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# The Fourth Amendment: Internal Revenue Code or Body of Principles?

Stephen A. Saltzburg\*

## *Introduction*

It is difficult to be certain when the Supreme Court made the body of Fourth Amendment law so complicated, inconsistent, and confusing that neither police nor citizens can be sure they understand the reach of and limits on law enforcement action. Although there were inconsistent decisions before the Supreme Court decided *Mapp v. Ohio*<sup>1</sup> in 1961, *Mapp* represented a watershed moment for the Court and may have had as great an impact on Fourth Amendment jurisprudence as any case before or since.

Prior to that decision the Court focused its attention on federal law enforcement and devoted less of its docket to criminal procedure cases than it does today.<sup>2</sup> Once it decided *Mapp* and was called upon to review state cases developing throughout the country, the Court was forced to deal with the myriad of state law enforcement issues that inevitably arise when law enforcement officers deal with a range of offenses as minor as traffic violations and as major as homicide. *Mapp* also meant that when the Court upheld a Fourth Amendment claim and found that the police violated the Constitution, evidence would to some extent<sup>3</sup> become unavailable. Thus,

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<sup>1</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961) (creating an exclusionary rule making inadmissible in state courts all evidence obtained by unconstitutional searches and seizures). Although the Court had held years earlier in *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), that the substance of the Fourth Amendment (i.e., the security of one's privacy against arbitrary intrusion by the police) was part of due process protected by the Fourteenth Amendment, the absence of an exclusionary rule meant that the Court did not have to worry that its interpretation of the Fourth Amendment would result in a federally mandated loss of evidence in state cases, which constituted the vast bulk of criminal cases in the United States.

<sup>2</sup> For the first one hundred years, the Fourth Amendment was rarely litigated in the Supreme Court, which is not surprising given that federal criminal jurisdiction was limited. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 106 (1937).

<sup>3</sup> The Court has created numerous exceptions to or limitations on the exclusionary rule. These make it impossible to know exactly what the result of suppression of evidence will be. For example, not all suspects have "standing" to complain about Fourth Amendment violations. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (holding that Fourth Amendment rights are personal, and only one whose rights are violated can complain). Another example is the "independent source doctrine." *See, e.g., Murray v. United States*, 487 U.S. 533, 537 (1988) (holding that evidence obtained unlawfully will not be excluded if later obtained by independent legitimate means). The exclusionary rule, with all of its limitations, is itself an example of how the Fourth Amendment resembles an intricate code.

the Court knew that every Fourth Amendment rule would set a standard for federal<sup>4</sup> and state law enforcement officers and thereby control law enforcement, but could also exact a price from society by letting a defendant who was in fact guilty, possibly of a serious crime, and others who were similarly situated go free. It would hardly be surprising, therefore, for the Court to feel torn as it rendered Fourth Amendment decisions, wanting to make Fourth Amendment protections meaningful but not wanting guilty defendants to go free as a result of law enforcement errors.

Whether it was this tension that led the Court to decide cases in an erratic way only the Justices can know, and even they might not be certain as to why particular rules or applications of rules were approved. Whatever the reason, there can be no doubt that for much of the forty-five years since the *Mapp* decision, the Court has made the meaning of the relatively few words that constitute the Fourth Amendment extremely complicated. The Court has created so many rules and subrules that the total body of Fourth Amendment law has begun to take on the shape of an Internal Revenue Code (a hodgepodge of rules enacted by ever-shifting coalitions of decision makers) rather than a body of coherent principles (of the type often associated with judicial decisions and reasoning).<sup>5</sup>

The Court itself has noticed the complexity of its work. From time to time, it has adopted “bright line” rules in an effort to provide some clarity amidst a jumble of confusion.<sup>6</sup> As it turns out, these bright line rules generally are announcements of an expanded police power that rests on judicial fiat rather than reason. The Court’s bright line rules run in one direction: they favor the police and disfavor claims of individual rights. But the problem with the bright-line-rule cases is not that they are unidirectional; the problem is that bright line rules are generally unprincipled and, for that reason, tend in the long run to make Fourth

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<sup>4</sup> An exclusionary rule governed federal law enforcement officers beginning with *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>5</sup> A 2002 analysis of Supreme Court cases by the Congressional Research Service of the Library of Congress concluded that “[e]xceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, e.g., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception.” CONG. RESEARCH SERV., LIBRARY OF CONG., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 28, 2002*, S. DOC NO. 108-17, at 1291 (2004).

<sup>6</sup> See, e.g., *New York v. Belton*, 453 U.S. 454, 462–63 (1981) (establishing a “bright line” rule permitting the search of the passenger compartment of a car incident to arrest). The Court maintains that it does not prefer bright line rules. See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“[W]e have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”). The discussion that follows will demonstrate, however, that the Court often adopts arbitrary lines in an effort to provide guidance to law enforcement officers.

Amendment doctrine arbitrary, inconsistent, and confusing.

The alternative to bright line rules is a body of principles that capture the essence of the Fourth Amendment. It is amazing that, after more than two hundred years of experience with the Fourth Amendment, more than ninety years with an exclusionary rule covering federal cases, and almost a half century with an exclusionary rule covering all cases, the Supreme Court has articulated only one fundamental Fourth Amendment principle—i.e., warrantless searches generally are *per se* unreasonable<sup>7</sup>—that is subject to so many exceptions and applies so relatively infrequently that it is a principle honored more in the breach than in the observance.<sup>8</sup>

In this article, I offer examples of the unsatisfactory present state of the law. I also suggest alternatives to the Court's holdings, seek to demonstrate why principled rules provide clearer guidance to law enforcement and citizens than arbitrary "bright line" rules, and explain how principled rules can enable law enforcement to do its work effectively while being true to basic Fourth Amendment values.

There are many examples that could be used to support the argument I make, and I have chosen those that make the case clearly and powerfully. I begin with the automobile exception to the warrant requirement of the Fourth Amendment, explain its history and the paucity of support upon which the Court relied in creating the exception, show how it is unprincipled and inconsistent with other cases the Court has decided, and demonstrate that the exception has led the Court to decide a number of cases in an arbitrary and inconsistent way. The sheer length of the discussion of the automobile exception cases is testament to the complexity and confusion it has generated. Although this is not an article about automobiles, after discussion of the automobile exception, I turn to the search-incident-to-arrest doctrine and, in part, focus on the special rules the Court created when it applied the doctrine to searches of persons arrested in

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<sup>7</sup> The Court has said that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>8</sup> Justice Scalia made this point in his concurring opinion in *California v. Acevedo*, 500 U.S. 565 (1991):

Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . ." Since then, we have added at least two more [exceptions, including] searches of mobile homes [and] searches of offices of government employees.

*Id.* at 582–83 (Scalia, J., concurring in the judgment) (first two alterations in original) (citations omitted).

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or near cars. The discussion of the doctrine illustrates the difference between adopting a principled approach, which the Court did at one time, and abandoning such an approach in favor of arbitrary, inconsistent, “bright line” rules.

After demonstrating the problems associated with the Court’s arbitrary and inconsistent decisions, I identify some basic principles that should guide the Court in interpreting the Fourth Amendment. First, I explain the importance of determining whether law enforcement officials are engaging in consensual or nonconsensual conduct. Second, I discuss seizures and *Terry* stops and offer suggestions on adopting principles that would make it easier for both law enforcement officers and citizens to know when a seizure occurs. In this section, I argue that it makes more sense to focus on police conduct rather than to require police to intuit what reasonable individuals think about police conduct. A focus on police conduct leads to the conclusion that a number of Supreme Court decisions provide less Fourth Amendment protection than they should provide. The discussion of seizures covers seizures of both individuals and property.

Third, I address what I regard as one of the most important, and sure to be one of the most controversial, suggestions for reform of Fourth Amendment law. I do this in a discussion of arrests, where I claim that the Court has failed to adequately consider the unreasonableness of many arrests for minor offenses. I discuss the reasons why law enforcement officers arrest suspects, offer a principled approach to limit the number of future arrests, and suggest an improvement on the Court’s approach to warrants as a prerequisite to arrest.

Fourth, I conclude with three straightforward suggestions for making the law of searches clearer and more principled. One deals with search incident to arrest. The other two address searches of property and the requirement of a warrant. The three suggestions would give the Warrant Clause of the Fourth Amendment the deference the Court claims it deserves, provide better guidance for law enforcement officers, and replace arbitrary rules with principled ones.

This article makes no claim that the Rehnquist Court was the sole or even the principal cause of Fourth Amendment law’s arbitrariness and complexity. The problems with Fourth Amendment doctrine are eighty years old, have grown over time, and have largely been ignored by both the predecessors to the Rehnquist Court and the Rehnquist Court itself. Fourth Amendment law was complex, inconsistent, and confusing before Chief Justice Rehnquist led the Court.<sup>9</sup> But the Rehnquist Court missed

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<sup>9</sup> Some of the confusion was generated while Chief Justice Rehnquist was an Associate Justice. Chief Justice Rehnquist was part of the Court’s decision making for three quarters of the post-*Mapp* period, as Associate Justice from 1972 to 1985, and thereafter as Chief Justice.

opportunities to correct the problems that it inherited and even exacerbated some of them as it continued down the path of the Warren and Burger Courts and their predecessors. With the Roberts Court now underway, the problems will continue unless the Court is willing to take a fresh look at the complex Internal Revenue-type law it has created.

*I. The Automobile Exception to the Fourth Amendment*

Given that Americans love their cars, love to drive, and use their cars for a variety of tasks,<sup>10</sup> it is surprising how the Supreme Court has dealt with automobiles in Fourth Amendment cases. It is fair to say that there is more bad law involving the automobile than any other single item, with the possible exception of narcotics.<sup>11</sup>

*A. Carroll v. United States*

The Court's first major automobile case was *Carroll v. United States*.<sup>12</sup> Federal prohibition agents stopped a car with two occupants driving westward on a highway between Detroit and Grand Rapids.<sup>13</sup> The agents had unexpectedly encountered the suspects and suspected that they were carrying illegal liquor.<sup>14</sup> After stopping the car, they searched it.<sup>15</sup> Chief Justice Taft's opinion for the Court laid out the legislative history of the federal prohibition statute authorizing the search and seizure of the vehicle, which read as follows:

"When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."<sup>16</sup>

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<sup>10</sup> Former Virginia Attorney General Mary Sue Terry came from a Virginia town that was so small that, as she so aptly put it, "[O]ur high school taught sex education and driver ed in the same car." Patricia Edmonds, *Walking Fine Line in Feud*, USA TODAY, June 21, 1991, at 2A.

<sup>11</sup> See generally Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

<sup>12</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>13</sup> *Id.* at 135.

<sup>14</sup> *Id.* at 135–36.

<sup>15</sup> *Id.* at 136.

<sup>16</sup> *Id.* at 144 (quoting National Prohibition Act § 26, 41 Stat. 305, 315–16 (1919)).

The statute required the federal officers to seize any intoxicating liquors found in a vehicle and to take possession of the vehicle itself.<sup>17</sup> Although the statute did not specifically address searches of the vehicle, it is fair to assume that even if officials came upon illegal liquor in plain view, they would want to search the vehicle to assure that they seized all of the liquor concealed therein. Since they were authorized to seize the vehicle because it contained contraband, any search would have been of a vehicle in which the government had a possessory right.<sup>18</sup> The Court claimed to be relying on early statutes that authorized warrantless searches. It quoted from section 24 of the Act of 1789, which provided:

“That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods . . . .”<sup>19</sup>

The Court in *Carroll* noted that the First Judiciary Act and other early federal statutes empowered officers to board and search vessels when they had reason to suspect the vessels were concealing items subject to duty. *Id.* at 150–51. The Court explained that there was a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.

*Id.* at 151. None of the statutes cited by the Court dealt with movable property or forms of transport other than vessels.

<sup>17</sup> National Prohibition Act § 26, 41 Stat. 305, 315–16 (1919).

<sup>18</sup> The government also claimed a possessory right to the liquor. Title II, section 25 of the National Prohibition Act was enacted to enforce the Eighteenth Amendment. The statute made it unlawful to have or possess any liquor and provided that no property rights existed in such liquor. *Id.* § 25. The statute restricted searches of homes even with warrants but permitted warrants to issue to search places of business:

No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term ‘private dwelling’ shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house.

*Id.* Upon conviction of the person from whom the liquor was seized, the liquor was to be destroyed and the property (e.g., a car) was to be sold with the proceeds going to the government. *Id.* §§ 25–26.

<sup>19</sup> *Carroll*, 267 U.S. at 150–51 (quoting Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29,

The Court further noted that three subsequent acts passed shortly after the Act of 1789 contained similar provisions.<sup>20</sup> It is clear, however, that each of the statutes cited permitted only warrantless searches of ships and vessels and required warrants for searches of any “other place.”<sup>21</sup> A search of a coach, saddlebags, or other property that was mobile would be a search for things in various “other places,” and would have required a warrant. The Court ignored the precise language of the statutes in its conclusion:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure<sup>[22]</sup> in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods,<sup>[23]</sup> where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.<sup>24</sup>

Furthermore, the Court found that legislative history of the federal

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43).

<sup>20</sup> *Id.* at 151. The three statutes mentioned by the Court are as follows: Act of Aug. 4, 1790, ch. 35, §§ 48–51, 1 Stat. 145, 170; Act of Feb. 18, 1793, ch. 8, § 27, 1 Stat. 305, 315; Act of Mar. 2, 1799, ch. 22, §§ 68–71, 1 Stat. 627, 677–78.

<sup>21</sup> *See* Act of Aug. 4, 1790 § 48; Act of Feb. 18, 1793 § 27; Act of Mar. 2, 1799 § 68.

<sup>22</sup> The Court substituted the word “structure” for the word “place” in the statutes. This makes a big difference. *See, e.g.*, Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.

<sup>23</sup> The Court made things somewhat easier for itself by suggesting that from the early days of the Republic, movable vehicles could be searched without a warrant. In fact, there were no motor boats or automobiles, and no early statute addressed them. Ships were a special case because it was almost impossible to envision magistrates being available when agents stopped a ship on the water. What about wagons? They existed in 1791 and were capable of carrying all kinds of private property. Were they always subject to search without warrants? What about a person riding a horse? Was anyone who was in motion subject to search without warrants? The Court suggested that the statutes authorized such searches, but quoted language that only addressed vessels.

Even though the language of the early statutes required a warrant to search for items in any place except in ships and vessels, in later decisions the Court simply cited its *Carroll* version of the statutes without looking back to their actual language. *See, e.g.*, *United States v. Ross*, 456 U.S. 798, 805–06 (1982).

It is clear that prior to the adoption of the Fourth Amendment, the Framers of the Constitution were concerned about searches of “boxes chests & trunks” as well as homes. LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* 160 (1995) (quotation omitted). Were they only concerned about these items when contained in houses? There is evidence that the Framers were concerned about searches of “possessions” and “places” as well as searches of homes. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 237 (1988) (citation omitted).

<sup>24</sup> *Carroll*, 267 U.S. at 153.



prohibition statute indicated that Congress intended to authorize warrantless searches for automobiles and other road vehicles.<sup>25</sup> It is questionable whether this conclusion is correct. The Court demonstrated that Congress ultimately enacted a law that made it a misdemeanor for any officer seeking to enforce prohibition “without a search warrant [to] maliciously and without reasonable cause search any other building or property . . . .”<sup>26</sup> The Court reasoned that this meant that officers were free to search automobiles and other property other than homes without warrants.<sup>27</sup> This may be a stretch. Congress’s decision to make it a crime to search without a warrant only when the officer acted maliciously and without reasonable cause did not necessarily mean that Congress thought all warrantless activity was constitutional. Congress might have wanted to criminalize the worst warrantless conduct and leave ordinary warrantless conduct to the courts to enforce through the exclusionary rule. The House Report expressed a desire to permit warrantless searches of automobiles,<sup>28</sup> in contravention of the Senate’s proposed statute. The Conference Report adopted the language quoted above without explanation.<sup>29</sup>

Of course, there was no *Terry v. Ohio*<sup>30</sup> at the time *Carroll* was decided, and neither Congress nor the Court had occasion to consider whether it was reasonable to search a vehicle without a warrant if it were possible instead to seize the vehicle while a warrant was obtained. The *Carroll* Court simply never addressed whether a ship, automobile, or other transportation vehicle is so mobile as to make it “not practicable to secure a warrant” if law enforcement officers have the power and ability to seize it while a warrant is sought.

It also should be noted that the Court’s emphasis was on contraband, which no party had a right to possess. At the time, the government could not search for “mere evidence,” with or without a warrant.<sup>31</sup> This greatly limited the government’s ability to search.

One of the overlooked parts of *Carroll* is this phrase: “In cases where the securing of a warrant is reasonably practicable, it must be used . . . .”<sup>32</sup>

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<sup>25</sup> *Id.* at 147.

<sup>26</sup> Act Supplemental to the National Prohibition Act § 6, 42 Stat. 222, 223–24 (1921).

<sup>27</sup> *Carroll*, 267 U.S. at 147.

<sup>28</sup> See H.R. REP. NO. 67-344, at 3 (1921).

<sup>29</sup> See H.R. REP. NO. 67-361, at 1 (1921) (Conf. Rep.).

<sup>30</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that a restricted search by a police officer for the officer’s protection does not require a warrant in reasonable and dangerous circumstances).

<sup>31</sup> See *Gouled v. United States*, 255 U.S. 298, 309–311 (1921) (holding that papers possessing evidentiary value, but no pecuniary value, may not be taken under search warrants).

<sup>32</sup> *Carroll*, 267 U.S. at 156. Not long after *Carroll* was decided, some writers concluded that it was a limited decision resting on the fact that it was impractical to obtain a warrant on the facts presented:

This language makes *Carroll* something of a puzzle. The Court sustained the power conferred by Congress to engage in warrantless searches by reasoning that it was impractical to obtain a warrant, but asserted that a warrant must be used where it was reasonably practical to obtain one.<sup>33</sup> The controlling assumption is that warrantless searches of vehicles are always impractical.

Without knowing the general availability of magistrates and of resources available to law enforcement for seizing and storing vehicles, it is impossible to assess how reasonable the Court's assumption was in 1925. It is plausible to assume that limited manpower, communications, and magistrate availability supported the notion that it was generally or typically impractical to obtain a warrant to search automobiles. The plausibility increases if one assumes that the Court operated on the assumption that it was all or nothing: no seizure or search unless there was a warrant, or seizure and search without a warrant.<sup>34</sup>

#### B. *Terry v. Ohio*

Seven years after it decided *Mapp*, the Supreme Court recognized in *Terry v. Ohio*<sup>35</sup> the right of law enforcement officers to engage in "stop and frisks" and thus gave its approval to one of the most important tools available to law enforcement officers.<sup>36</sup> *Terry* recognized that the Fourth Amendment permitted searches and temporary seizures of individuals upon reasonable suspicion of criminal activity and danger while an officer

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In the searching of automobiles, then, where as a practical matter it would be impossible to procure a warrant in time to effect a search, the same rule applies as has always held in the case of vessels; namely, that no warrant but only the existence of probable cause is necessary to constitute the search a reasonable one.

