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TWO MODELS OF THE FOURTH AMENDMENT†

Craig M. Bradley*

The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the "Brethren" in such a way that every effort to extract themselves only finds them more profoundly stuck. In 1971 Justice Harlan called for "an overhauling" of fourth amendment law,¹ but this has not occurred. Instead, the Court has simply continued to struggle with the same problems, finding "solutions" which sow ever more litigation and confusion. More than a decade ago, Professor Weinreb cited the fact that in the preceding five Terms (1968-69 to 1972-73) the Court had rendered sixteen major opinions interpreting the fourth amendment, illustrating that the "body of [fourth amendment] doctrine . . . is unstable and unconvincing."² In the past five Terms (1979-80 to 1983-84) the Court has decided thirty-five cases involving the fourth amendment. In seven of these there was no majority opinion. In the seventeen cases decided in the last two years, the Supreme Court has never reached the same result as all lower courts and has usually reversed the highest court below, rendering a total of sixty-one separate opinions in the process. Thus it is apparent that not only do the police not understand fourth amendment law, but that even the courts, after briefing, argument, and calm reflection, cannot agree as to what police behavior is appropriate in a particular case.³ What policeman (or

† The author wishes to express his appreciation to Professors Yale Kamisar, Wayne LaFave, and Alex Tanford for their helpful comments on an earlier draft of this Article.

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1. *Coolidge v. New Hampshire*, 403 U.S. 443, 490-91 (1971) (Harlan, J., concurring in the judgment).

2. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974).

3. Consider, for example, the Supreme Court's discussion of what had gone on in the court below in *United States v. Ross*, 456 U.S. 798 (1982):

Judge Tamm, the author of the original panel opinion, reiterated the view that *Sanders* prohibited the warrantless search of the leather pouch but not the search of the paper bag. Judge Robb agreed that this result was compelled by *Sanders*, although he stated that in his opinion "the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room." . . . 655 F.2d at 1180. Judge MacKinnon concurred with Judge Tamm that *Sanders* did not prohibit the warrantless search of the paper bag.

judge or law professor) could say confidently what the proper scope of a search incident to arrest is,⁴ or how far the authorities may go in detaining a suspected drug smuggler at an airport?

Professor LaFave recently engaged in the game, so dear and familiar to fourth amendment scholars, of demonstrating that the nine search and seizure decisions rendered in the 1982-83 Term were illogical, inconsistent with prior holdings and, generally, hopelessly confusing.⁵ While opinions that lend themselves to this sort of demolition are wonderful grist for law professors' mills, they do little to advance the purposes of the amendment: "to safeguard citizens from rash and unreasonable interferences with privacy"⁶ by giving the police clear-cut rules to follow.⁷ The Court's failure to provide such rules leads not only to the exclusion of evidence in cases involving the guilty, but also to intrusions upon the rights of both the innocent and the guilty by police who, faced with incomprehensibly complex rules either ignore them or, in their efforts to follow them, make mistakes which lead to evidentiary exclusion.

Contributing to the Court's difficulties in this area is the exclusionary rule, but it is not solely to blame. Until the establishment of the "good faith" exception to the exclusionary rule last Term,⁸ the rule's operation was simple: if evidence was unconstitutionally obtained it was (always) inadmissible in the prosecutor's case-in-chief.⁹ There

Concerning the leather pouch, he agreed with Judge Wilkey, who dissented on the ground that *Sanders* should not be applied retroactively. 456 U.S. 798, 803 n.3 (1982) (citation omitted). Amazingly, this disagreement was just among the dissenting judges, whose views obviously differed from that of the majority as well.

4. For example, see Professor Kamisar's discussion of the unanswered questions raised by the search incident to arrest case of *New York v. Belton*, 453 U.S. 454 (1981), in J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-81*, at 90-100 (1982).

5. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983).

6. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

7. In three recent opinions the Court has emphasized the overriding necessity of providing clear rules for the police to follow in fourth amendment cases. *Oliver v. United States*, 104 S. Ct. 1735, 1742-43 (1984); *United States v. Ross*, 456 U.S. 798, 825 (1982) (Blackmun, J., concurring); *New York v. Belton*, 453 U.S. 454, 458 (1981).

8. Last Term, in *United States v. Leon*, 104 S. Ct. 3405 (1984), and *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984), the Court created a "good faith" exception to the exclusionary rule in cases where the police have acted in reasonable reliance on a warrant, thus opening up a new area for litigation and confusion. See Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J., in press.

