limitations" of human vision, not too unlike the large mirrors on public buses, to which we are all accustomed, by which the driver can observe anyone who might try to slip on or off without paying. Since the premises are private—that is, privately owned—and the observations made for private purposes, we are led to assume that what the fourth amendment protects is not at stake.

Technological surveillance that transcends the limits of the human body is not merely more efficient than "human" investigation. The aspects of privacy that are part of the pattern of our lives depend on our knowledge of human limitations. There is no *necessity* that observation be limited by the capacities of the human eye and ear. Those limits are contingent and can be extended by man's technical virtuosity. But if we do so, our attitudes and finally our behavior will be affected. It is a risky business to speculate how human beings will adapt to a changed environment. Without being very precise, experience suggests that if we were to lose the cloak of anonymity in public places, we should be less open, more crafty, more secretive, and more isolated than we are now. There is no way to establish that our behavior now is better (more "natural," or more "human," or more pleasant) than it would be if we expected and had less privacy. In the end, we must rely on an unproved vision of man in society.

The matter of telephonic wiretapping illustrates the point. Although my perception of the fourth amendment as an expansive text and my understanding of its purpose lead me to conclude that private telephonic conversations are among our protected "effects," I cannot offer a decisive argument that the original decision to the contrary,[105] now overruled, was wrong. Given that telephones appeared rather recently in the course of human history, I cannot insist that it is "natural" or "essential" that men be able to speak to one another over great distances in private. I can, however, point out the consequences of unprivate telephone conversations. Suppose it were announced that all telephone conversations from an even-numbered hour to an odd-numbered hour—6-7, 8-9, 10-11, etc.—would be recorded and reviewed by public officials. We should not be surprised to find a great shift in telephone use toward the odd-numbered hours.

The ability to transmit voices electronically over long distances, and then the ability to intercept such transmissions and eavesdrop

105. Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

on conversations without a trespass on the place where either the speaker or listener was located, led us to abandon physical trespass as an essential element of a constitutional violation. If, from our present vantage, a trespass seems obviously not essential, we should recognize that formerly it seemed just as obvious that it was. Similarly, the ability that technology gives us to observe large areas efficiently and unobtrusively requires us again to develop a more subtle understanding of the privacy that the fourth amendment protects. It is privacy of presence that is most jeopardized by such technology. If in the conditions of modern life anonymity has become the only means for privacy of presence in much of our lives, then we should reflect carefully before we allow incursions on it by unseen observers and recorders. It may make little difference to the outcome whether the incursion extends to a "private" place open to the public or a "public" place where people go to be in private.

Formerly it was sufficient to reject (or extend metaphorically) the notion of trespass because the overheard parties themselves remained "in private." If we are to preserve anonymity in public as an aspect of privacy, it will be necessary to reconsider the distinction between public and private places.[106] Until now, the courts have been willing to extend the concept of a private place only to places like a public telephone booth[107] or toilet facility,[108] where the physical arrangements create an expectation of privacy. The larger and more difficult step will be to move beyond the element of "place" altogether and consider the privacy that one expects while anonymously "in public" in private or public places.

Serious reconsideration of privacy of place would raise issues at another level. As long as one can plausibly urge that there are no societal, institutional barriers to realization of the American dream, so that acquisition of one's own private place is dependent—in a meaningful sense—on oneself, restriction of the fourth amendment's scope to the privacy that one has achieved otherwise is consistent with, if not required by, the values that the amendment protects. But if one believes that the society creates—or accepts, or simply includes within its definition—barriers to such acquisition, on the basis of race or wealth or any factors not within one's control,

106. This reconsideration would have a different basis and therefore would lead to different results from those urged by Justice Harlan in United States v. White, 401 U.S. 745, 768 (1971) (dissenting opinion). *See* text and notes at notes 62-64 *supra*.

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

108. *E.g.*, People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). *But see* Smayda v. United States, 352 F.2d 251 (9th Cir. 1965).

then it is not consistent with the protected values to afford privacy of place only according to private ownership of property. It is a far remove from the present or historical application of the fourth amendment to find in it a commitment to public provision of housing. According to one view of contemporary American society, that is where the amendment leads.

The privacy secured by the fourth amendment fosters large social interests. Political and moral discussion, affirmation and dissent, need places to be born and nurtured, and shelter from unwanted publicity. So do economic and aesthetic creation and enterprise. It would misconceive the great purpose of the amendment to see it primarily as the servant of other social goods, however large and generally valuable. What the fourth amendment protects above all is the conduct of ordinary lives.