In an appropriate case, however, where the principal basis for this exception as to movable vehicles does not apply, e.g., where the automobile for some reason will not be able to be moved or where a vessel, let us say, is firmly beached, and there consequently is time to respect the safeguard of a warrant, it is reasonable to suppose that upon the *ratio decidendi* of the automobile cases a warrant might be held necessary in such an instance.

LASSON, *supra* note 2, at 125–26.

<sup>33</sup> *Carroll*, 267 U.S. at 156.

<sup>34</sup> There is some evidence that the Court made this assumption. It insisted that the car was seized before an arrest was made. This meant that, even though the offense of possessing illegal liquor was a misdemeanor, the crime clearly was in the officer's presence because the seizure and search revealed the liquor. By reasoning this way, the Court was able to defend the warrantless arrest for a misdemeanor by referring to a traditional common law power. *Id.* at 156–57. Justice McReynolds dissented and argued that the arrest preceded the search and that Congress had not authorized a warrantless arrest under these circumstances. *Id.* at 163, 166–69 (Reynolds, J., dissenting). The dissent also challenged the probable cause determination by the majority. *Id.* at 171–75.

<sup>35</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>36</sup> *Id.* at 30–31. See generally Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998).

decided whether there was probable cause to arrest.<sup>37</sup>

Two years after deciding *Terry*, the Court recognized that the power to detain upon reasonable suspicion applied to property as well as to people. In *United States v. Van Leeuwen*,<sup>38</sup> the Court approved of the conduct of officers who detained mailed packages for more than a day while they investigated and obtained the probable cause they needed to get a warrant to search the packages.<sup>39</sup> Justice Douglas, the sole dissenter in *Terry*, wrote for a unanimous Court in *Van Leeuwen* and distinguished between seizing the packages and searching them:

The “protective search for weapons” of a suspect which the Court approved in *Terry v. Ohio*, even when probable cause for an arrest did not exist, went further than we need go here. The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right “to be secure” in the “persons, houses, papers, and effects” protected by the Fourth Amendment against “unreasonable searches and seizures.” Theoretically . . . detention of mail could at some point become an unreasonable seizure of “papers” or “effects” within the meaning of the Fourth Amendment. . . .

No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.<sup>40</sup>

With *Terry* and *Van Leeuwen* on the books, the stage was set for another look at searches of automobiles. It would come in *Chambers v. Maroney*,<sup>41</sup> shortly after *Van Leeuwen* was decided.<sup>42</sup>

### C. *Chambers v. Maroney*

The facts of *Chambers* are uncomplicated. Two men with guns robbed a gas station.<sup>43</sup> Two teenagers saw a station wagon speed away from the gas station, learned the station had been robbed, and reported a description

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<sup>37</sup> The *Terry* standard is now clearly established as reasonable suspicion, although that was not true when the case was decided. Saltzburg, *supra* note 36, at 949.

<sup>38</sup> *United States v. Van Leeuwen*, 397 U.S. 249 (1970).

<sup>39</sup> *Id.* at 253.

<sup>40</sup> *Id.* at 252–53 (citation omitted).

<sup>41</sup> *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>42</sup> The cases were heard during the same Term. *Van Leeuwen* was argued on February 25, 1970, and decided on March 23, 1970. *Van Leeuwen*, 397 U.S. at 249. *Chambers* was argued on April 27, 1970, and decided on June 22, 1970. *Chambers*, 399 U.S. at 42.

<sup>43</sup> *Chambers*, 399 U.S. at 44.

of what they had seen to the police.<sup>44</sup> The police broadcast a description of the car and the two robbers over the police radio.<sup>45</sup> Within an hour, officers spotted a station wagon meeting the description.<sup>46</sup> They arrested the occupants<sup>47</sup> and drove the station wagon to the police station, where they searched it without a warrant and found evidence used to convict Chambers.<sup>48</sup>

The issue before the Court was whether the warrantless search was reasonable.<sup>49</sup> Justice White's majority opinion, relying on *Carroll*, held that it was.<sup>50</sup> The majority, however, failed completely to discuss the language from *Carroll* quoted above: "In cases where the securing of a warrant is reasonably practicable, it must be used . . . ."<sup>51</sup> The Court also drew no distinction between the fact patterns of the two cases: *Carroll* was a search and seizure of contraband<sup>52</sup> while *Chambers* was a search and seizure of both contraband and evidence. Justice White cited several post-*Carroll* cases that added little to the *Carroll* analysis.<sup>53</sup> He purported to recognize that not all warrantless searches of automobiles are reasonable, and then set forth the alternative options available to the police:

Neither *Carroll* nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Although there were two robbers with guns, the teenagers reported that the station wagon contained four men. When the police stopped the car, it contained four men. *Id.*

<sup>48</sup> *Id.* at 43–45.

<sup>49</sup> *Id.* at 46–47.

<sup>50</sup> *Id.* at 51–52.

<sup>51</sup> *Carroll v. United States*, 267 U.S. 132, 156 (1925).

<sup>52</sup> Justice Harlan's opinion in *Chambers*, concurring in part and dissenting in part, pointed out that all prior holdings of the Court regarding warrantless automobile searches involved contraband. *Chambers*, 399 U.S. at 62 n.7 (Harlan, J., concurring in part and dissenting in part).

<sup>53</sup> *Id.* at 49 (majority opinion) (citing *Husty v. United States*, 282 U.S. 694 (1931) (warrantless search of automobile for liquor); *Scher v. United States*, 305 U.S. 251 (1938) (warrantless search of trunk of automobile for liquor); *Brinegar v. United States*, 338 U.S. 160 (1949) (warrantless search of automobile for liquor)).

the search.<sup>54</sup>

Justice White then summarized the holding in *Carroll*:

Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.<sup>55</sup>

Justice White then confronted the issue not considered in *Carroll*:

Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." *But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances.* 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.

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.<sup>56</sup>

The most striking thing about this reasoning (or lack thereof) is the complete failure to recognize what the Court unanimously held three months earlier in *Van Leeuwen*: there is a tremendous difference between seizing an object while securing a warrant and searching the contents of the object.<sup>57</sup> Almost equally striking is the Court's suggestion that the station wagon was still mobile after the police stopped it, arrested the occupants,

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<sup>54</sup> *Id.* at 50–51 (citation omitted).

<sup>55</sup> *Id.* at 51 (citation omitted).

<sup>56</sup> *Id.* at 51–52 (footnote omitted) (emphasis added).

<sup>57</sup> *See* *United States v. Van Leeuwen*, 397 U.S. 249, 252–53 (1970).

and took control of the vehicle.<sup>58</sup> The facts clearly demonstrate that not only could the police render the vehicle immobile to all but themselves, but they could (and did) remove the vehicle to a location under their control.

Justice Harlan responded to Justice White:

The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a “lesser” intrusion than warrantless search is itself a debatable question and the answer may depend on a variety of circumstances. I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values.

The Fourth Amendment proscribes, to be sure, unreasonable “seizures” as well as “searches.” However, in the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often also justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. 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.<sup>59</sup>

Justice Harlan cited *Terry*, but he ignored the more recent and more relevant decision in *Van Leeuwen*.<sup>60</sup> The most powerful line in his opinion

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<sup>58</sup> See *Chambers*, 399 U.S. at 52.

<sup>59</sup> *Id.* at 63–64 (quotation omitted) (citations omitted) (Harlan, J., concurring in part and dissenting in part).

<sup>60</sup> See *Van Leeuwen*, 397 U.S. at 252–53.

is relegated to a footnote: “The Court, unable to decide whether search or temporary seizure is the ‘lesser’ intrusion, in this case authorizes both.”<sup>61</sup> Justice Harlan was charitable to the majority, for his footnote makes clear that the majority did not realize that one plus one equals two, and that two is a larger number than one. A seizure is one intrusion, while a search is another. The two together amount to one intrusion greater than a seizure standing alone.

*D. Houses That Are Automobiles*

*Carroll* distinguished between a “dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile . . . .”<sup>62</sup> The question that was bound to arise was whether a home that had wheels was a dwelling house or an automobile for Fourth Amendment purposes. In the final year of the Burger Court, the Supreme Court answered this question in *California v. Carney*.<sup>63</sup>

Carney’s motor home was under surveillance by drug enforcement agents when a young man entered, stayed a while, and left.<sup>64</sup> The agents confronted him and learned that he had received marijuana from Carney in exchange for sex.<sup>65</sup> The agents prevailed upon the young man to return to the motor home and knock on its door.<sup>66</sup> When Carney stepped out, the agents identified themselves and, “[w]ithout a warrant or consent, one agent entered the motor home and observed marijuana, plastic bags, and a scale of the kind used in weighing drugs on a table.”<sup>67</sup> The agents arrested Carney and took possession of the motor home.<sup>68</sup> “A subsequent search of the motor home at the police station revealed additional marijuana in the cupboards and refrigerator.”<sup>69</sup> Both searches of the motor home were warrantless.<sup>70</sup>

Perhaps realizing that a motor home is not as easily moved as a regular car, the Court noted that mobility was not the only justification for the *Carroll* rule.<sup>71</sup> The Court emphasized that there is a lesser expectation of privacy in cars than in other places.<sup>72</sup> Ultimately, the Court concluded that

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<sup>61</sup> *Chambers*, 399 U.S. at 63 n.8 (Harlan, J., concurring in part and dissenting in part).

<sup>62</sup> *Carroll v. United States*, 267 U.S. 132, 153 (1925).

<sup>63</sup> *California v. Carney*, 471 U.S. 386 (1985).

<sup>64</sup> *Id.* at 388.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 391.

<sup>72</sup> *Id.* at 392.

motor homes are sufficiently mobile to be treated as automobiles even though people live in them.<sup>73</sup> It left open, however, the question of whether a mobile home could be treated as an automobile if there were objective indications that it was being used as a residence and not for transportation.<sup>74</sup>

The Court ignored, as it did in *Chambers*, the fact that the police took possession of the motor home, transported it to the police station, controlled it exclusively, and made certain that they controlled its movement. Once the agents seized the motor home, it was no more mobile for Carney than the station wagon was for Chambers after the police seized it.<sup>75</sup>

*E. Property in Automobiles Prior to the Rehnquist Court*

Because of the bankrupt state of the mobility doctrine and the difficulty after *Terry* and *Van Leeuwen* of justifying a warrantless search of property (where a seizure pending the obtaining of a warrant is practicable), it is not surprising that the arbitrariness of the automobile exception has led to inconsistent and confusing decisions. This happened as the Court addressed moveable property in cars.

Because cars are mobile, it obviously follows that items that can fit into cars are also mobile. Indeed, any object that is capable of fitting into a vehicle is as mobile as the vehicle itself. Should this mean that government agents should be able to seize and search any such item without a warrant?

The Court said “no” in *United States v. Chadwick*.<sup>76</sup> Amtrak railroad officials in San Diego became suspicious of a footlocker that was loaded onto a train heading for Boston.<sup>77</sup> When the train arrived in Boston, federal agents were waiting.<sup>78</sup> The two men who had brought the footlocker from San Diego met Chadwick at the station, and with the help of an attendant, lifted the footlocker into the trunk of Chadwick’s waiting car.<sup>79</sup> Before the trunk closed and the car started, the federal agents arrested Chadwick and the two San Diego men.<sup>80</sup> The agents took the arrestees and Chadwick’s car with the footlocker to the Federal Building in Boston, where they conducted a warrantless search of the footlocker and found large quantities of marijuana.<sup>81</sup>

The case boiled down to two arguments that are as amusing as they are

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<sup>73</sup> *Id.* at 393–94.

<sup>74</sup> *Id.* at 394 n.3.

<sup>75</sup> See *Chambers v. Maroney*, 399 U.S. 42, 43–44 (1970).

<sup>76</sup> *United States v. Chadwick*, 433 U.S. 1 (1977).

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4–5.



strange. The government argued that a footlocker was not a house, and therefore a warrant should not be required to search it.<sup>82</sup> Chadwick and the other defendants argued that the footlocker was not a car, and therefore a warrant was required.<sup>83</sup> The Supreme Court, using its wisdom and experience from its earlier automobile cases, agreed with both parties by holding that a footlocker was neither a house nor a car.<sup>84</sup> In the end, though, the Court concluded that a footlocker in the trunk of a car was more like a house than a car.<sup>85</sup>

One bit of Chief Justice Burger's reasoning was especially memorable: "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile."<sup>86</sup> This is amazing. Most people who have not been trained in Fourth Amendment law, if asked what the purpose of luggage is, would reply that it is used for traveling. After all, what is more mobile than luggage? And how do most people get their luggage from place to place? The trip usually begins in a car or taxi, which is how most people transport their private and personal effects from one place to another. Cars are vehicles for transporting people and their things, even their most private things. But the Court in *Chadwick* insisted on treating luggage in cars as more worthy than the cars themselves. Incredibly, the Court concluded that people have a greater expectation of privacy in a container that is placed in a car than in a container that is part of a car.<sup>87</sup> The Court did not explain its conclusion, which is not surprising given that it doesn't really matter whether one puts something in the trunk, in the glove compartment, or in a bag which is then placed in a car—the effect is still the same.

In *Arkansas v. Sanders*,<sup>88</sup> the Court held that a warrant was required to search a suitcase that had been placed in the trunk of a taxi.<sup>89</sup> The Court reasoned that although the police had probable cause to search the suitcase, they did not have the authority to search the suitcase absent a warrant because it was practicable to keep the suitcase secure in police custody while a warrant was sought.<sup>90</sup>

In the Court's next automobile exception case, *Robbins v. California*,<sup>91</sup>

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<sup>82</sup> *Id.* at 7.

<sup>83</sup> *Id.* at 12.

<sup>84</sup> *Id.* at 12–13.

<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Arkansas v. Sanders*, 442 U.S. 753 (1979).

<sup>89</sup> *Id.* at 765.

<sup>90</sup> *Id.* at 761, 766.

<sup>91</sup> *Robbins v. California*, 453 U.S. 420 (1981) (plurality opinion), *overruled by* *United States v. Ross*, 456 U.S. 798 (1982).

California Highway Patrol officers stopped a station wagon driven by Robbins because he had been driving erratically.<sup>92</sup> Robbins left his car, walked towards the patrol car, and fumbled with his wallet when asked for his driver's license and registration.<sup>93</sup> When he opened the car door, the officers smelled marijuana smoke.<sup>94</sup> One officer patted Robbins down and discovered a vial of liquid.<sup>95</sup> The officer searched the passenger compartment and found both marijuana and paraphernalia.<sup>96</sup> After the officers put Robbins in the patrol car, they opened the tailgate of the station wagon where they uncovered a recessed luggage compartment containing a tote bag and two packages wrapped in green opaque plastic.<sup>97</sup> The police unwrapped the packages and found that each contained fifteen pounds of marijuana.<sup>98</sup>

The issue before the Court was whether the police could search the green opaque plastic packages (i.e., garbage bags) without a warrant.<sup>99</sup> Justice Stewart's plurality opinion, which relied upon *Chadwick* and *Sanders*, declined to treat one person's garbage bags as less worthy of protection than another person's footlocker or suitcase.<sup>100</sup> Justice Powell concurred only in the judgment and objected to what he regarded as the plurality's "bright line" rule.<sup>101</sup> He concluded that "the law of search and seizure with respect to automobiles is intolerably confusing. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided."<sup>102</sup>

Then, in *United States v. Ross*,<sup>103</sup> the Court appeared determined to eliminate some of the confusion as it upheld the warrantless search of a car.<sup>104</sup> In *Ross*, a police informant telephoned a District of Columbia Police Department detective and told him that an individual known as "Bandit" was selling narcotics kept in the trunk of a car parked at a particular location.<sup>105</sup> After the informant had observed "Bandit" complete a sale, "Bandit" had told him that the trunk contained more narcotics.<sup>106</sup> The informant gave a detailed description of "Bandit" and stated that the car

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<sup>92</sup> *Id.* at 422.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 423.

<sup>100</sup> *Id.* at 428.

<sup>101</sup> *Id.* at 429, 430 (Powell, J., concurring in the judgment).

<sup>102</sup> *Id.* at 430.

<sup>103</sup> *United States v. Ross*, 456 U.S. 798 (1982).

<sup>104</sup> *Id.* at 800.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

was a “purplish maroon” Chevrolet Malibu with District of Columbia license plates.<sup>107</sup> The detective and two other officers immediately drove to the area and found a maroon Malibu parked in front of the identified location.<sup>108</sup> Through a license plate check, they discovered that the car was registered to Albert Ross, and a computer check on Ross revealed that he used the alias “Bandit” and matched the informant’s description.<sup>109</sup>

The officers initially could not find anyone meeting the description, so they left the area to avoid arousing suspicion.<sup>110</sup> They returned a few minutes later and observed the maroon Malibu being driven.<sup>111</sup> They pulled alongside the car, noticed that the driver matched the informant’s description, pulled the car over, and ordered the driver out of the vehicle.<sup>112</sup> Ross was the driver.<sup>113</sup> While the officers searched him, another officer searched the car’s interior, discovering a bullet on the car’s front seat and a pistol in the glove compartment.<sup>114</sup> They arrested Ross, took his keys, opened the trunk, found a closed brown paper bag, opened the bag and discovered a number of glassine bags containing a white powder later determined to be heroin.<sup>115</sup> They drove the car to headquarters, searched it again, and found in the trunk a zippered red leather pouch with \$3200 in cash.<sup>116</sup>

Justice Stevens’s opinion for the Court distinguished *Chadwick* and *Sanders* as cases where probable cause existed to search the containers inside the cars, not the vehicles themselves.<sup>117</sup> In *Ross*, however, the probable cause existed to search the car itself.<sup>118</sup> Justice Stevens explained as follows:

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 801.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 817.

<sup>118</sup> *Id.*

search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.<sup>119</sup>

Justice Blackmun, who dissented in the prior cases,<sup>120</sup> wrote a concurring opinion in which he joined the Court's opinion because it was important "that the applicable legal rules be clearly established."<sup>121</sup> He continued, "Justice Stevens' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed."<sup>122</sup> Justice Powell also wrote a concurring opinion indicating that he agreed that it was important to have clear rules, and that Justice Stevens's opinion reduced the uncertainty in the law and was consistent with *Carroll* and *Chambers*.<sup>123</sup>

Ironically, Justice Powell's objection to "bright line" rules disappeared when the rules set down permitted rather than restricted searches. Six Justices now seemed to believe that *Ross* had done the trick by resolving the chaos created by prior decisions.