9. Well, almost always. See *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (evidence admissible even though seized pursuant to an arrest under city ordinance later found unconstitutional), for a minor exception to this rule. See also *United States v. Janis*, 428 U.S. 433 (1976) (evidence illegally seized by police and therefore inadmissible in state criminal proceeding is nevertheless admissible in collateral federal civil suit); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury witness may not refuse to answer question even though it is based on evidence obtained from

was no confusion surrounding the operation of the rule. The only difficulty arose in the first step of the exclusionary process — determining whether the evidence was constitutionally obtained. However, the fact that a negative conclusion on this question led to the unpalatable result of excluding valid (and frequently vital) evidence against a person who was probably a criminal undoubtedly influenced this determination.¹⁰ As will be demonstrated, the Court is loathe to declare searches unconstitutional, with the concomitant evidentiary exclusion, in cases where the police have essentially acted reasonably, even if they have not exactly conformed to existing Supreme Court doctrine. The result is that the Court strives to justify such police behavior by stretching existing doctrine to accommodate it. Herein lies the inherent contradiction, and source of confusion, in fourth amendment law: The Court tries on the one hand to lay down clear rules for the police to follow in every situation while also trying to respond flexibly, or “reasonably,” to each case because a hard-line approach would lead to exclusion of evidence. Since the rules are not clear and since, even if they were, it is virtually impossible to lay down a rule that anticipates all potential cases, the police engage in behavior that does not conform to the rules but that strikes the Court as having been essentially reasonable. Given the Court’s predilection for clear-cut rules, however, simply declaring such conduct “reasonable” and leaving it at that is not enough. Instead, the Court offers a detailed explanation as to how the police behavior really did conform to the old rule (and in so doing, changes the contours of the old rule), or creates a new rule to justify the behavior. Naturally, such a holding spawns new litigation, which leads to a new opinion, which leads to a new rule, etc.¹¹

Fourth amendment critics rank in rows, and it has been repeatedly pointed out that individual cases are inconsistent with each other or that whole chunks of doctrine, such as the automobile exception or the plain view exception, are either misconceived, too broad, or too narrow. But these critics all play the Court on its own field, simply arguing as tenth Justices that the doctrines should be tinkered with in different ways than the Court has done. This Article, in contrast, sug-

him in an unconstitutional search); *Walder v. United States*, 347 U.S. 62 (1954) (unconstitutionally seized evidence is admissible at trial for impeachment purposes).

10. It has previously been observed that *any* meaningful sanction for violation of the rules governing searches will tend to create pressure to relax the rules. Paulsen, *The Exclusionary Rule and Misconduct by the Police in POLICE POWER AND INDIVIDUAL FREEDOM* 87, 88 (C. Sowle ed. 1962).

11. Justice Blackmun, dissenting in *Robbins v. California*, 453 U.S. 420 (1981) (later overruled by *United States v. Ross*, 456 U.S. 798 (1982)), expressed his fear that the holding in that case would lead to a “new stream of litigation.” 453 U.S. at 436.

gests that current fourth amendment law, complete with the constant tinkering which it necessarily entails, should be abandoned altogether. Instead, there are two, and only two, ways of looking at the fourth amendment which will provide the police with reasonably coherent direction as to how they must proceed and the courts with a consistent basis for decision.

The two models, briefly, may be called the "no lines" and the "bright line" approaches. Model I, no lines, uses tort law as a guide¹² in proposing that the hopeless quest of establishing detailed guidelines for police behavior in every possible situation be abandoned. It suggests that the Court adopt the following view of the fourth amendment: A search or seizure must be reasonable, considering all relevant factors on a case-by-case basis. If it is not, the evidence must be excluded.¹³ Factors to be considered include, but are not limited to, whether probable cause existed, whether a warrant was obtained, whether exigent circumstances existed, the nature of the intrusion, the quantum of evidence possessed by the police,¹⁴ and the seriousness of the offense under investigation. This model enjoys support from the history of the fourth amendment¹⁵ and is (roughly) the current practice in Germany and other European countries.¹⁶ Moreover, in most cases it reflects the result, though not the reasoning, of current Supreme Court cases.

The second model may be as shocking at first glance to "law and order" advocates as the first model is to civil libertarians. It is, basically, that the Supreme Court should actually enforce the warrant doctrine to which it has paid lip service for so many years. That is, a warrant is *always* required for *every* search and seizure when it is practicable to obtain one. However, in order that this requirement be workable and not be swallowed by its exception, the warrant need not be in writing but rather may be phoned or radioed into a magistrate (where it will be tape recorded and the recording preserved) who will authorize or forbid the search orally. By making the procedure for obtaining a warrant less difficult (while only marginally reducing the safeguards it provides), the number of cases where "emergencies" justify an exception to the warrant requirement should be very small.