#### F. California v. Acevedo

The Rehnquist Court cannot be blamed for these automobile decisions. Chief Justice Rehnquist was not a member of the Courts that decided *Carroll* and *Chambers*. He joined Justice Blackmun's dissenting opinions in *Chadwick*<sup>124</sup> and *Sanders*,<sup>125</sup> and wrote his own dissenting opinion in *Robbins*<sup>126</sup> before joining the majority in *Ross*. His *Robbins* dissent indicated that he preferred a particular bright line rule:

[O]ne need *not* demonstrate that a *particular* automobile was capable of being moved, but that automobiles *as a class* are inherently mobile, and a defendant seeking to suppress evidence obtained from an automobile should not be heard to say that this particular automobile had broken down, was in a parking lot under the supervision of the police, or the like.<sup>127</sup>

<sup>119</sup> *Id.* at 824.

<sup>120</sup> See *Robbins v. California*, 453 U.S. 420, 436 (1981) (Blackmun, J., dissenting); *Arkansas v. Sanders*, 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting); *United States v. Chadwick*, 433 U.S. 1, 17 (1977) (Blackmun, J., dissenting).

<sup>121</sup> *Ross*, 456 U.S. at 825 (Blackmun, J., concurring).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 826 (Powell, J., concurring). Justice Powell also wrote that Justice Stevens's opinion was consistent with the Court's decision from the previous Term in *New York v. Belton*, 453 U.S. 454 (1981), which is discussed *infra* at note 186. *Ross*, 456 U.S. at 826 (Powell, J., concurring)

<sup>124</sup> See *Chadwick*, 433 U.S. at 17 (Blackmun, J., dissenting).

<sup>125</sup> See *Sanders*, 442 U.S. at 768 (Blackmun, J., dissenting).

<sup>126</sup> See *Robbins v. California*, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting).

<sup>127</sup> *Id.* at 440–41.

Because he did not write separately in *Ross*, we cannot know whether he thought that *Ross* adopted his rule or whether, like Justices Blackmun and Powell, he thought that *Ross* eliminated the confusion in prior cases.

We do know, however, that less than ten years after the Court decided *Ross*, the Rehnquist Court found it necessary to return to the automobile exception because confusion remained. This case was *California v. Acevedo*.<sup>128</sup>

In *Acevedo*, a federal drug enforcement agent in Hawaii telephoned a California police department, informing the department that a package containing marijuana, originally destined for California, had been seized in Hawaii and that the package was supposed to be delivered to a Federal Express office in California.<sup>129</sup> The agent sent the package to the California police department, which then took it to the Federal Express office.<sup>130</sup> Jamie Daza arrived at the office, picked up the package, and drove his car with the package to an apartment.<sup>131</sup> Charles Acevedo arrived at the apartment, stayed for ten minutes, and left carrying a full paper bag that was about the same size as one of the original packages.<sup>132</sup> After placing the bag in the trunk of his car, he started to drive away.<sup>133</sup> He was immediately stopped by police, who opened the trunk and found the marijuana.<sup>134</sup>

Acevedo's case exposed the confusion that continued to exist in lower courts despite *Ross*. The California Court of Appeals concluded that the marijuana evidence should have been suppressed because, even though the police had probable cause to believe that the paper bag (which was not an automobile) had marijuana in it, they did not have probable cause to believe that the automobile otherwise contained marijuana.<sup>135</sup> The court of appeals held that because the police only had probable cause to believe that the paper bag contained marijuana, they had to, yet failed to, obtain a search warrant before opening it.<sup>136</sup>

Justice Blackmun wrote for the Court as it reversed.<sup>137</sup> The *Acevedo* Court had the opportunity to abandon its prior approach and apply a principled approach to searches of automobiles. All it had to do was say that, absent exigent circumstances, property could be seized for a

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<sup>128</sup> *California v. Acevedo*, 500 U.S. 565 (1991).

<sup>129</sup> *Id.* at 567.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *People v. Acevedo*, 265 Cal. Rptr. 23, 27 (Ct. App. 1989), *rev'd*, 500 U.S. 565 (1991).

<sup>136</sup> *Id.*

<sup>137</sup> *Acevedo*, 500 U.S. at 566.

temporary period upon reasonable suspicion, and for a longer period upon probable cause, while a warrant is sought. Such a holding would have recognized that most property is mobile, can be moved by car, train, or plane, and regardless of whether it happens to be in a house or in a car, cannot be moved while a warrant is sought if the house or car is under the control of the police.

Instead, Justice Blackmun held that containers in cars can be searched as long as there is probable cause.<sup>138</sup> He recognized that, despite the hope he expressed in *Ross* that it would make the rules governing automobile searches clearer, “[t]he line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear . . . .”<sup>139</sup> He also recognized that the Court’s prior decisions created “separate rules that govern the two objects to be searched [that] may enable the police to broaden their power to make warrantless searches and disserve privacy interests.”<sup>140</sup> Justice Blackmun further reasoned:

At the moment when officers stop an automobile, it may be less than clear whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.<sup>141</sup>

This is strange reasoning. Police who stop a car cannot search it completely under any circumstances without probable cause, even under the Court’s prior decisions. The question for officers is whether they have probable cause to believe. They cannot choose to search a car simply because they would like to open packages. *Ross* required that there be probable cause to believe that the car, as opposed to a package in the car, contained contraband that could be searched for.<sup>142</sup> *Ross* did give police an incentive to gather more general, as opposed to specific, information about precisely what type of container drugs or evidence might be found in. But *Ross* did not give police the power to expand a search when they lacked probable cause with respect to the car itself.<sup>143</sup>

Justice Blackmun’s reasoning cannot be confined to automobiles. In

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<sup>138</sup> *Id.* at 580.

<sup>139</sup> *Id.* at 574.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 574–75.

<sup>142</sup> *United States v. Ross*, 456 U.S. 798, 824 (1982).

<sup>143</sup> Justice Blackmun cited *United States v. Johns*, 469 U.S. 478 (1985), as an example of law enforcement expanding a search. *Acevedo*, 500 U.S. at 575. But the Court held in *Johns* that agents had probable cause to search trucks and therefore could search packages seized from trucks. *Johns*, 469 U.S. at 482. It did not hold that agents who lacked probable cause as to a vehicle could search either the vehicle or packages within it.

*Acevedo*, he cited his own earlier dissent:

To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. "Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."<sup>144</sup>

While his assumption is fair, it applies to all property, not just automobiles. The Court has never cited a shred of evidence to support the notion that law enforcement officers make better probable cause judgments about cars or containers in cars than they make about other property.<sup>145</sup>

Justice Blackmun suggested that the Court was finally ending the confusion over automobile searches with its *Acevedo* decision:

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.<sup>146</sup>

Unfortunately, the suggestion was wrong, and confusion remains. Suppose, for example, police have probable cause to believe that a bag of marijuana is in the trunk of a car. Can they search the entire car? The full trunk? Only the part of the trunk that contains a bag?<sup>147</sup> It will take yet another Supreme Court decision to provide an answer.

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<sup>144</sup> *Acevedo*, 500 U.S. at 575 (citation omitted) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

<sup>145</sup> Justice Blackmun added that "the police often will be able to search containers without a warrant, despite the *Chadwick-Sanders* rule, as a search incident to a lawful arrest." *Id.* But as we shall see, that is because the Court has adopted a special rule for searching automobiles incident to arrest that is as arbitrary as the automobile exception to the warrant requirement.

<sup>146</sup> *Id.* at 580.

<sup>147</sup> See Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 394 (1992) (arguing that following *Acevedo*, a defendant "may challenge a search of areas of the car other than the targeted container"). Compare *United States v. McSween*, 53 F.3d 684, 686 (5th Cir. 1995) (holding that an officer who smelled burnt marijuana could search under the hood of a car after a fruitless search of the passenger compartment), with *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993) (holding that an officer who smelled burnt marijuana could not search the trunk after a fruitless search of the passenger compartment).

G. *The Problem with Arbitrary Rules*

The problem with arbitrary rules like the automobile exception to the warrant requirement is that because they have no principled basis, they provide no guidance as to how law enforcement officers should deal with a new set of facts.

For example, suppose Federal Express telephones law enforcement agents to report a suspicious package which is emitting an odor or leaking powder, suggesting it might contain drugs. The package was just off-loaded from a truck. Can the package be searched without a warrant? After all, it is mobile, it has actually been moved, and it could be moved again. Does the fact that it was recently in a vehicle bring it within the automobile exception? It will take a new Supreme Court decision for anyone to be sure.

Consider another scenario, where the police have probable cause to believe that a bicycle might contain drugs in a saddle bag. Is a bicycle the equivalent of an automobile so that it can be searched without a warrant? What about a tricycle? Only the new Supreme Court can tell us.

What qualifies an item as a vehicle? Is a suitcase or a shopping cart with wheels the equivalent of an automobile? What about a wagon or a cart? The rule favored by then-Associate Justice Rehnquist in *Robbins*—

one need *not* demonstrate that a *particular* automobile was capable of being moved, but that automobiles *as a class* are inherently mobile, and a defendant seeking to suppress evidence obtained from an automobile should not be heard to say that this particular automobile had broken down, was in a parking lot under the supervision of the police, or the like<sup>148</sup>

—suggests that a car that has no engine or an engine that does not work still falls within the automobile exception. But the rule still does not answer the basic question: what is a car?

What about a delivery person on inline skates who the police believe is unknowingly carrying a package with drugs? Is he or she equivalent to an automobile?

In a sensible world, one would neither ask nor answer these questions. Instead, one would adopt a principle that would enable future actors to respond logically to new circumstances. That principle would recognize that automobiles and all other moveable property should be treated the same way. If moveable property outside automobiles generally can be detained while a warrant is sought and searched only after such warrant has been obtained (absent exigent circumstances), the same rule should apply to automobiles. If it did, we would not have to worry about the proper

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<sup>148</sup> *Robbins v. California*, 453 U.S. 420, 440–41 (1981) (Rehnquist, J., dissenting), *overruled by United States v. Ross*, 456 U.S. 798 (1982).



treatment of bicycles, tricycles, wagons, shopping carts, luggage with wheels, and inline skating delivery personnel.

## II. *More on Automobiles: Search Incident to Arrest*

The Supreme Court has treated automobiles with disfavor not only by establishing the automobile exception discussed above, but also in its handling of the search-incident-to-arrest doctrine. The Court has abandoned a rational, principled rule governing searches incident to arrest in favor of an arbitrary and confusing approach.

### A. *The Pendulum Swings*

Until 1969, the Court wavered in its approach to searches incident to arrest. The *Carroll* case, discussed above,<sup>149</sup> offered the first dictum suggesting that a search incident to arrest could extend beyond the person arrested to the place where the person was arrested: “When a man is legally arrested for an offense, whatever is found upon his person *or in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.”<sup>150</sup> Decided shortly after *Carroll*, *Agnello v. United States*<sup>151</sup> relied in part upon *Carroll* for this dictum:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.<sup>152</sup>

As often happens, dictum leads to holding. In *Marron v. United States*,<sup>153</sup> agents executing a warrant to search a speakeasy for liquor and related items seized an incriminating ledger that was not in the warrant.<sup>154</sup> The Court justified the seizure by holding that because the agents had made an arrest on the premises, “[t]hey had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise.”<sup>155</sup>

But in *Go-Bart Importing Co. v. United States*<sup>156</sup> and *United States v.*

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<sup>149</sup> See *supra* text accompanying notes 12–34.

<sup>150</sup> *Carroll v. United States*, 267 U.S. 132, 158 (1925) (emphasis added).

<sup>151</sup> *Agnello v. United States*, 269 U.S. 20 (1925).

<sup>152</sup> *Id.* at 30 (citing *Carroll*, 267 U.S. at 158, and *Weeks v. United States*, 232 U.S. 383, 392 (1914)). *Weeks* did not actually discuss searching places incident to arrest.

<sup>153</sup> *Marron v. United States*, 275 U.S. 192 (1927).

<sup>154</sup> *Id.* at 193–94.

<sup>155</sup> *Id.* at 199.

<sup>156</sup> *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

*Lefkowitz*,<sup>157</sup> the Court distinguished *Marron* as involving only a slight intrusion<sup>158</sup> as it held two postarrest premises searches unconstitutional. In *Go-Bart Importing Co.*, the Court held that the search of an office and the seizure of papers from a desk, a safe, and other parts of the office were forbidden.<sup>159</sup> In *Lefkowitz*, the Court held that the search of an office and seizures from a desk and cabinet in the office were not justifiable.<sup>160</sup>

The restrictive attitude toward searches incident to arrest was cast aside in *Harris v. United States*,<sup>161</sup> as the Court approved a search of a four-room apartment in which officers arrested Harris on the basis of his alleged involvement with the cashing and interstate transportation of a forged check.<sup>162</sup> The officers had searched for two cancelled checks thought to have been used in effecting the forgery.<sup>163</sup>

In the Court's own words, "[o]nly a year after *Harris*, however, the pendulum swung again."<sup>164</sup> The case was *Trupiano v. United States*.<sup>165</sup> Despite the fact that agents made lawful arrests of individuals running an illegal distillery, the Court held that a search of the premises was invalid:

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.<sup>166</sup>

The pendulum would swing again just two years later in *United States v. Rabinowitz*.<sup>167</sup> Federal authorities secured an arrest warrant for Rabinowitz for dealing in stamps bearing forged overprints.<sup>168</sup> They arrested him at his one-room business office and searched his desk, safe,

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<sup>157</sup> *United States v. Lefkowitz*, 285 U.S. 452 (1932).

<sup>158</sup> The Court reasoned that the articles seized in *Marron* were "visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place." *Go-Bart Importing Co.*, 282 U.S. at 358. The Court here essentially anticipated the future "plain-view" rule. See, e.g., *Horton v. California*, 496 U.S. 128, 142 (1990) (holding that the seizure of weapons allegedly used in a robbery was authorized by the "plain-view" doctrine, despite the lack of specific authorization in the warrant to search for weapons).

<sup>159</sup> *Go-Bart Importing Co.*, 282 U.S. at 358.

<sup>160</sup> *Lefkowitz*, 285 U.S. at 467.

<sup>161</sup> *Harris v. United States*, 331 U.S. 145 (1947).

<sup>162</sup> *Id.* at 148, 155.

<sup>163</sup> *Id.* at 148.

<sup>164</sup> *Chimel v. California*, 395 U.S. 752, 758 (1969).

<sup>165</sup> *Trupiano v. United States*, 334 U.S. 699 (1948), *overruled in part by United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>166</sup> *Id.* at 708.

<sup>167</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>168</sup> *Id.* at 57-58.

and file cabinets.<sup>169</sup> The Court, relying on *Harris*, upheld the search, citing a number of factors:

We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, was invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money.<sup>170</sup>

The Court rejected the notion that a warrantless search was invalid if a warrant could have been secured.<sup>171</sup> It reasoned that it was well understood that some searches incident to arrest were reasonable without a warrant, so the Fourth Amendment could not be said to prohibit all such warrantless searches.<sup>172</sup> But the Court confined itself to reciting the factors relied upon by the district court. It failed completely to explain what rationale or principle distinguished unreasonable and reasonable warrantless searches incident to arrest.

*B. A Principled Approach*

Finally, in *Chimel v. California*,<sup>173</sup> the Court explained the justifications for the search-incident-to-arrest doctrine. In so doing, it stated a clear and logical principle that guided arresting officers in determining the proper scope of such searches.

Three police officers arrived at Chimel's home with a warrant for his arrest for the burglary of a coin shop.<sup>174</sup> Chimel's wife let the officers wait in the house until Chimel returned.<sup>175</sup> When he returned, the officers arrested him and, over Chimel's objection, conducted a search of the three-bedroom house, including the attic, the garage, and a small workshop.<sup>176</sup> The Court held that the search violated the Fourth Amendment.<sup>177</sup>

Justice Stewart's opinion for the Court explained that a search incident to arrest had two legitimate purposes: to protect the arresting officer and to

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<sup>169</sup> *Id.* at 58–59.

<sup>170</sup> *Id.* at 63–64 (footnote omitted).

<sup>171</sup> *Id.* at 65.

<sup>172</sup> *Id.* at 65–66.

<sup>173</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>174</sup> *Id.* at 753.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 753–54.

<sup>177</sup> *Id.* at 768.

protect against destruction or loss of evidence.<sup>178</sup> The purpose of the search therefore dictated its permitted scope:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. 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.<sup>179</sup>

*Chimel* demonstrates two realities about principled rules. First, if the principle is clear, application by ordinary people should be relatively easy in most cases. Second, no matter how clear the principle, at the outer margins of any rule, judgment will be required.

After *Chimel*, any reasonable officer who made a custodial arrest knew that he or she may search the physical person of a suspect for weapons and for evidence that might be destroyed. Any reasonable officer also knew that he or she may also search the area in which a suspect might grab a weapon or evidence.

### C. *The Principle Eroded*

Judgment is required, however, if the principle is to be meaningful. Just four years after deciding *Chimel*, the Court per Justice Rehnquist decided *United States v. Robinson*.<sup>180</sup> A District of Columbia police officer, who had checked the status of Robinson's license a few days earlier, stopped Robinson's car and arrested him for driving after his license was revoked and for obtaining a license by misrepresentation.<sup>181</sup> The officer conducted a search incident to arrest in which he found a crumpled up cigarette package in Robinson's breast pocket, which the officer removed and opened. He found fourteen gelatin capsules which turned out to contain heroin.<sup>182</sup> The issue was whether opening the package was legitimate. The Court said it was, announcing another bright line rule that "a full search of the person" is always reasonable when incident to a custodial arrest.<sup>183</sup>

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<sup>178</sup> *Id.* at 762–63.

<sup>179</sup> *Id.*

<sup>180</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>181</sup> *Id.* at 220.

<sup>182</sup> *Id.* at 221–23.

<sup>183</sup> *Id.* at 235. The Court stated,

It is the fact of the lawful arrest which establishes the authority to search, and we

But *Robinson* was not about the full search of a person; it was about the search of a container found on a person. If an officer could not reasonably believe that a container could contain a weapon or evidence, why should the officer be permitted to search it? The Court's answer seemed to be that, without a per se rule, courts would have to litigate the reasonableness of the officer's judgment in every case.<sup>184</sup>

This is not necessarily true. Because a custodial arrest is always an unwelcome experience for the arrestee, and could therefore spark a violent reaction against the arresting officer, there is a principled basis for the Court's holding that a search for weapons is always permissible—i.e., the protection of the officer. There is no such principled basis for saying that it is *always* reasonable to search for evidence that might be destroyed. When an officer arrests a person for a crime and there is no possibility of finding evidence in any container possessed by the arrestee that could be destroyed by the arrestee, *Chimel* suggests that there is no reason to permit a search for evidence.

The *Robinson* Court never considered an approach that would have been more consistent with *Chimel*: i.e., (1) an officer always may search the arrested person for weapons and search any container from which the suspect could get a weapon; (2) once an officer has determined that a suspect has no weapon or has disarmed the suspect, the officer may only continue to search a container for evidence as long as there is some possibility that it contains evidence and the suspect remains capable of opening the container and destroying the contents; and (3) thereafter, the officer may only seize a container to bring before a magistrate in order to seek a warrant to search it further.

Would this be too complicated? Absolutely not. Under this alternative, officers would know that they can always conduct a search for weapons incident to arrest to protect their safety, and furthermore they would know that they can search for evidence as long as it is in danger of being destroyed. When the dangers of physical harm or destruction of evidence disappear, the reason for a warrantless search also disappears. This is hardly rocket science, because it is a staple of Fourth Amendment law in other contexts.<sup>185</sup>

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hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

*Id.*

<sup>184</sup> *See id.*

<sup>185</sup> *See, e.g.,* *Mincey v. Arizona*, 437 U.S. 385, 393–95 (1978) (rejecting a “murder scene exception” to the warrant requirement and holding that when exigency disappears, a warrant is required).

*D. The Automobile and Search Incident to Arrest*

While *Robinson* eroded to some extent the principle established in *Chimel*, *New York v. Belton*<sup>186</sup> essentially ignored the *Chimel* principle. This was somewhat surprising because Justice Stewart, the author of *Chimel*, wrote for the Court in *Belton*.

In *Belton*, a New York state trooper driving an unmarked car saw another car speeding on the New York Thruway, chased the car, pulled it over, and asked to see the driver's license and registration.<sup>187</sup> He discovered that none of the men in the car owned it or were related to its owner, smelled burnt marijuana in the car, and saw an envelope marked "Supergold" on the floor of the car, which he associated with marijuana.<sup>188</sup> The trooper ordered the four male occupants out of the car, placed them all under arrest, patted them down, placed them in four different areas outside the car, picked up the envelope, found that it contained marijuana, gave the men *Miranda* warnings,<sup>189</sup> and searched them all incident to arrest.<sup>190</sup> The officer also searched the passenger compartment of the car, found a black jacket belonging to Belton, searched it, and found cocaine.<sup>191</sup> The officer put the jacket and the men in his car and drove them to the police station.<sup>192</sup>

There is little doubt that the officer acted properly in all respects. He properly stopped the vehicle for speeding and requested to see the driver's license and registration. After he smelled burnt marijuana and saw the envelope, he had probable cause to believe that the men were sharing marijuana and appropriately arrested them. The search of their persons incident to arrest was clearly valid.

The officer also had probable cause to believe that there was marijuana in the car. Because the officer was determined to take the men into custody, it was reasonable for him to search the interior of the car for the marijuana rather than leave it for whoever might come along while the car sat unprotected on the Thruway. The search of the car was an exigent-circumstance search—the officer obviously could not remove the men and protect the car at the same time. Of course, an officer can always call for backup, but there is no constitutional requirement that an officer always do so, and there is no unlimited supply of backup for every stop and arrest an officer might make.

Rather than treat the case as a classic example of exigent circumstances, Justice Stewart's opinion for the Court recognized that

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<sup>186</sup> *New York v. Belton*, 453 U.S. 454 (1981).

<sup>187</sup> *Id.* at 455.

<sup>188</sup> *Id.* at 455–56.

<sup>189</sup> *See Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966).

<sup>190</sup> *Belton*, 453 U.S. at 456.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

*Chimel* set forth a principled rule, suggested that the rule was confusing and that a clearer rule for cars was needed,<sup>193</sup> and adopted a per se rule for

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<sup>193</sup> Justice Stewart noted,

Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases. Yet, as one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments “can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.”

*Id.* at 458 (quoting Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142). Although Justice Stewart made the assertion about the difficulty lower courts were having, he cited no cases to illustrate the point. It is difficult to see why lower courts would have found *Chimel* difficult to apply. Its principle is easy to state, and it requires only a limited amount of judgment.

Elsewhere in the opinion, however, Justice Stewart purported to identify examples of confusion in the lower courts. *See id.* at 459 & n.1. After evaluating these cases mentioned by Justice Stewart, Professor David S. Rudstein concluded that “some of the cases cited by the Court in *Belton* as examples of cases reaching inconsistent results may not have done so.” David S. Rudstein, *Belton Redux: Reevaluating Belton’s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1324–27, 1324 n.191 (2005). Professor Rudstein’s description of the cases and the issues they address is insightful and demonstrates the kind of questions that can arise when officers arrest individuals in cars. I agree with his conclusion that the Court failed to justify the per se rule in *Belton*. *Id.* at 1287–88. Although it is true that the cited cases involved cars in one way or another, it would be wrong to assume that any confusion in the lower courts actually arose because of the presence of a car in the cases. The same issues involving cars arose in other contexts in which people were arrested. The confusion occurred because police naturally want to take full advantage of the permissible “free search” (i.e., the automatic search) following an arrest. To take full advantage, they may seek to expand the scope of the search as much as possible.

For example, an officer might arrest someone in her home while she is sitting next to a locked suitcase or chest, handcuff her and remove the suitcase from her reach. The officer may want to search the suitcase. Once the suitcase is out of reach of the arrestee, however, there is no greater reason to permit a warrantless search than if the suitcase were in the next room when the arrest occurred. If the Court were to say that when the exigency ended (i.e., when the reasonable possibility that a suspect could reach into a place for a weapon or evidence dissipated), the search-incident-to-arrest exception becomes inapplicable, the Court would be true to the principles set forth in *Chimel* and to its emphasis on the Warrant Clause and judicial supervision over searches absent true exigent circumstances. Moreover, a focus on whether an actual exigency exists would make clear to law enforcement officers that exigent circumstances permit immediate reactions without the necessity of relying on arbitrary doctrines similar to that laid down in *Belton*.

One gets a feeling from the lower court cases that judges feel that the police are somehow “cheated” if they remove the exigency before they have conducted a search. One example of this is found in *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973). The court held that a search incident to arrest was valid where the defendant was arrested before he entered his car (thus making it not a true *Belton* situation) and his attaché case, which was in the back seat of his car, was searched. *Id.* at 669–70. Under these circumstances, it is difficult to see why an automatic search of the case was more justifiable than it would have been if the defendant were arrested on the front porch of his house, and the case was inside

cars with two major parts: (1) “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile” and (2) “the police may also examine the contents of any containers found within the passenger compartment . . . whether it is open or closed.”<sup>194</sup>

There was no convincing reason for *Belton* to abandon *Chimel*'s clearly stated principle. The apparent reason for the change was that the Court realized that in the factual scenario presented in *Belton*, as well as in many similar cases, the police would not be able to search a car incident to arrest under the *Chimel* rule and did not want to deprive the police of the opportunity to do so.

When police officers stop cars, they often order the driver and all passengers out of the car, a practice the Supreme Court has upheld.<sup>195</sup> If the officer makes an arrest and handcuffs a suspect outside the car, often there is no reasonable possibility that the suspect could seize a weapon or evidence in the car, especially if the car doors are closed. This means that had the arrest been made while the suspect was in the car, an officer could have searched wherever in the car the suspect could have reached, but when the arrest is made outside the car and there are no exigent circumstances, the officer loses the right to search the interior of the car.

This is an accurate description of what would happen if *Chimel* were applied to the facts of *Belton*. Why is this a problem? This result is precisely what *Chimel*'s principle dictates. A search incident to arrest is not some right given to officers because the Court thinks officers should have an entitlement to a “free search”—without probable cause or a warrant. When the reasons for a warrantless search disappear, such a search should not be permitted.

The Court in *Belton* did not say that the decision was intended to give the police a free search, although that is the end result of the decision. Instead, Justice Stewart argued that his own opinion in *Chimel* was confusing as applied to cars and that there was a need for a clear rule.<sup>196</sup> He did not explain, however, why *Chimel* was more confusing with respect to cars than any other place where an arrest occurs.

Justice Stewart also failed to recognize that a principled rule always provides more guidance than an arbitrary one. Fair application of *Chimel* would have resulted in a holding in *Belton* that a search of the car incident to arrest was not permissible, but would in no way have inhibited the Court

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his house not far from the front door.

<sup>194</sup> *Belton*, 453 U.S. at 459–61 (footnotes omitted).

<sup>195</sup> See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (driver); *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (passengers).

<sup>196</sup> *Belton*, 453 U.S. at 460.



from recognizing that the search of the individuals was nonetheless permissible, and that the search of the car also was permissible because of exigent circumstances. A fair application of *Chimel* would have bolstered the principle laid down in that case and thereby provided more guidance than *Belton* could possibly provide. *Belton*, as it turned out, was not a clear rule.

*E. The Confusion of Belton*

What is the passenger compartment of a car? Consider the vast range of options. Are vans and minivans to be treated as though their interiors are nothing but passenger compartments? Are the storage areas of hatchbacks part of the passenger compartment if the cover is up, but part of a trunk if the cover is down?<sup>197</sup> How are station wagons to be treated? Is there a passenger “compartment” of a motorcycle? Justice Brennan asked some of these questions in his dissenting opinion in *Belton*.<sup>198</sup>

There are no easy answers to these questions. There never are when arbitrary rules are adopted because there is no way to reason from one arbitrary conclusion to another.

Justice Brennan’s dissent recognized that the situation involving an arrest of someone who has been in a car is not so different from an arrest of someone at home.<sup>199</sup> A slightly different scenario from the one raised by the dissent illustrates how the two arrest scenarios could be similar. Suppose that police officers arrest a person at her home, handcuff her, and bring her outside. Can they go back and search the part of home they would have been able to search if the suspect were still inside, i.e., the part of the home where the suspect could have accessed a weapon or evidence? Lower courts have disagreed, but there seems to be something of a trend to saying yes. If it is right to make a search in *Belton* after it is clear that danger to officers and destruction of evidence are no longer concerns, why is it less right to make the same search when a home is involved? The

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<sup>197</sup> See, e.g., *United States v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994) (holding that the hatch area of a two-door Ford Mustang generally is within the passenger compartment).

<sup>198</sup> Specifically, Justice Brennan asked:

Does [the passenger compartment] include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver’s compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be “capable of holding another object”? Or does the new rule apply to any container, even if it “could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested”?

*Belton*, 453 U.S. at 470 (Brennan, J., dissenting) (citation omitted).

<sup>199</sup> *Id.* Justice Brennan posited, “What if a suspect is seen walking out of a house where the police, peering in from outside, had formed probable cause to believe a crime was being committed? Could the police then arrest that suspect and enter the house to conduct a search incident to arrest?” *Id.*

*Belton* majority provided no answer.

There are at least two other major problems with *Belton* that can arise at any place an arrest occurs. First, suppose an arrestee has a locked suitcase or briefcase that cannot easily be opened, and the arrestee is subdued and handcuffed. Should the police be permitted to break open the suitcase or briefcase when there is no possibility that its contents could be harmful to them or be destroyed? *Belton* says they can, and it says so in part because once *Robinson* eroded the *Chimel* principle while purporting to deal only with searches of the person, it was very easy to conclude that the same principle should apply to containers near the person.<sup>200</sup>

Second, there is the related question of how long a search incident to arrest should take. What if it takes bolt cutters to open a container? Can the police take a half hour at the scene of an arrest to force open a container they have total control of? If not, for how long can they try to break it open? *Chimel* appeared to assume that a search incident would be a quick search to protect officers and evidence. *Belton*'s statement that any container may be searched—open or closed, locked or unlocked—raises questions of how long as well as why.<sup>201</sup>

#### F. *Confusion Reduced or Exacerbated?*

As was true of the automobile exception, the Rehnquist Court was not responsible for *Chimel*, *Robinson*, or *Belton* (although Justice Rehnquist authored *Robinson*). The Rehnquist Court did have an opportunity, however, to reconsider or limit *Belton* and return to principled jurisprudence in *Thornton v. United States*.<sup>202</sup>

Chief Justice Rehnquist wrote for the Court as it held that *Belton*, not *Chimel*, applied when police officers arrest a suspect after he or she gets out of a car.<sup>203</sup> The case arose when a Norfolk police officer thought a car was driving suspiciously.<sup>204</sup> The officer checked the license plates and discovered that they were issued to a different car from the one he saw.<sup>205</sup> Meanwhile, Thornton, the driver of the car, drove into a parking lot, parked

<sup>200</sup> Not surprisingly, lower courts have read *Belton* as eliminating any distinction between searches of persons and searches of objects within an arrestee's control. *See, e.g.*, *United States v. Johnson*, 846 F.2d 279, 282 (5th Cir. 1988) ("We conclude that *Belton* eradicates any differences between searches of the person and searches within the arrestee's immediate control."). A concurring judge wrote that "*Belton* constituted a virtual overruling of the rationale of *Chimel*." *Id.* at 284 (Williams, C.J., concurring).

<sup>201</sup> A third problem might arise if there is a dispute as to what constitutes a container in an automobile. *See, e.g.*, *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1222 (11th Cir. 1993) (noting that the search of an automobile incident to arrest may not include damaging the vehicle in any way, including the ripping of upholstery).

<sup>202</sup> *Thornton v. United States*, 541 U.S. 615 (2004).

<sup>203</sup> *Id.* at 620.

<sup>204</sup> *Id.* at 617.

<sup>205</sup> *Id.* at 618.

his car, and got out of the car.<sup>206</sup> After Thornton was out of the car, the officer approached him and asked for his driver's license.<sup>207</sup> During the ensuing conversation, Thornton admitted, in response to questions from the officer, that he had drugs on his person, and produced them for the officer.<sup>208</sup> The officer arrested Thornton, handcuffed him, and put him in the back seat of his patrol car before searching Thornton's car and finding a handgun under the driver's seat.<sup>209</sup>

Chief Justice Rehnquist's opinion concluded that *Belton* did not turn on whether the arrest was made in the vehicle, and reasoned,

In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested.<sup>210</sup>

This language is incredibly broad, suggesting that any time anyone is arrested next to a vehicle, that vehicle may be searched incident to arrest. The opinion also reasoned, "[N]or is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle,"<sup>211</sup> which suggests that the decision might be confined to an arrestee's own vehicle. This, however, is not totally clear.

Even less clear is whether there was any danger of Thornton lunging into the car after he was arrested. If not, then there was nothing to support the search as incident to arrest. Chief Justice Rehnquist conceded that there might have been little or no danger:

It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.<sup>212</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* Whether the search would qualify as a justified probable-cause, exigent-circumstance search would turn on whether the officer had probable cause to believe that additional drugs were in the car. If so, given that the car was in a public parking lot, the officer might well have been warranted in searching it before removing Thornton to the station house.

<sup>210</sup> *Id.* at 620–21.

<sup>211</sup> *Id.* at 621.

<sup>212</sup> *Id.* at 622–23 (footnote omitted). Justice Scalia, concurring in the judgment, wrote

This would be remarkable if it were not so typical of Fourth Amendment Supreme Court cases. *Belton* approved of a search incident to arrest in which neither the officer nor evidence were endangered by arrestees.<sup>213</sup> *Thornton* extends the *Belton* rule by analogy: the danger in *Thornton* was no less than the danger in *Belton* because there was no real danger in either case.<sup>214</sup> The original and extended rules are needed, according to the Court, to provide clarity.<sup>215</sup> But there is no more clarity after *Thornton* than before. Must a suspect have recently been in a car to justify a search incident when an arrest is outside the car? If so, how recently? As Chief Justice Rehnquist put it, “So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”<sup>216</sup> This is not clear guidance to police officers.

What if a suspect steps out of his home, opens his trunk, removes a bag, and closes the trunk? Is he the sort of “recent occupant” the Chief Justice described? Who knows?

Moreover, *Thornton* provides no guidance as to a suspect who approaches a car. Does the *Belton* rule apply to future occupants of vehicles? If so, must the officer know whose car the suspect is approaching? Some day, the Supreme Court may answer these questions.

It should be obvious that such bright line rules are not so bright and are hardly understandable as rules. Even Justices who supported *Belton* had second thoughts in *Thornton*. Justice O’Connor, for example, in her one-paragraph partial concurrence wrote, “[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*. That erosion is a direct consequence of *Belton*’s shaky foundation.”<sup>217</sup>

Justice Scalia, joined by Justice Ginsburg, concurred only in the judgment.<sup>218</sup> He concluded that *Belton* could not be squared with *Chimel*.<sup>219</sup> The *Belton* rule could only be retained, he argued, by adopting

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as follows:

When petitioner’s car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer’s squad car. The risk that he would nevertheless “grab a weapon or evidentiary ite[m]” from his car was remote in the extreme.

*Id.* at 625 (Scalia, J., concurring in the judgment) (alteration in original).

<sup>213</sup> See *New York v. Belton*, 453 U.S. 454, 460 (1981).

<sup>214</sup> See *Thornton*, 541 U.S. at 622.

<sup>215</sup> *Id.* at 622–23.

<sup>216</sup> *Id.* at 623–24 (footnote omitted).

<sup>217</sup> *Id.* at 624 (O’Connor, J., concurring in part) (citation omitted).

<sup>218</sup> *Id.* at 625 (Scalia, J., concurring in the judgment).

<sup>219</sup> *Id.* at 629–31.

the broader *Rabinowitz* approach to searches incident to arrest and limiting its application to cars (which have a lesser expectation of privacy).<sup>220</sup> Justice Scalia also suggested that *Robinson*—under which any arrest justifies a search—was wrongly decided.<sup>221</sup>

The end result is that the Court has created a rule for searches incident to arrests made near cars that is as arbitrary and confusing as the automobile exception. Confusion abounds when rules are established without foundations.

### *III. Some Basic Principles*

This article is not just about cars. Its goal is to demonstrate how principled decision making can simultaneously enhance Fourth Amendment protections and provide guidance to law enforcement officials without making the Fourth Amendment the Internal Revenue Code of criminal procedure. Because the Amendment controls two types of government intrusions upon individuals—seizures and searches—it may be useful to consider what basic principles the Court ought to establish clearly as to each. Before examining these principles, there is a preliminary point to be made.

#### *A. Consensual Versus Nonconsensual Activity*

The preliminary point is that law enforcement officers and other government agents are as entitled to ask an individual to consent to, permit, or engage in a particular activity as any nongovernmental person. Because anyone can walk up to another person and ask, “May I talk to you?” law enforcement officers may do the same. Although it is unusual, anyone can contact another person and ask for a tour of the other person’s house. Law enforcement officials may do the same. In theory, one person may ask another for permission to search the other’s person or things, and law enforcement officers may do the same. Consensual activity is generally reasonable for Fourth Amendment purposes.<sup>222</sup> Reasonable suspicion and

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 631–32.

<sup>222</sup> *See, e.g.,* *United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (“Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.”); *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984) (per curiam) (explaining that asking a suspect to talk in an airport is “the sort of consensual encounter that implicates no Fourth Amendment interest”); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (“[L]aw enforcement officers do not violate the Fourth Amendment[’s prohibition of unreasonable seizures] by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . .”); *id.* at 523 n.3 (Rehnquist, J., dissenting) (agreeing with plurality that no

probable cause are not required, nor are warrants.

Because law enforcement officers have authority to engage in conduct that is not authorized for all people, questions may arise as to whether an individual has consented or has merely submitted to authority. Only the latter is governed by the Fourth Amendment.

A far better approach would be for the Court to draw lines that focus on the actions of law enforcement officers rather than on the beliefs of the individuals with whom they come in contact. These lines are consistent with some Supreme Court cases and inconsistent with others, as will become apparent in the discussion below.

### B. *Seizures and Terry Stops*

Almost all seizures of persons or property can be broken down into two categories: seizures pursuant to reasonable suspicion and seizures pursuant to probable cause. In the case of individuals, these are *Terry* stops and arrests.<sup>223</sup> In the case of property, all seizures look similar: some are preliminary to seeking warrants, while others are preliminary to warrantless searches.

#### 1. *When Does a Stop Occur?*

The Court's approach to seizures originated with Justice Stewart's plurality opinion in *United States v. Mendenhall*,<sup>224</sup> and in Justice White's plurality opinion in *Florida v. Royer*.<sup>225</sup> A seizure of an individual occurs, according to the plurality in *Mendenhall*, when a reasonable person would not feel free to terminate an encounter.<sup>226</sup> Justice Kennedy's opinion for the Court in *United States v. Drayton*<sup>227</sup> stated the same rule in converse form: "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized."<sup>228</sup> Stated either way, the test focuses on reasonable people and their feelings.

The Court focused on what a reasonable person would feel under the circumstances. The problem with such a focus is that reasonable people may not feel free to terminate *any* encounter with the police because they may not know and are not told that they have a right to terminate an encounter.<sup>229</sup> Thus, what an officer might regard as a request for

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seizure occurred when the detectives first approached and questioned the suspect).

<sup>223</sup> See *supra* Part I.B.

<sup>224</sup> *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>225</sup> *Florida v. Royer*, 460 U.S. 491 (1983).

<sup>226</sup> *Mendenhall*, 446 U.S. at 554 (plurality opinion).

<sup>227</sup> *United States v. Drayton*, 536 U.S. 194 (2002).

<sup>228</sup> *Id.* at 201.

<sup>229</sup> Then-Associate Justice Rehnquist recognized this for the Court in *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly

permission may be heard as a command by many individuals.<sup>230</sup> Although an argument could be made that a seizure occurs any time an officer approaches an individual and does not affirmatively state that the individual is free at any time to terminate the encounter, the Supreme Court has rejected this argument in the context of consent searches.<sup>231</sup> And there are good reasons why law enforcement officers should not be required to discourage individuals from cooperating with them.<sup>232</sup>

The Court erred by focusing on the hypothetical feelings of a “reasonable person.” If reasonable people generally do not feel free to terminate any encounter with officers, they feel “seized” to some extent from the outset of any encounter. Yet the Court was not prepared to call all encounters seizures or to require warnings in all encounters. Although the Court’s holdings suggest that reasonable people feel free to terminate encounters, surveys among groups of students and judges show disagreement with the Court’s assessment of reasonable people.<sup>233</sup> Furthermore, the holdings are not particularly useful in the long run to law enforcement officers because they tend to be fact-specific. Giving only fact-specific guidance, the Court then requires police officers to foresee accurately how a reasonable person would react and what he or she would believe, a task which they have no particular ability, education, or training to accomplish.

## 2. *A Better Approach*

A better approach is to focus on the conduct of law enforcement officers rather than on the reactions of individuals to law enforcement officers. This approach asks law enforcement officers to pay attention to their own actions, not to predict how reasonable civilians would respond to those actions.

Any time that a law enforcement officer uses physical force, threats of any kind, or physically makes it appear difficult for a person to terminate

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eliminates the consensual nature of the response.”).

<sup>230</sup> See Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 535 (2001) (“Far from feeling free to terminate an encounter, the reasonable person, by all indications, submits to the legitimate and coercive authority of the police.”).

<sup>231</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 231–32 (1973).

<sup>232</sup> See *id.* (noting that consent searches are standard in police investigatory work and necessary in order to conduct effective investigations in informal and unstructured conditions).

<sup>233</sup> I frequently ask my students and judges who are participating in discussions of Fourth Amendment issues for their reactions to the seizure decisions of the Supreme Court. I find frequent dissent. Their reactions are not surprising given existing social science research. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153.

an encounter, courts should say that there has been a seizure.<sup>234</sup> If the Court had followed this approach, it would have decided a number of cases differently, and it would have enabled law enforcement officers to know what they cannot do without reasonable suspicion or probable cause.

*Drayton* is a good example. At a scheduled stop for a Greyhound bus, the driver permitted three police officers to board the bus as part of a routine drug and weapons enforcement effort.<sup>235</sup> The officers, dressed in plain clothes, had visible badges and carried concealed weapons.<sup>236</sup> Two officers went to the rear of the bus, while the third officer stayed up front, kneeling down on the driver's seat and looking towards the rear.<sup>237</sup> One of the two officers who had gone to the back of the bus walked forward, asking questions of passengers and seeking to match passengers with their bags in the overhead racks.<sup>238</sup> This officer approached two men, Drayton and Brown, stuck his face twelve to eighteen inches from Drayton's face as he leaned over Drayton's shoulders, and identified himself as a police officer doing a drug investigation in a voice both men could hear.<sup>239</sup> The officer asked about Drayton's luggage, obtained permission to search it, but found no contraband.<sup>240</sup> The officer then asked Brown whether he had any weapons or drugs and whether he could check Brown's "person."<sup>241</sup> Brown consented, and during the ensuing pat down, the officer found drugs.<sup>242</sup> Similarly, after obtaining consent from Drayton to search his person, the officer patted him down and found more drugs.<sup>243</sup>

The issue before the Court was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>244</sup> Justice Kennedy explained that in *Florida v. Bostick*,<sup>245</sup> the Court adopted this test as more appropriate than the one stated by the *Mendenhall* and *Royer* pluralities for the context of searches on buses:

*Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper

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<sup>234</sup> The Supreme Court almost said as much in *Terry v. Ohio*, 392 U.S. 1 (1968): "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n.16.

<sup>235</sup> *United States v. Drayton*, 536 U.S. 194, 197 (2002).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 197–98.

<sup>238</sup> *Id.* at 198.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 199.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 202 (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

<sup>245</sup> *Florida v. Bostick*, 501 U.S. 429 (1991)).



inquiry necessitates a consideration of “all the circumstances surrounding the encounter.” The Court noted next that the traditional rule, which states that a seizure does not occur so long as a reasonable person would feel free “to disregard the police and go about his business,” is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. A bus rider’s movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive.<sup>246</sup>

In sum, *Bostick* attempted to frame the question of whether “a reasonable person would feel free to disregard the police and go about his business” when an encounter occurs on a bus, while *Drayton* sought to answer the question on the facts presented.<sup>247</sup>

It is certainly arguable that when reasonable people are confronted by multiple police officers on a bus, some of whom are standing at the front and rear of the bus while another roams the aisle asking questions of passengers, many people would not feel free to disregard the officers and go about their business. Presumably, the officers decided to enter the bus and take up the positions they did to send a message to the passengers—i.e., that they were not free to leave. Although the officers stated in court that they would have let a passenger step off the bus without restriction,<sup>248</sup> the message they actually communicated to the passengers was far different.

When the officers manned the exits, they physically made it appear difficult for anyone on the bus to terminate the encounter. This should have been sufficient to make it a seizure. The same result should prevail in a situation in which an officer closes a door to a room, stands in front of the door, and then requests a conversation. Making it appear difficult to leave should be sufficient to constitute a seizure.

This standard for a seizure would have required a different result in *INS v. Delgado*.<sup>249</sup> In that case, Immigration and Naturalization Service (“INS”) agents conducted “factory surveys” by entering factories or plants to look for illegal aliens, with the permission of the factory owners.<sup>250</sup> Some agents stationed themselves near the buildings’ exits while others moved around the factory to question workers.<sup>251</sup> The agents had visible

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<sup>246</sup> *Drayton*, 536 U.S. at 201–02 (citations omitted).

<sup>247</sup> *Id.* at 201 (quotation omitted).

<sup>248</sup> *Id.* at 198.

<sup>249</sup> *INS v. Delgado*, 466 U.S. 210 (1984).

<sup>250</sup> *Id.* at 212.

<sup>251</sup> *Id.*

weapons, badges, and walkie-talkies.<sup>252</sup> Four employees questioned in one of the surveys filed suit, claiming that they were seized in violation of the Fourth Amendment.<sup>253</sup> Incredibly, the Court concluded that because the employees were working inside the factory and only faced the possibility of *questioning* if they tried to leave, the placement of armed guards at the doors had no coercive effect.<sup>254</sup> This is a strange view of how reasonable people might react if the exit doors at their workplace were blocked by armed individuals. Presumably, the doors were manned because the INS agents thought people might otherwise leave. Law enforcement officers certainly understand that when they use force, threats, or block normal means of ingress or egress, they are conducting a seizure. Officers need not and should not be required to double as psychoanalysts simply to determine whether their actions constitute a seizure. Yet the Court's reasoning in *Delgado* seems to require this very thing. Officers would have a much easier time focusing on their own actions.

### 3. *Unsuccessful Attempts*

Focusing on the actions of the police rather than on the reactions of individuals to the police would reinforce the constitutional mandate that police can never use force or threats in dealing with individuals unless they satisfy the requirements of the Fourth Amendment. Such a focus would have led to a very different result in a case like *California v. Hodari D.*<sup>255</sup>

*Hodari D.* arose when police officers encountered a group of youths huddled around a car who fled when they saw the officers.<sup>256</sup> Hodari, one of the fleeing youths, threw away a small rock as a pursuing officer was about to catch him.<sup>257</sup> The officer tackled Hodari, handcuffed him, and discovered that the discarded rock was crack cocaine.<sup>258</sup> The only issue before the Court was whether Hodari had been seized when he saw the officer running towards him and subsequently dropped the cocaine.<sup>259</sup>

Justice Scalia's opinion for the Court distinguished between two types of seizures: those in which the officer has physically touched a person in an effort to restrain the person, and those in which the arrestee has submitted to an officer's nonphysical show of authority.<sup>260</sup> With respect to physical-touching seizures, Justice Scalia wrote, "To constitute an arrest . . . —the quintessential 'seizure of the person' under our Fourth Amendment

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 213.

<sup>254</sup> *Id.* at 218–19.

<sup>255</sup> *California v. Hodari D.*, 499 U.S. 621 (1991).

<sup>256</sup> *Id.* at 622–23.

<sup>257</sup> *Id.* at 623.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 624–26.

jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.”<sup>261</sup>

Applying this test in *Hodari D.*, Justice Scalia’s reasoning suggested that if the officer had touched Hodari (i.e., seized him) before Hodari threw the cocaine, there would have been a seizure and the evidence would have been suppressed.<sup>262</sup> Justice Scalia also noted, however, that at some point the effects of an unsuccessful attempt to arrest dissipate:

To say that an arrest is effected by the slightest application of physical force, despite the arrestee’s escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, [the officer] had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest.<sup>263</sup>

As for nonphysical seizures, Justice Scalia reasoned that the *Mendenhall* “free to leave” test<sup>264</sup> was a necessary, but not a dispositive, test for determining whether a seizure has occurred.<sup>265</sup> He concluded that a person is not seized when she is not touched and does not submit to police action, even though reasonable persons would not feel free to resist:

The word “seizure” readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. (“She seized the purse-snatcher, but he broke out of her grasp.”) It does not remotely apply, however, to the prospect of a policeman yelling “Stop, in the name of the law!” at a fleeing form that continues to flee. That is no seizure.<sup>266</sup>

In the footnote accompanying this quote, Justice Scalia described and dismissed the English-common-law prohibition on unlawful attempted seizures:

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<sup>261</sup> *Id.* at 624–25 (citing *Whitehead v. Keyes*, 85 Mass. (3 Allen) 495, 501 (1862) (“[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.”)); *see also* RESTATEMENT (FIRST) OF TORTS § 41 cmt. h (1934); ASHER L. CORNELIUS, *THE LAW OF SEARCH AND SEIZURE* 163–64 (2d ed. 1930).

<sup>262</sup> *See Hodari D.*, 499 U.S. at 625.

<sup>263</sup> *Id.* Whether or not Justice Scalia is correct in saying that it would not be realistic to assume that a toss following an escape does not occur during an arrest, the toss still might be the fruit of an arrest attempt.

<sup>264</sup> *See supra* text accompanying note 226.

<sup>265</sup> *Hodari D.*, 499 U.S. at 628 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

<sup>266</sup> *Id.* at 626 (footnote omitted).

For this simple reason—which involves neither “logic-chopping,” nor any arcane knowledge of legal history—it is irrelevant that English law proscribed “an unlawful *attempt* to take a presumptively innocent person into custody.” We have consulted the common law to explain the meaning of seizure—and, contrary to the dissent’s portrayal, to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice). But neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.<sup>267</sup>

It seems that the English common law made perfect sense, much more so than Justice Scalia. Consider again a physical touching. If, in fact, an officer grabbed a person and had control of her, no one would doubt that a seizure occurred. If the person broke away, reasonable people would conclude that an escape from a seizure had been accomplished. Suppose, however, an officer sought to grab a suspect, tripped, and brushed a finger against the suspect as the suspect began to run. No one would say that the suspect had been seized in any normal understanding of a physical seizure, but as the Court appropriately interprets the Fourth Amendment, such a slight touching would constitute a seizure.<sup>268</sup> Why? The answer is that no person should be put at risk of the use of force or threats unless constitutional standards are satisfied.

Now, say that the officer tripped before his finger touched the suspect, but the officer yelled, “Stop or I’ll shoot!” After taking one step as if to flee, the suspect dropped dead of a heart attack. Following his opinion in *Hodari D.*, Justice Scalia would reason that no seizure had taken place, and thus the officer had taken no action that falls within the ambit of the Fourth Amendment.<sup>269</sup> This makes no sense. Whether or not suspects submit to official demands, the Fourth Amendment still controls what law enforcement officers may do. Law enforcement officers who seek to put suspects at risk should be within the reach of the Fourth Amendment.

Apparently, Justice Scalia would hold that if an officer shot at a suspect to stop him from fleeing, but the bullet missed the suspect because he lunged away to avoid being shot, there would be no seizure. There is little logic to the result that the touch of a finger that fails to restrain a suspect is a seizure, while an unsuccessful attempt to shoot a suspect is not.

The common-law prohibition on unlawful attempted seizures, on the

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<sup>267</sup> *Id.* at 626 n.2 (citations omitted).

<sup>268</sup> If the suspect subsequently ran away after being touched, he would no longer be seized, although the initial seizure still would have occurred. *See id.* at 625.

<sup>269</sup> *See id.* at 626.

other hand, had the right focus. *Hodari D.* adopted the common law with respect to physical touching seizures, i.e., the mere touching of a suspect is a seizure, even if wholly ineffective in controlling the suspect.<sup>270</sup> The common law recognized, as a properly interpreted Fourth Amendment should, that police who attempt to use force or threats should be judged according to whether they had sufficient cause to do so, not whether they succeeded in actually touching or apprehending the suspect. Whether or not they succeeded may determine the harm actually visited on individuals who are wrongly seized, but it should not affect the determination of the legality of the police action.<sup>271</sup>

#### 4. *Reasonable Suspicion: A Necessary Ingredient*

Absent the minimal showing of reasonable suspicion, no use of force or threats should be permitted under the Fourth Amendment. This is the lesson of *Terry v. Ohio* and its progeny.<sup>272</sup> No exceptions or “bright line” rules should be permitted to confuse this basic constitutional requirement. Thus, Chief Justice Rehnquist’s opinion for the Court in *Muehler v. Mena*,<sup>273</sup> written in his final term as Chief Justice, should not stand the test of time.

This case arose when police detained Iris Mena in handcuffs during a search of the premises that she and several others occupied.<sup>274</sup> Police had reason to believe that a gang member, who was armed and dangerous and recently involved in a shooting, lived on the premises.<sup>275</sup> A SWAT team was used to execute a search warrant in the early morning hours.<sup>276</sup> Mena and three other handcuffed individuals were taken to a converted garage, where they were kept while the search was conducted.<sup>277</sup> Mena filed a civil

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<sup>270</sup> *Id.* at 625. Justice Scalia attempted to reconcile a discrepancy between dictionaries and the common law regarding the definition of “seizure”: “From the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession.’” *Id.* (citations omitted) (referring to definitions from three dictionaries dated 1828, 1856, and 1981). A touching is clearly not the same as “taking possession.” Yet a touching, according to Fourth Amendment Supreme Court jurisprudence, is a seizure.

<sup>271</sup> To constitute action that is regulated by the Fourth Amendment, police conduct must involve a deliberate attempt to stop a person, as Justice Scalia concluded for the Court in *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). An officer who slips on ice and falls accidentally on another person may have stopped and even seized the person, but not for Fourth Amendment purposes. Such is not the use of force or a threat to compel a person to halt; it is an accident.

<sup>272</sup> This line of cases is well summarized in *Michigan v. Summers*, 452 U.S. 692, 697–701 (1981). See *infra* text accompanying notes 284–301.

<sup>273</sup> *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>274</sup> *Id.* at 95.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 96.

<sup>277</sup> *Id.*

rights action against the police.<sup>278</sup> A jury found that two officers violated the Fourth Amendment by using greater force than was reasonable and for a longer period than was reasonable, and awarded Mena \$20,000 in actual damages and \$40,000 in punitive damages.<sup>279</sup> The United States Court of Appeals for the Ninth Circuit affirmed the judgment for Mena.<sup>280</sup> The court reviewed the denial of qualified immunity *de novo*,<sup>281</sup> and held that the detention of Mena violated the Fourth Amendment because it was objectively unreasonable to confine her in the converted garage and to keep her in handcuffs during the search.<sup>282</sup> The court further held that the officers should have released Mena as soon as it became clear that she posed no immediate threat.<sup>283</sup>

Chief Justice Rehnquist's opinion rejected the reasoning of the Ninth Circuit as he relied upon *Michigan v. Summers*<sup>284</sup> as controlling authority.<sup>285</sup> In *Summers*, police officers in Detroit were preparing to execute a search warrant at a house to look for narcotics when they encountered Summers coming down the front steps.<sup>286</sup> They asked him to assist them in entering the house, detained him while they conducted their search, and arrested and searched him after they found narcotics in the basement and ascertained that he owned the house.<sup>287</sup> In conducting the search of his person, the police also found heroin in his coat pocket.<sup>288</sup>

Justice Stevens's opinion for the Court noted that the State's argument that the search warrant authorized a search of individuals in the house, even if true, could not sustain the detention of Summers because he was not actually in the house when the police arrived to execute the warrant.<sup>289</sup> Justice Stevens then spent a good deal of effort distinguishing *Summers* from *Dunaway v. New York*<sup>290</sup> and establishing that the intrusion on

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 97.

<sup>280</sup> *Mena v. City of Simi Valley*, 332 F.3d 1255, 1270 (9th Cir. 2003), *vacated and remanded sub nom. Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>281</sup> *Id.* at 1261 n.2.

<sup>282</sup> *Id.* at 1263–64.

<sup>283</sup> *Id.* at 1263. Other parts of the court's opinion, which shall not be discussed here, include, e.g., whether the questioning of Mena about her immigration status constituted an independent Fourth Amendment violation. *See id.* at 1264–66.

<sup>284</sup> *Michigan v. Summers*, 452 U.S. 692 (1981).

<sup>285</sup> *Mena*, 544 U.S. at 98 (citing *Michigan v. Summers*, 452 U.S. 692 (1981)).

<sup>286</sup> *Summers*, 452 U.S. at 693.

<sup>287</sup> *Id.* The officers detained eight other individuals in the house, whose detentions were not at issue in this case. *Id.* at 693 n.1.

<sup>288</sup> *Id.* at 693.

<sup>289</sup> *Id.* at 694.

<sup>290</sup> *Dunaway v. New York*, 442 U.S. 200 (1979) (holding that police violated the Fourth Amendment when they took a murder suspect into custody without a warrant or probable cause and questioned him in an interrogation room at the police station).

Summers was not the equivalent of an arrest requiring probable cause.<sup>291</sup> He reasoned as follows:

In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, *both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found.* Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation. Finally, the orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand.<sup>292</sup>

The crucial language in the above quote has been emphasized. Justice Stevens added another explanation:

The existence of a search warrant . . . also provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.<sup>293</sup>

The language quoted thus far is based on simple logic: if the police have probable cause to search a home for contraband, it is reasonable to suspect that anyone residing in the home might be subject to arrest if the contraband is found. Thus, detaining those persons is reasonable under the *Terry* line of cases.

Unfortunately, Justice Stevens added more than was necessary to

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<sup>291</sup> *Summers*, 452 U.S. at 697–98, 701–02.

<sup>292</sup> *Id.* at 702–03 (emphasis added) (footnote omitted) (citation omitted).

<sup>293</sup> *Id.* at 703–04 (footnote omitted).

decide the case:

If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.<sup>294</sup>

In two of the footnotes accompanying this text, Justice Stevens added that “[w]e do not decide whether the same result would be justified if the search warrant merely authorized a search for evidence,”<sup>295</sup> and “[a]lthough special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.”<sup>296</sup>

In *Mena*, the police searched for evidence of guns and gang membership paraphernalia associated with a particular individual.<sup>297</sup> The officers executing the warrant found a .22 caliber handgun, ammunition, and some evidence of gang membership.<sup>298</sup> Having found this, they did not arrest Mena because they never had reason to suspect her of involvement with the gang (the search warrant for the premises was issued based on reasonable suspicion of another resident of the house).<sup>299</sup> Thus, three issues that were not decided in *Summers* were before the Court in *Mena*: (1) Where the police are looking for evidence directed at a particular individual, may they detain others on the premises while they execute a search warrant, absent any articulable facts suggesting that, if they found evidence, they would arrest the detained people? (2) Does *Summers* apply to a search for evidence other than drugs or other contraband? (3) Does *Summers* apply to a situation where a person, as to whom there is no reasonable suspicion, is handcuffed for more than two hours?

Chief Justice Rehnquist's opinion for the Court in *Mena* assumed that *Summers* had decided all of these questions and adopted a per se rule applicable to all searches of premises: “An officer's authority to detain incident to a search is categorical; it does not depend on the ‘quantum of proof justifying detention or the extent of the intrusion to be imposed by

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<sup>294</sup> *Id.* at 704–05 (footnotes omitted).

<sup>295</sup> *Id.* at 705 n.20.

<sup>296</sup> *Id.* at 705 n.21.

<sup>297</sup> *Muehler v. Mena*, 544 U.S. 93, 95–96 (2005).

<sup>298</sup> *Id.* at 96.

<sup>299</sup> *Id.*



the seizure.<sup>300</sup> Although Rehnquist's rule quoted language from Justice Stevens's opinion in *Summers*, it ignored the fact that *Summers* involved contraband with which everyone on the premises could reasonably be suspected of involvement, did not decide whether its reasoning would apply to a search for noncontraband evidence, and left open the question of whether special circumstances such as a prolonged detention (or handcuffs perhaps?)<sup>301</sup> might require a different result.

Perhaps the biggest step that the Court took in *Mena* was to substitute the word "occupant" for "resident" in applying the per se rule.<sup>302</sup> The Chief Justice's opinion in *Mena* authorizes an automatic seizure, including the use of reasonable force, upon anyone occupying any premises when a search warrant is executed upon that premises.<sup>303</sup> There is no longer any recognition that different circumstances might require a different result.

Consider the implications. Suppose that police officers have a search warrant to search a house for a gun belonging to X. They arrive and discover that a Lamaze birthing class is being conducted in a den by X's spouse. According to *Mena*, the officers executing the warrant have a per se right to detain all of the pregnant mothers-to-be and their coaches while the warrant is executed. This is indefensible.

Change the Lamaze class to a scout troop meeting. Whether it is Boy Scouts, Girl Scouts, Eagle Scouts, or some combination, there is nothing reasonable about a per se rule that the scouts and the scout masters can be detained pending a search. This is also indefensible.

Putting aside pregnant women, coaches, scouts, and scout masters, one can imagine a reading discussion group, a Bible study class, or any number of activities in which people occupy premises in which it is implausible to regard their detention during the execution of a search warrant as reasonable.

It makes more sense to instruct police that, pursuant to *Terry*, while

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<sup>300</sup> *Id.* at 98 (quoting *Summers*, 452 U.S. at 705 n.19).

<sup>301</sup> The Chief Justice recognized that the use of the handcuffs was a greater intrusion than in *Summers*. *Id.* at 99.

<sup>302</sup> It is of paramount importance that in *Summers*, the suspect was a resident of the house that was the subject of the search warrant. *Michigan v. Summers*, 452 U.S. 692, 693 (1981). The police knew that the suspect lived in the home prior to the search. *Id.* at 695 n.4. Furthermore, Justice Stevens strongly and repeatedly emphasized the importance of the fact that the suspect lived at the premises: "If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home." *Id.* at 704-05. Thus, although Justice Stevens did use the words "resident" and "occupant" interchangeably at times, the context of the case, plus his repeated emphasis on the importance of the suspect's resident status, clearly demonstrates that the two words were intended to convey the same thing, i.e., that the suspect *resided* at the premises being searched. This emphasis disappeared in *Mena*.

<sup>303</sup> *Mena*, 544 U.S. at 98.

executing a search warrant, they may detain anyone at the premises who is reasonably likely to be arrested if the evidence being sought is found. That is what *Summers* was all about. The Court has frequently indicated that when drugs are found in a place that is shared by several people, all of them may be arrested.<sup>304</sup> That is why the detention in *Summers* made sense. Expanding *Summers* to all searches, regardless of what is sought or who is an occupant of the premises, is unwarranted.<sup>305</sup>

##### 5. *Why and for How Long Stops Are Permitted*

The power to stop an individual pursuant to *Terry* and other cases is intended to provide the police with a brief opportunity to ascertain whether they have probable cause to arrest or issue a citation for a crime or violation of the law. The *Terry* doctrine recognizes that law enforcement officers cannot always know instantaneously whether a crime has been committed or is about to be committed. The power to stop permits officers to “freeze the scene” in order to make the probable cause determination. Without such power, law enforcement officers might well have to make premature arrests in order to protect society or risk having criminals escape or commit crimes that could have been prevented.

The Court has made clear that stops are permissible only for limited periods. It has not set a time limit, but police by now understand that they can freeze the scene for only a little while and must then make a decision of whether to arrest (or cite) a person or let the person go. In *United States v.*

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<sup>304</sup> See, e.g., *Maryland v. Pringle*, 540 U.S. 366 (2003); *New York v. Belton*, 453 U.S. 454, 455–56 (1981) (four individuals arrested when marijuana found in car). Justice Rehnquist wrote for the Court in *Pringle* as it upheld the arrest of three occupants of a car in which cocaine and money were found. *Pringle*, 540 U.S. at 369. Two of the men were released after Pringle confessed, which is a reminder that probable cause to arrest is not an indication of sufficient evidence to convict. *Id.*

<sup>305</sup> In *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Court refused to uphold a frisk of a bar patron who happened to be present when the police arrived to conduct a search of the bar pursuant to a valid search warrant. *Id.* at 88–89, 96. The search warrant authorized a search of the bar and the bartender for narcotics. *Id.* at 88. The Court held that officers needed to have specific facts suggesting that Ybarra was armed and dangerous in order to frisk him. *Id.* at 93. Justice Stewart’s opinion observed that “[a]lthough the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search ‘Greg [the bartender],’ it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern’s customers.” *Id.* at 92. These constitutional protections included the right to be free from seizure as well as from searches (i.e., frisking), absent reasonable suspicion. *Id.* at 91. Then–Associate Justice Rehnquist joined Chief Justice Burger’s dissenting opinion. *Id.* at 96 (Burger, C.J., dissenting). Justice Rehnquist also wrote his own dissent, in which the Chief Justice and Justice Blackmun joined. *Id.* at 98 (Rehnquist, J., dissenting). Justice Rehnquist argued for the same kind of per se rule that ultimately was adopted in *Mena*: “Because the police were aware that heroin was being offered for sale in the tavern, it was quite reasonable to assume that any one or more of the persons at the bar could have been involved in drug trafficking.” *Id.* at 106.

*Place*,<sup>306</sup> the Court held that a ninety-minute detention of Place's luggage, which also delayed Place, was unreasonable.<sup>307</sup> Police used the time to bring the luggage from one metropolitan airport to another, where a drug sniffing dog was present.<sup>308</sup> Justice O'Connor's opinion reasoned that the officers had not diligently pursued their investigation and commented that "we have never approved a seizure of the person for the prolonged [ninety]-minute period involved here."<sup>309</sup>

In *United States v. Sharpe*,<sup>310</sup> the Court held that a twenty-minute delay between stopping a car and arresting its occupant was reasonable under the circumstances.<sup>311</sup> The Court found that the suspect bore much of the responsibility for the delay as a result of his flight and failure to pull over as requested.<sup>312</sup>

The Court wisely emphasized that law enforcement officers utilizing their *Terry* powers must act diligently: "[W]e consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."<sup>313</sup>

Diligent police action usually means detaining a suspect for a short time in order to decide whether to arrest or cite the suspect. When police conduct a search for contraband, as in *Summers* and *Mena*,<sup>314</sup> and they have reasonable suspicion to believe that a person on the premises would be subject to arrest if the contraband is found, detaining the suspect until the search is completed may constitute diligent police action even though the detention is longer than most *Terry* stops.

*Terry* seizures of property, approved first in *Van Leeuwen*,<sup>315</sup> are indistinguishable from seizures of persons when the property seizure effectively detains the person possessing the property as in *Place*.<sup>316</sup> The

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<sup>306</sup> *United States v. Place*, 462 U.S. 696 (1983).

<sup>307</sup> *Id.* at 710.

<sup>308</sup> *Id.* at 699.

<sup>309</sup> *Id.* at 709–10.

<sup>310</sup> *United States v. Sharpe*, 470 U.S. 675 (1985).

<sup>311</sup> *Id.* at 688.

<sup>312</sup> *Id.* at 687–88.

<sup>313</sup> *Id.* at 686.

<sup>314</sup> *Summers* and *Mena* involved searches conducted pursuant to warrants. See *Michigan v. Summers*, 452 U.S. 692, 693 (1981); *Muehler v. Mena*, 544 U.S. 93, 95–96 (2005). There is no reason to believe, however, that in exigent circumstances when police are permitted to search without a warrant for contraband, a different result would obtain with respect to persons found on the premises who are subject to arrest if the contraband is found.

<sup>315</sup> See *supra* text accompanying notes 38–40.

<sup>316</sup> See *United States v. Place*, 462 U.S. 696, 708–09 (1983) (noting that because the detention of a traveler's luggage subjects the traveler to the possible disruption of his schedule and the inconvenience of either staying with his luggage or tracking it down, the same limitations that apply to *Terry* stops of individuals apply to investigative detentions of

permissible length of a detention of property in such circumstances equals the permissible length that a person may be detained.<sup>317</sup>

Where, however, property is detained without the possessor's knowledge, as in *Van Leeuwen*, a detention may exceed the time that a person can be detained. In *Van Leeuwen*, a unanimous Supreme Court approved of the detention of a mailed package for more than a day.<sup>318</sup> Lower courts have upheld seizures of mail that lasted for three days,<sup>319</sup> but have also invalidated long seizures where the police failed to act diligently.<sup>320</sup>

The purpose of a *Van Leeuwen*-type detention is the same as the purpose of detaining a person: i.e., to permit law enforcement to decide whether there is probable cause for a full seizure and search. The requirement in all detentions is that police act diligently. But thus far, the cases suggest that detentions of people will only be tolerated for short periods of time, while detentions of property that do not effectively detain people may be for longer periods.

The Supreme Court has not addressed very many property detention cases. In the future, it may have to decide whether the diligence requirement limits the amount of time that property may be detained, especially if law enforcement is aware that the failure of such property to arrive at its destination on time may result in substantial damage to the recipient. The Court might also have to decide, with respect to both individuals and property, whether a prolonged detention might be reasonable if the investigation involved a major threat to public safety or national security, such as a possible terrorist attack.<sup>321</sup> It would make sense for the Court to hold that detentions of property may become unreasonable if law enforcement detains them for a somewhat lengthy period, with the knowledge that a delay in delivery threatens to cause substantial injury to the recipient of the property. Furthermore, it would make sense for the Court to hold that detentions of both persons and property may be extended when the probable cause inquiry involves a great threat to public safety or national security.

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luggage as well).

<sup>317</sup> *Id.*

<sup>318</sup> *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970).

<sup>319</sup> *See, e.g., United States v. Aldaz*, 921 F.2d 227, 231 (9th Cir. 1990).

<sup>320</sup> *See, e.g., United States v. Dass*, 849 F.2d 414, 415 (9th Cir. 1988) (holding that the detention of mail for seven to twenty-three days was unreasonable where diligent police action could have reduced the detention to thirty-six hours).

<sup>321</sup> *Cf. Florida v. J.L.*, 529 U.S. 266, 273–74 (2000) (holding that an anonymous tip that a person is carrying a gun is not sufficient to justify a stop and frisk, but also noting that “a report of a person carrying a bomb need [not] bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk”).

### C. Arrests

#### 1. Why Are Arrests Made?

The discussion of temporary seizures above reveals that they are made to give officers an opportunity to decide whether they have probable cause to arrest or cite, or to seek to obtain a search warrant. But why are arrests made?

One answer is that the arrest is the initiation of a criminal process. Yet, an arrest is not required to initiate that process. Issuance of a citation or summons charging an offense and requiring a person to appear before a magistrate is an alternative. For example, Federal Rule of Criminal Procedure 4(a) provides in relevant part:

If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it.<sup>322</sup>

In many places, law enforcement officers have the authority to issue a citation or summons in lieu of making an arrest.<sup>323</sup> If the only reason for an arrest were to initiate the criminal process, an arrest might seem an unreasonable seizure given the availability of an adequate, less intrusive substitute.

An additional reason for arrest is to assure that a person is properly identified. The booking process usually involves taking a photograph and fingerprinting a suspect. But custodial arrests are not actually required to assure proper identification. An officer issuing a summons or citation could take a photograph and even obtain fingerprints.<sup>324</sup> Moreover, it is doubtful that most individuals with driver's licenses and other forms of identification are carrying false identification, which itself may be a crime.<sup>325</sup> If identification were the justification for arrest, arrest might again seem like an unreasonable seizure given the availability of an adequate, less intrusive substitute.

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<sup>322</sup> FED. R. CRIM. P. 4(a). Federal Rule of Criminal Procedure 4(b)(2) provides that "[a] summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place."

<sup>323</sup> See, e.g., *Gustafson v. Florida*, 414 U.S. 260, 263 (1973) (noting that police regulations did not require that a minor-traffic-law violator be taken into custody).

<sup>324</sup> See *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (leaving open the possibility that fingerprinting in the field based on reasonable suspicion might be permissible).

<sup>325</sup> To the extent that police want to be sure that there are no outstanding warrants against people who are detained, they can run a background check before deciding to issue a summons or citation. Arrests are not necessary to perform these checks.

There are two other valid reasons why police officers arrest suspects. One is to prevent escape and thereby to assure that the suspect will appear for trial. Given the enormous number of statutes that penalize conduct in this day and age, there is reason to question whether escape is really a threat when offenders are charged with traffic or other minor offenses. If the penalty for failure to appear is set high enough, minor offenders have a great incentive to make court appearances.

Another valid reason for arrest is to remove dangerous individuals from situations in which they may threaten society and permit a magistrate to decide whether these individuals should be released pending trial and on what grounds. The arrest of dangerous individuals not only protects the safety of the public, but it makes the public aware that law enforcement officials believe that a threat has been removed and that the public need not continue to fear the presence of a particular offender in the community. However, it seems obvious that not all individuals pose such a danger to society that their isolation, even for a brief period, is necessary.

These valid reasons for arrest apply to some suspects, but not to all. Many people who are arrested for minor crimes could easily be processed with a summons or citation. Why, then, do we continue to arrest them? At one time, a writ of attachment could even issue in a civil case for the seizure of the defendant unless adequate bail was posted.<sup>326</sup> Few would think the arrest of a defendant in a civil case would be reasonable today.

There are practical reasons why law enforcement officers make arrests when circumstances do not require taking individuals into custody. These reasons ought to be invalid under a “reasonable” interpretation of the Fourth Amendment’s reasonableness requirement.

Before identifying these reasons, it is important to identify the ordeal entailed in a custodial arrest. Typically, the suspect is handcuffed, fully searched incident to arrest, placed while handcuffed in the back seat of a patrol car, taken to a police station, booked (photographed and fingerprinted), placed in a holding cell, and after some time passes (which might be forty-eight hours if the arrest is on a weekend<sup>327</sup>) taken before a

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<sup>326</sup> See, e.g., *The Robert W. Parsons*, 191 U.S. 17, 37 (1903) (comparing *in personam* jurisdiction, where a warrant of arrest could be issued for the defendant, with *in rem* jurisdiction, where the defendant’s possessions could be attached); *Palmer v. Allen*, 11 U.S. (7 Cranch) 550, 551 (1813) (noting that in an action for trespass, assault and battery, and false imprisonment, the plaintiff attached the body of the defendant); see also *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) (noting that the purpose of an arrest at common law, both in criminal and civil cases, was to ensure the arrestee’s appearance in court).

<sup>327</sup> The Supreme Court created a rebuttable presumption that it is reasonable for the police to arrest a suspect without a warrant for up to forty-eight hours before a magistrate makes a probable cause determination. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991). The holding deals only with the probable cause determination. It says nothing about how long a person may be detained following an arrest for a minor offense

magistrate who determines whether to release the person and on what conditions. While in a holding cell, the suspect may be housed with career criminals, sociopaths, and/or other extremely dangerous individuals. Assaults, physical and sexual, are a genuine danger. Despite the realities associated with custodial arrests, most courts, including the Supreme Court, seem oblivious to exactly what occurs in an arrest scenario.

Law enforcement officers understand what happens to a custodial arrestee. They know when they make an arrest of any offender who they have the power to take into custody that by making a custodial arrest, they are able to serve as judge, jury, and sentencer as well as officer of the law. They know this because whatever time an arrestee spends in a jail cell following a lawful arrest is deemed lawful incarceration, even if the law that the arrestee broke was punishable only by a fine.<sup>328</sup>

Put another way, in some circumstances a law enforcement officer can unilaterally determine to arrest rather than issue a summons or citation and can do so for the purpose of punishing the person arrested. Arresting someone for such a purpose must be deemed improper in any system in which suspects are presumed innocent and punishment is a decision for judges or juries. A related reason for arrest is to humiliate the arrestee by subjecting her to the “perp walk,” where the arrestee is deliberately marched before the news media so that she can be photographed and publicly displayed.<sup>329</sup> If the purpose of publicity were only to assure the public that law enforcement officials believe that a danger to the community has been removed, the arrest and ensuing publicity both could be justified. But to the extent that the public aspects of the arrest are meant to humiliate, the humiliation is a form of punishment that is as objectionable as the arrest itself.<sup>330</sup>

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before a release decision is made. In most instances, however, the magistrate who makes the probable cause determination also makes a release decision. Indeed, that is why a majority of the Court in *McLaughlin* was willing to give jurisdictions the forty-eight hour leeway—i.e., so that the probable cause determination could be combined with other proceedings. *Id.*

<sup>328</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001) (holding that there was no Fourth Amendment violation for the custodial arrest of a woman following a seat-belt violation that was punishable by a \$25–\$50 fine).

<sup>329</sup> See, e.g., *The Perp Walk*, *BUS. WK.*, Jan. 13, 2003, at 86. The term “perp walk” has a dictionary definition: “The deliberate escorting of an arrested suspect by police in front of news media, esp. as a means of pressuring or humiliating the suspect.” *The American Heritage College Dictionary* 1038 (4th ed. 2002).

<sup>330</sup> In *Wilson v. Layne*, 526 U.S. 603, 612–13 (1999), the Court recognized that a desire to publicize law enforcement efforts is not sufficient to justify permitting media personnel to accompany police when a search warrant is executed. The Court expressed concern about intruding into residential privacy. *Id.* It is ironic that, although the Court proclaimed in *Katz v. United States*, 389 U.S. 347, 351 (1967), that “the Fourth Amendment protects people, not places,” the Court has failed to protect people against unnecessary arrests. In *Terry v. Ohio*, 392 U.S. 1 (1968), Chief Justice Warren described the Fourth Amendment as a protection of personal security as he wrote, “This inestimable right of personal security

Another practical reason that law enforcement officers arrest people is because they get the benefit of the “free” or automatic search incident to arrest that has been discussed above.<sup>331</sup> If they issue a summons or citation, they do not get to make the search.<sup>332</sup> If there is no valid reason to make an arrest, it should not be permitted in order to enable the police to search. The justification for a search incident to arrest presumes there is a valid reason to arrest in the first place. There is no reasonable basis for subjecting an individual to an arrest and a subsequent search if there is no reason to arrest to begin with.

The final practical reason why law enforcement officers like to make arrests is that an arrest gives them an opportunity to engage in custodial interrogation.<sup>333</sup> But like a search incident to arrest, custodial interrogation is another burden imposed upon an arrestee. If an arrest is unwarranted, such an additional onus ought also to be regarded as unreasonable.<sup>334</sup>

## 2. Arrests for Minor Offenses

Justice Stewart suggested in a concurring opinion in *Gustafson v. Florida*<sup>335</sup> that a “persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments.”<sup>336</sup> The Supreme Court rejected such a claim in *Atwater v. City of Lago Vista*.<sup>337</sup>

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belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” *Id.* at 8–9. Yet, the person is not protected against unreasonable arrests.

<sup>331</sup> See *supra* Part II.

<sup>332</sup> In *Knowles v. Iowa*, 525 U.S. 113 (1998), Chief Justice Rehnquist wrote for a unanimous Court as it held that a “search incident to citation” is impermissible. *Id.* at 118–19.

<sup>333</sup> See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (enacting procedural safeguards to ensure compliance with the Fifth Amendment during police interrogations following arrests).

<sup>334</sup> A new motivation to search may emerge if Congress approves a proposed Senate bill allowing federal authorities to collect and maintain DNA samples of arrestees. See Jonathan Krim, *Bill Would Permit DNA Collection from All Those Arrested*, WASH. POST, Sept. 24, 2005, at A3. An argument also might be made that fingerprints and/or DNA records should be kept of all individuals in the United States to aid in identification in case of emergency. See generally Alan Zarembo, *Morgue Stands Ready To Give Names to the Dead*, L.A. TIMES, Sept. 6, 2005, at A19 (describing the difficulty of identifying dead bodies in the wake of Hurricane Katrina). Whether or not this need outweighs privacy concerns, any such proposal would seek to impose a uniform burden on all individuals. As a result, the political process ought to assure that all voices are heard. Using arrests to generate DNA samples would mean that only those individuals who are singled out for arrests will be burdened. The political process is less likely to work, particularly if the burden falls heavily on the poor and the disenfranchised.

<sup>335</sup> *Gustafson v. Florida*, 414 U.S. 260 (1973).

<sup>336</sup> *Id.* at 266–67 (Stevens, J., concurring).

<sup>337</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).



Gail Atwater was driving her pickup truck in Lago Vista, Texas, when a police officer pulled her over after he saw her three-year-old son and five-year-old daughter in the front seat not wearing seatbelts.<sup>338</sup> The officer had stopped Atwater previously when he thought she had not belted in her son, but discovered that the child was in fact belted although in a position that Atwater conceded was unsafe.<sup>339</sup> After the second stop, the officer called for backup and asked Atwater for her license and insurance documentation.<sup>340</sup> She had none and explained that her purse had been stolen the day before.<sup>341</sup> The officer arrested Atwater, handcuffed her, placed her in his patrol car, and drove her to the station house where she was booked and placed in a cell before being released by a magistrate on a \$310 bond.<sup>342</sup> Atwater pleaded no contest to a seatbelt violation charge and paid a \$50 fine.<sup>343</sup> She then filed a civil rights suit against the officer, the city, and the chief of police, claiming that the arrest was a violation of the Fourth Amendment.<sup>344</sup>

After a district court granted summary judgment for the defendants, a panel of the United States Court of Appeals for the Fifth Circuit reversed, holding that “an arrest for a first-time seat belt offense” was an unreasonable seizure within the meaning of the Fourth Amendment.<sup>345</sup> The en banc court reversed the panel and reinstated the summary judgment.<sup>346</sup>

The Supreme Court agreed with the en banc Fifth Circuit and rejected what Justice Souter characterized as “Atwater’s specific contention [] that ‘founding-era common-law rules’ forbade peace officers to make warrantless misdemeanor arrests except in cases of ‘breach of the peace,’ a category she claims was then understood narrowly as covering only those nonfelony offenses ‘involving or tending toward violence.’”<sup>347</sup> Justice Souter observed that

Atwater has cited no particular evidence that those who framed and ratified the Fourth Amendment sought to limit peace officers’ warrantless misdemeanor arrest authority to instances of actual breach of the peace, and our own review of the recent and

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<sup>338</sup> *Id.* at 323–24.

<sup>339</sup> *Id.* at 324 n.1.

<sup>340</sup> *Id.* at 324.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 325.

<sup>345</sup> *Atwater v. City of Lago Vista*, 165 F.3d 380, 387–88 (5th Cir.), *vacated*, 171 F.3d 258 (5th Cir.), and *reinstated in part on reh’g en banc*, 195 F.3d 242 (5th Cir. 1999), *aff’d*, 532 U.S. 318 (2001).

<sup>346</sup> *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 (5th Cir. 1999) (en banc), *aff’d*, 532 U.S. 318 (2001).

<sup>347</sup> *Atwater*, 532 U.S. at 326–27 (citation omitted).

respected compilations of framing-era documentary history has likewise failed to reveal any such design.<sup>348</sup>

Justice Souter recognized that, on the facts, the arrest of Atwater appeared unreasonable and somewhat vindictive:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.<sup>349</sup>

But Justice Souter then reasoned that any standard other than one permitting officers to arrest everyone at their discretion was unworkable:

One line . . . might be between ‘jailable’ and ‘fine-only’ offenses, between those for which conviction could result in commitment and those for which it could not. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, . . . but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.<sup>350</sup>

Despite this analysis, Justice Souter was able to come up with one simple rule, but ultimately rejected it:

One may ask, of course, why these difficulties may not be answered by a simple tie breaker for the police to follow in the field: if in doubt, do not arrest. The first answer is that in practice the tie breaker would boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those “ifs, ands, and buts” rules, generally thought inappropriate in working out Fourth Amendment protection. . . . Beyond that, whatever help the tie breaker might give would come at the price of a systematic disincentive to arrest in situations where even Atwater concedes that arresting would serve an important societal interest.

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<sup>348</sup> *Id.* at 336.

<sup>349</sup> *Id.* at 346–47.

<sup>350</sup> *Id.* at 348–49 (footnotes omitted).

An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect's risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked, as Atwater herself acknowledges.<sup>351</sup>

Justice Souter's concern about Atwater's particular facts was somewhat assuaged by his belief that there was "a dearth of horrors demanding redress."<sup>352</sup> This was evidenced by the fact that "when Atwater's counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one."<sup>353</sup>

Justice Souter clearly minimized the importance of the personal and emotional consequences of being arrested:

Atwater's arrest was surely "humiliating," as she says in her brief, but it was no more "harmful to . . . privacy or . . . physical interests" than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on \$310 bond. The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.<sup>354</sup>

As lawyers and family members who visit persons who have been arrested are quick to realize, to say that a particular arrest was "no more harmful to privacy or physical interests" than the normal arrest is to ignore the harm that often occurs from such arrests. Not everyone is kept alone in a cell, and not everyone gets out in an hour. Fear of physical and sexual assault is often real and sadly warranted. The notion that because all custodial arrests are potentially dangerous, we should not worry about *any* of them reflects a failure to appreciate what it is like to be arrested.

Justice Souter completely failed to offer any genuine reason why arrests are needed in a host of cases. His argument that lines may be difficult to draw ultimately is unpersuasive. His "ifs, ands, and buts" analysis came from *Belton*,<sup>355</sup> and we have seen that the problem with

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<sup>351</sup> *Id.* at 350–51 (citation omitted).

<sup>352</sup> *Id.* at 353.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 354–55.

<sup>355</sup> *Id.* at 350 (citing *New York v. Belton*, 453 U.S. 454, 458 (1981)).

*Belton* is simply that it is unprincipled.<sup>356</sup>

Furthermore, Justice Souter's opinion seemed to assume that if the Court announced a principle—e.g., that an arrest may only be made where an individual poses a danger to society or is at risk of not appearing in court if a summons or citation is issued<sup>357</sup>—police officers would be unable to enforce such a rule. There is, however, every reason to think otherwise. Legislatures could act to identify dangerous offenses for which arrests are always deemed proper, and courts could give appropriate deference to such judgments. Moreover, officers now make these judgments, but they do so without any constitutional principle to guide them—i.e., every time police officers have authority to decide whether to arrest or issue a summons, they make the very judgment that Justice Souter concludes they cannot make.

In effect, the *Atwater* Court sanctioned arrests made with questionable motives. For the majority, it was acceptable for an officer to make an arrest of a person whom the officer knows could only be fined, thereby punishing the person with imprisonment. It was also permissible to arrest a person solely for the purpose of making an otherwise impermissible search incident to arrest,<sup>358</sup> or to assure an opportunity for custodial interrogation that would not otherwise exist. As noted earlier, the Court ought to forbid these purposes, and limiting the number of arrests is the only way to accomplish this.

Justices Stevens, Ginsburg, and Breyer joined Justice O'Connor's dissent.<sup>359</sup> Justice O'Connor identified the harms associated with arrest more clearly than did Justice Souter,<sup>360</sup> and she limited her preferred rule to fine-only offenses:

In light of the availability of citations to promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be

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<sup>356</sup> See *supra* text accompanying notes 197–200.

<sup>357</sup> This is the standard used in Canada. Under the Canada Criminal Code, a police officer has the obligation to not arrest a person if he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person and there are no reasonable grounds to believe that the person will fail to show up in court. Canada Criminal Code, R.S.C., ch. C-46, § 495(2) (1985). Indeed, even in terrorism cases, arrest without warrant is the exception rather than the rule. Canadian law allows a peace officer to arrest without a warrant under exceptional circumstances when it is believed a terrorist act is about to occur, and it is impractical to obtain the necessary warrant in time. Anti-Terrorism Act, 2001 S.C., ch. 41, § 83.3(4) (Can.). This warrantless arrest provision is subject to an annual reporting requirement, and the authority to make warrantless arrests expires in early 2007, unless an extension is passed by both Houses of Parliament. CANADIAN ANNUAL REPORT ON THE USE OF ARREST WITHOUT WARRANT PURSUANT TO THE ANTI-TERRORISM ACT 5 (2002), [http://ww2.psepc.gc.ca/publications/national\\_security/pdf/ARC36\\_2002\\_e.pdf](http://ww2.psepc.gc.ca/publications/national_security/pdf/ARC36_2002_e.pdf).

<sup>358</sup> Justice O'Connor's dissenting opinion specifically recognizes this motivation on the part of officers. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

<sup>359</sup> See *id.* at 360.

<sup>360</sup> See *id.* at 364–65.

reasonable in every circumstance. Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.<sup>361</sup>

Justice O'Connor also argued that the doctrine of qualified immunity would protect officers from liability for making reasonable judgments at the time of arrest that a court later deemed wrong.<sup>362</sup> Qualified immunity would thus assure that there were no undue disincentives to arresting those for whom a legitimate reason existed to arrest.<sup>363</sup>

Law enforcement officers are called upon to make judgments all the time. They must decide whether they have reasonable suspicion or probable cause, and whether an exigency exists that justifies a search without a warrant. The rule is that courts will not condemn a judgment of an officer as long as it is reasonable. The court need not agree with the officer; it is sufficient that the court finds that the officer acted within the ballpark of reasonableness.

The *Atwater* Court could have built upon this deference to police and simultaneously imposed a principled limit on the power to arrest. It could have held that officers may arrest when they have a reasonable basis to conclude that a suspect poses a risk to the community or a risk of nonappearance. It could have added that violent acts presumptively involve risk to the community; that drug offenses, because of the potential penalties involved, presumptively pose a risk of flight; and that courts should give deference to legislative judgments mandating arrests under certain circumstances. Finally, the Court could have clearly stated that an officer who is deciding whether or not to make an arrest may check for outstanding warrants before deciding to issue a citation in order to assure that dangerous individuals are not inadvertently released. There was no need to limit restrictions on arrest to fine-only situations, as Justice O'Connor's dissent would have done. The limit could easily have extended to all minor offenses and offenders where there is no apparent danger or likelihood of flight. Instead, the Court permitted law enforcement officers to continue to act arbitrarily, punitively, and

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<sup>361</sup> *Id.* at 365–66 (citation omitted).

<sup>362</sup> *Id.* at 367–68.

<sup>363</sup> *Id.*

unnecessarily—to engage in totally unprincipled behavior. The alternative was to adopt a principle and trust law enforcement to apply it reasonably.

Similarly, when arrest warrants are sought, there is no reason why magistrates should not be required to decide whether an arrest is appropriate or whether a summons would suffice. Rules like Federal Rule of Criminal Procedure 4(a), which permits a prosecutor to compel the issuance of an arrest warrant whenever there is probable cause, are overbroad. The prosecutor ought to have to state reasons why he believes an arrest is required. Because it is the magistrates who determine whether to release arrestees and on what conditions, they surely have the capacity to determine whether people should be arrested in the first place.<sup>364</sup>

In his majority opinion, Justice Souter relied on the failure of Atwater’s counsel to cite more than one other case in which police conduct was as offensive as in the Atwater case.<sup>365</sup> His conclusion that there was a “dearth of horrors”<sup>366</sup> is surprising, if not amazing. After all, the Supreme Court itself invited offensive conduct and placed its imprimatur on it in *Whren v. United States*.<sup>367</sup> In *Whren*, plainclothes officers of the District of Columbia Metropolitan Police Department patrolled, in an unmarked car, a “high drug area” and became suspicious of several youths occupying a Pathfinder truck with temporary license plates waiting at a stop sign.<sup>368</sup> The only suspicious act that the Court described, other than the automobile’s presence in a “high drug area,” was that the driver was looking down into the lap of the passenger at his right while remaining stopped at the stop sign for more than twenty seconds.<sup>369</sup> When the police car turned around to head back toward the truck, the truck turned suddenly, without signaling, and drove away at an “unreasonable” speed.<sup>370</sup> The police pursued and were able to approach the Pathfinder when it stopped at a red light.<sup>371</sup>

District of Columbia police regulations prohibited the officers from enforcing traffic laws generally.<sup>372</sup> Plainclothes officers were permitted to enforce traffic laws “only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.”<sup>373</sup> It was clear, therefore,

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<sup>364</sup> There may be more information available about a suspect when a release decision is made than when a warrant is sought. If it were known, however, that the magistrate would decide whether an arrest should occur, information about the suspect might well be made available to the magistrate when prosecutors or the police seek the arrest warrant.

<sup>365</sup> *Atwater*, 532 U.S. at 353.

<sup>366</sup> *Id.*

<sup>367</sup> *Whren v. United States*, 517 U.S. 806, 816–19 (1996).

<sup>368</sup> *Id.* at 808.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 815.

<sup>373</sup> *Id.* (quotation omitted).

that the officers in *Whren* were not entrusted with responsibility for ordinary driving infractions; they were generally prohibited from policing such infractions. Nevertheless, the officers concluded that they had probable cause to arrest the driver of the car for making a turn without signaling properly and for driving at an unreasonable speed (which presumably is not the same as exceeding the speed limit).<sup>374</sup> A unanimous Court in *Whren* rejected the argument that the stop was a pretext and that an officer's subjective intent should govern rather than an objective assessment of reasonableness.<sup>375</sup>

*Whren* did not specifically address the question finally reached in *Atwater*, but it certainly foreshadowed the *Atwater* decision. Justice Scalia wrote for the unanimous Court:

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.<sup>376</sup>

This may have been dictum, but it also was a strong statement that the Court was not going to distinguish between types of offenses in assessing the legitimacy of police practices.

Even if the *Whren* Court was correct in holding that police conduct should be viewed by an objective standard, a reasonable objective standard could place limits on the right to arrest. In *Whren*, the police saw drugs as they approached the car.<sup>377</sup> Thus, they did not have to arrest for the traffic violations in order to justify a search of the car. But *Atwater* and *Whren* clearly empower police departments to direct officers who see any traffic violation for which an arrest can be made, no matter how minor, to arrest the driver for the specific purpose of searching the car, even though the officer lacks reasonable suspicion that the car contains contraband or evidence of a crime. That is what the officers were prepared to do in *Whren*. That is what officers do throughout the country now that they have been given permission by the Supreme Court.

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<sup>374</sup> *Id.* at 809.

<sup>375</sup> *Id.* at 813.

<sup>376</sup> *Id.* at 818–19.

<sup>377</sup> *Id.* at 808–09.

The reason that Justice Souter found a “dearth of horrors” is that, although the Court expressed concern for the specific treatment of Gail Atwater, it has demonstrated indifference to the use of the power to arrest in other settings. For more than thirty years, it has empowered the police to arrest for minor offenses and to subsequently search incident to an arrest.<sup>378</sup> Now it has made clear that there is no offense so minor that arrest is a constitutionally impermissible response to a violation.

*Whren* might well be a sound decision, but it greatly increased the need for the Supreme Court to impose a limit on the power to arrest. The problem is not that law enforcement officers use the power given to them. The problem is that the power to arrest ought to be subject to the reasonableness restriction of the Fourth Amendment.

### 3. *The Warrant Requirement*

#### a. *The Basic Rule*

Despite the Supreme Court’s assumption that warrantless searches and seizures are presumptively bad, the most common warrantless police activity is a warrantless arrest. In many, if not most instances, warrantless arrests are easily justified because exigent circumstances exist. When law enforcement officers encounter people who are engaged in criminal activity, about to engage in such activity, or are fleeing the scene of such activity, it would make little sense to require police to get warrants to apprehend these individuals. The question is not whether the police should act; society demands that they act. The question is whether the police should arrest.

Even though the vast bulk of arrests occur as police react to events they could not fully anticipate, there are situations in which investigations occur over time, law enforcement officers identify suspects well in advance of arrest, there is sufficient time to obtain a warrant for arrest, and there is no appreciable danger of destruction of evidence or escape while a warrant is sought. Even in these cases, as a result of its decision in *United States v. Watson*,<sup>379</sup> the Supreme Court does not require a warrant.<sup>380</sup> Ironically, like *New York v. Belton*,<sup>381</sup> *Watson* invoked a doctrine that was unnecessary to decide the case.

In *Watson*, Khoury, an informant, told a postal inspector that Watson possessed a stolen credit card, and later delivered the card to the

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<sup>378</sup> See, e.g., *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (holding that the arrest and subsequent search of a driver for not having his driver’s license was constitutionally permissible).

<sup>379</sup> *United States v. Watson*, 423 U.S. 411 (1976).

<sup>380</sup> *Id.* at 423–24.

<sup>381</sup> See *supra* text accompanying notes 186–200.



inspector.<sup>382</sup> Khoury had been a reliable informant in the past, and his tip could have supported an arrest warrant.<sup>383</sup> The inspector, however, learned that Watson had agreed to supply additional cards and wanted to gather all possible evidence regarding Watson's illegal activity.<sup>384</sup> Khoury agreed to cooperate and arranged to meet with Watson.<sup>385</sup> The two met in a restaurant, where Khoury signaled to officers that Watson had the cards with him; the officers closed in and arrested Watson.<sup>386</sup> A search incident to the arrest revealed that he had no stolen cards, but after Watson agreed to a search of his car, officers found two more stolen cards under a floor mat.<sup>387</sup>

The officers had probable cause to arrest Watson as a result of Khoury's past track record, tip in the case, and signal.<sup>388</sup> Had Khoury not given the signal, an arrest probably would not have been made. When the officers got the signal, they judged that they had probable cause.<sup>389</sup> They were not about to let Watson leave with the stolen cards, and thus the warrantless arrest was a typical arrest made for a crime in progress.<sup>390</sup>

Despite the fact that the warrantless arrest was justifiable as an exigent-circumstance arrest, Justice White's opinion for the Court addressed the general question of whether an arrest for a felony may be made without a warrant regardless of the circumstances.<sup>391</sup> He concluded that it could.<sup>392</sup> His majority opinion and Justice Marshall's dissent dueled over the meaning of the history of warrantless arrests.<sup>393</sup> The majority and the dissent agreed on the common law rule: "[A] peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."<sup>394</sup> The disagreement came over how to phrase the question. For the majority, the question was whether warrantless felony arrests were historically

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<sup>382</sup> *Watson*, 423 U.S. at 412–13.

<sup>383</sup> *Id.* at 412.

<sup>384</sup> *Id.* at 413.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 434–35 (Marshall, J., dissenting).

<sup>389</sup> *Id.* at 434.

<sup>390</sup> *Id.* at 435.

<sup>391</sup> *Id.* at 416–17 (majority opinion). Justice Powell's concurring opinion argued that "the case could be disposed of on the ground that respondent's consent to the search was plainly voluntary." *Id.* at 425 (Powell, J., concurring). This is questionable. If the arrest had been invalid, the consent might have been tainted.

<sup>392</sup> *Id.* at 423–24 (majority opinion).

<sup>393</sup> Compare *id.* at 418–23, with *id.* at 438–42 (Marshall, J., dissenting).

<sup>394</sup> *Id.* at 418 (majority opinion); *id.* at 438 (Marshall, J., dissenting).

permitted.<sup>395</sup> For the dissent, the question was whether warrantless arrests for crimes that today are classified as felonies were historically permitted.<sup>396</sup> The answer by the majority to its question was “yes,” and the dissent did not quarrel with that.<sup>397</sup> The answer to the dissent’s question was “no,” and the majority did not quarrel with that.<sup>398</sup>

The Court might have discussed why the common-law rule permitted warrantless arrests, but it did not. Had it done so, it would have recognized that at common law, “[n]o crime was considered a felony which did not occasion a total forfeiture of the offender’s lands, or goods, or both,” and therefore the term “felony” was limited to a few of the most serious crimes.<sup>399</sup> A suspect had substantial reason to flee, police forces of the type that now exist throughout the United States did not exist then, and immediately apprehending the most dangerous suspects when they were found was thought to be reasonable. Given the number of felonies set forth in modern criminal codes and the range of penalties, the need to arrest all suspects in felony cases without warrants is not as apparent as it was at common law. Moreover, the Court’s preference for warrants was not firmed up until decisions like *Chimel*,<sup>400</sup> which preceded *Watson* by only a few years.

Justice Powell’s concurring opinion in *Watson* was the only opinion to address whether there is any good reason to excuse not obtaining a warrant when no exigent circumstances exist.<sup>401</sup> He recognized that the Court’s decisions created an anomaly, i.e., that people get less protection than property:

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one’s person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some

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<sup>395</sup> *Id.* at 418–24 (majority opinion).

<sup>396</sup> *Id.* at 438–40 (Marshall, J., dissenting).

<sup>397</sup> *Id.* at 418 (majority opinion).

<sup>398</sup> *Id.* at 440 (Marshall, J., dissenting).

<sup>399</sup> *Id.* at 439 (quotation omitted).

<sup>400</sup> See *supra* text accompanying notes 173–179.

<sup>401</sup> *Watson*, 423 U.S. at 426 (Powell, J., concurring).

neutral determination that there are grounds to do so, no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred.<sup>402</sup>

Despite the power of this analysis, Justice Powell added that “logic sometimes must defer to history and experience.”<sup>403</sup> It would seem, however, that logic should defer to history and experience only if those two elements provide an adequate reason for deference.<sup>404</sup> Justice Powell offered only this:

Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury. Under the holding of the Court of Appeals such additional investigative work could imperil the entire prosecution. Should the officers fail to obtain a warrant initially, and later be required by unforeseen circumstances to arrest immediately with no chance to procure a last-minute warrant, they would risk a court decision that the subsequent exigency did not excuse their failure to get a warrant in the interim since they first developed probable cause. If the officers attempted to meet such a contingency by procuring a warrant as soon as they had probable cause and then merely held it during their subsequent investigation, they would risk a court decision that the warrant had grown stale by the time it was used.<sup>405</sup>

This reasoning is flawed. If law enforcement officers have probable cause to believe that a suspect committed a crime for which an arrest is warranted, and there are no exigent circumstances to justify a warrantless arrest, then there is no reason that they should not obtain an arrest warrant. If they are involved in an investigation that makes it impractical to obtain a warrant, because they would have to leave the investigation scene, exigent

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<sup>402</sup> *Id.* at 428 (citation omitted).

<sup>403</sup> *Id.* at 429.

<sup>404</sup> Justice Powell opined that “the prior decisions of the Court have assumed the validity of such [warrantless] arrests without addressing in a reasoned way the analysis advanced by respondent.” *Id.* at 426. He attempted to provide some reason why warrantless arrests absent exigent circumstances made sense.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court rejected both history and experience as it held that the common law rule that law enforcement officers could use deadly force to prevent a felon from fleeing was invalid under the Fourth Amendment. *Id.* at 3. Justice White, the author of the Court’s opinion in *Watson*, also wrote the majority opinion in *Garner* and reasoned that “[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.” *Id.* at 13. This is akin to the argument made by the dissenters in *Watson*. See *Watson*, 423 U.S. at 439–42 (Marshall, J., dissenting).

<sup>405</sup> *Watson*, 423 U.S. at 431–32 (Powell, J., concurring) (footnote omitted).

circumstances would exist to excuse the warrant requirement. Once a warrant is obtained, it is the rarest of cases in which probable cause disappears. Indeed, it is difficult to understand how the facts leading to probable cause could ever become stale. Officers might learn that there is an innocent and true explanation for facts that seemed damning when a warrant was obtained. In such a case, they ought to seek withdrawal of the warrant. But unlike search warrants, which can become stale because property may be moved or disposed of, arrest warrants, once issued, will remain valid virtually forever.

Moreover, officers still have the option of continuing the investigation of a suspect, even though they already have probable cause to arrest him, in the hope of discovering additional crimes or criminals; if they are successful, as the police were in *Watson*, they will be permitted to arrest the suspect(s) without a warrant for the additional crimes. In short, none of Justice Powell's concerns support the distinction between warrants for searches of property and warrantless arrests of individuals.

*b. The Twists on the Basic Rule*

After deciding *Watson*, the Court developed a series of confusing rules for arrests in the home. In *Payton v. New York*,<sup>406</sup> the Court held that, absent exigent circumstances, police may not enter a suspect's home to arrest the suspect without an arrest warrant or a search warrant.<sup>407</sup> Police with a search warrant may enter at any time to search the premises. Police with an arrest warrant may only enter "when there is reason to believe the suspect is within."<sup>408</sup> *Payton* thus placed the burden on lower courts to decide whether arrests take place within the home or without.<sup>409</sup>

After *Payton*, the Court held in *Steagald v. United States*<sup>410</sup> that absent exigent circumstances, a search warrant rather than an arrest warrant was required to enter the home of a third party to arrest a suspect inside the home.<sup>411</sup> The Court was concerned that, absent a search warrant requirement, "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances."<sup>412</sup> *Payton* and *Steagald* required the police to know

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<sup>406</sup> *Payton v. New York*, 445 U.S. 573 (1980).

<sup>407</sup> *Id.* at 576.

<sup>408</sup> *Id.* at 603.

<sup>409</sup> See, e.g., *United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir. 1995) (holding that no arrest warrant was required where the defendant voluntarily opened his door and thus "exposed himself in a public place"); *United States v. Holland*, 755 F.2d 253, 257 (2d Cir. 1985) (holding in a two-to-one decision that an arrest in the entranceway to a common hallway outside of a home did not take place inside the home).

<sup>410</sup> *Steagald v. United States*, 451 U.S. 204 (1981).

<sup>411</sup> *Id.* at 205-06.

<sup>412</sup> *Id.* at 215.

exactly whose house they were entering to make an arrest. If it was the suspect's own house (or one shared by the suspect with others), an arrest warrant was sufficient. If it was a third party's house, a search warrant was required.

What if the suspect were temporarily sharing a house? The answer to that question came in *Minnesota v. Olson*,<sup>413</sup> where the Court held that an arrest warrant was required under *Payton* to arrest an overnight guest in the home of a third person.<sup>414</sup> The State argued that no warrant was needed to arrest Olson because an overnight guest has no reasonable expectation of privacy in the guest home—the Court flatly rejected this argument.<sup>415</sup>

Although the Court rejected the State's argument that no warrant was required, it failed to explain why a search warrant was not required to enter the home to arrest Olson, as *Steagald* would seem to require.<sup>416</sup> The answer almost certainly is that Olson, although a temporary guest, was not the intended beneficiary of the *Steagald* rule. *Steagald* protects the owner of the home, not the guest.<sup>417</sup> If the police enter a third party's home without a search warrant, the owner can complain, but the temporary guest cannot. If, however, the temporary guest is treated as though he has a protected interest in the home, as Olson was treated, the temporary guest can object to entry without the arrest warrant required by *Payton*.<sup>418</sup>

What if a person is not an overnight guest, but is visiting and taking an afternoon nap? Is an arrest warrant required to enter the house? How could the police know whether or not the person was napping, or how long the person intended to stay? How could the police know that a suspect had stayed overnight or was planning to stay for the night? The reality is that the police generally have no way of knowing how long a suspect is going to stay in a particular place.

The Court confirmed its reasonable expectation of privacy rule set down in *Olson* in its decision in *Minnesota v. Carter*.<sup>419</sup> The Court in *Carter* held that two men who were cutting up cocaine in an apartment had no standing to object to a warrantless search because they had no reasonable expectation of privacy in the premises.<sup>420</sup>

These decisions must be confusing to police. They have to know what a suspect's relationship is to a house in order to know whether a warrant is required, and if so, what kind of warrant is required to enter in order to make an arrest without violating someone's constitutional rights. It is often

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<sup>413</sup> *Minnesota v. Olson*, 495 U.S. 91 (1990).

<sup>414</sup> *Id.* at 100.

<sup>415</sup> *Id.* at 96–97.

<sup>416</sup> *See Steagald*, 451 U.S. at 205–06.

<sup>417</sup> *See id.* at 215.

<sup>418</sup> *Olson*, 495 U.S. at 96–97.

<sup>419</sup> *Minnesota v. Carter*, 525 U.S. 83 (1998).

<sup>420</sup> *Id.* at 91.

difficult for the police simply to locate a suspect. When they finally do, determining what role the suspect is playing vis-à-vis a particular premises may be quite burdensome.

*c. A Better Way*

The underlying problem that gives rise to these confusing holdings is that the power to arrest is not limited to suspects who pose a danger to society. If it were so limited, a strong case could be made that in order to make an arrest, with or without a warrant, officers should be able to enter a home when they have probable cause that the suspect is inside. If arrests were confined to persons who posed a danger to the community or of flight, there is a strong case to be made that exigent circumstances exist to arrest those persons immediately.

There is a trade-off: fewer people would be arrested if the Court limited the power to arrest for minor crimes, but more people would be arrested in their homes without warrants if the Court viewed the discovery of those subject to arrest as a per se exigent circumstance justifying immediate action.

*D. Searches*

The Supreme Court could make Fourth Amendment rules regarding searches much simpler if it adopted three straightforward principles:

1. *Chimel* governs searches incident to arrest in all settings, and *Belton* is no longer good law.<sup>421</sup>
2. Law enforcement officers who want to search property generally must obtain a warrant.
3. If, however, exigent circumstances exist such that property may be destroyed, cause damage, or disappear while a warrant is sought, officers may seize, detain, or restrain the property while a warrant is sought or may conduct an immediate search if it is not practicable to obtain a warrant, but must seek a warrant to continue a search once the exigency disappears.

These three principles would give the Warrant Clause the deference the Court said it deserves, guide law enforcement officers by providing principles for action, and obviate the need for arbitrary rules like the automobile exception and *Belton*. These principles are consistent with decisions the Court has made regarding murder scenes,<sup>422</sup> fire scenes,<sup>423</sup>

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<sup>421</sup> See *supra* text accompanying notes 173–179; *supra* text accompanying notes 186–201.

<sup>422</sup> See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (holding that a warrantless search must be circumscribed by exigency, and that when the emergency subsides, a warrant should be sought).

<sup>423</sup> See *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (holding that a warrantless

and drug scenes.<sup>424</sup> These principles would provide guidance to govern the basic enforcement of criminal law. They would not necessarily control the myriad of other government activities that are covered by the Fourth Amendment.

One additional principle would also be helpful. This principle would recognize that when police conduct health and safety inspections to enforce various administrative schemes, a warrant should be required to search individuals or places unless there is consent to search. There is no reason for the Court to continue to vacillate on the issue of whether a warrant is required for administrative searches.<sup>425</sup> Assuming the government has a reasonable health and safety plan, an administrative judge or other judge should be required to approve the plan and issue warrants implementing the plan. The warrants could be sought in advance of any searches, so surprise would still be possible if it was an important part of the government scheme. Furthermore, if the Court treated drug testing as a health and safety search, it could avoid the arbitrariness of the “special needs” cases and bring drug testing into the mainstream of administrative searches.<sup>426</sup>

In short, implementing this set of principles would help the Court to avoid continuing to develop a broad and confusing landscape of unprincipled bright line rules and exceptions thereto regarding searches. Such a principled approach would greatly assist law enforcement officers to do their jobs better and would ensure that dangerous criminals are not freed on technicalities that result from misinterpretations of these complex and arbitrary rules.

### *Conclusion*

The arbitrariness of the Supreme Court’s Fourth Amendment cases did

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entry into a home was limited to exigent circumstances immediately after fire).

<sup>424</sup> See *Illinois v. McArthur*, 531 U.S. 326, 328 (2001) (holding that police with probable cause to believe that a suspect had drugs in his home could prevent the suspect from entering for two hours while they obtained a search warrant).

<sup>425</sup> See *New York v. Burger*, 482 U.S. 691, 699–701 (1987), and cases cited therein.

<sup>426</sup> See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (drug testing of students participating in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (drug testing of student athletes); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of Customs Service employees). The warrants, like those the Court spoke favorably of in *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) and *See v. City of Seattle*, 387 U.S. 541, 545 (1967), need not be based on probable cause regarding particular individuals. The question would be whether the proposed search is in compliance with a reasonable administrative scheme. One could imagine a drug-testing scheme that resulted in warrants that described a group of individuals to be tested according to designated criteria rather than by name. This type of scheme could also be applied to testing programs like that reviewed in *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602 (1989). Although it might well be impossible prior to train accidents to name individuals who would be involved in the accidents, a description of the individuals who could be tested following an accident could be developed and a warrant issued for the group.

not begin with the Rehnquist Court. Doctrines like the automobile exception have deep roots in the decisions of earlier Courts. But the Rehnquist Court, like its predecessors, tended to adopt bright line rules that were neither needed by law enforcement nor likely to make it easier for law enforcement to deal with changing facts.

Law enforcement officers benefit more from an understanding of the principles that are derived from the Fourth Amendment than from arbitrary, bright line rules. Once they understand principles, they can apply those principles to changing facts.

I have sought to demonstrate how inconsistent and unpersuasive the Court's decisions have been over many years in a number of Fourth Amendment settings, and to suggest principles which, if adopted, would simplify the law, make it more understandable, and better protect both people and property.

The Rehnquist Court was satisfied with the rules it inherited, and generally built upon them. The end result of having more decisions piled on those that came before is that Fourth Amendment law resembles the Internal Revenue Code in its complexity. It need not. A principled approach to the Fourth Amendment remains an option.