12. See notes 84-88 *infra* and accompanying text.

13. Or whatever remedy is developed to replace the exclusionary rule must be applied.

14. In *Texas v. Brown*, 460 U.S. 730, 751 n.5 (1983) (concurring opinion of Stevens, J.), three Justices suggested that a greater intrusion might be justified if there were a "virtual certainty" that evidence was to be found in a particular place than if there were merely probable cause.

15. See notes 90-91 *infra* and accompanying text.

16. See Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983).

These models¹⁷ are the only two possibilities because they are the only two ways of dealing with fourth amendment problems that do not force the Court into the clear rule/flexible response dilemma. Model I, by presenting an unabashedly *unclear* rule that provides no guidelines, will never have to be modified to suit an unusual fact situation. While not an ideal solution, it will, it is argued, work considerably better than the present system where the Court purports to set forth clear rules but does not actually do so. Model II presents a clear rule which can be lived with. If the Court required a modified, easily obtainable warrant to be used in all but true emergencies, the police would know what is expected of them and would be able to conform their conduct to the requirement of the law, much as they have accommodated their behavior to the *Miranda* requirements.¹⁸ Any other approach which tries to set forth rules which the Court is unwilling to enforce strictly will necessarily become mired in exceptions and modifications (with resultant confusion) as has occurred in the current law.

I. THE PROBLEM

As indicated, the fundamental problem with fourth amendment law is that it is confusing. It fails to inform the police how to behave and to inform the lower courts of the basis for the exclusionary decision. This failure is the result of the Court's attempt to pursue a compromise between considering cases flexibly, on the grounds of the reasonableness of police behavior, and setting forth clear rules, which, if the police fail to follow them, will lead to evidentiary exclusion. The Court purports to set forth clear rules while actually adjusting them constantly to accommodate each new fact situation. Confusion in the law is not unique to the fourth amendment, of course, but it is a particularly serious problem in this area because the exclusionary remedy for fourth amendment violations does not make whole the criminal

17. Readers familiar with the criminal procedure literature may be tempted to identify the two models described here with Packer's "Due Process Model" and "Crime Control Model" described in H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968). This temptation should be resisted. Packer's models are descriptive of the two competing theoretical extremes which interact to form a criminal procedure doctrine that is somewhere in the middle. The two models suggested here are not models of ideological systems but rather are prescriptive of two possible means of actually dealing with fourth amendment problems. Despite a facial similarity between Model I and Packer's "Crime Control Model" and Model II and his "Due Process Model," the models suggested here are *not* extreme ideological positions. Rather, as will be argued, they are both intended to be ideologically as neutral as possible. The benefits of adopting either of these models would be the elimination of the confusion that currently pervades fourth amendment law, not an ideological victory for either law and order or civil liberties advocates.

18. This rule would, however, have a greater impact on protection of individual rights than the "reading of the rights" provides under *Miranda*.

defendant whose rights have been violated — nothing can “unsearch” his house — and does nothing at all for an innocent victim of an illegal search, who derives no benefit from evidentiary exclusion. Thus, it is not a “remedy” in the ordinary sense. If police are confused about the law and therefore perform illegal searches, the prosecution suffers loss of evidence (in many cases, if the police had understood the law they could have conformed their conduct to it) and society suffers violations of the civil rights of its citizens. Moreover, unlike other areas of law, which can be contemplated at leisure by judges and lawyers, fourth amendment law is supposed to instruct police how to act in the heat of enforcement of the criminal laws. Consequently, in criminal procedure it is uniquely imperative that the police be informed of simple, straightforward principles by which to guide their behavior.

At the heart of both the fourth amendment and the clear rule/flexible response dichotomy is the warrant “requirement” — so often espoused and so rarely enforced by the Court.¹⁹ Recently, in *United States v. Ross*,²⁰ the Court, quoting an earlier, unanimous opinion, reaffirmed its commitment to the search warrant:

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.”²¹

In fact, these exceptions are neither few nor well-delineated.²² There are over twenty exceptions to the probable cause or the warrant requirement or both. They include searches incident to arrest (exceptions to both);²³ automobile searches (exception to warrant require-

19. See, e.g., *Weeks v. United States*, 232 U.S. 383, 389-90 (1914) (affirming the antiquity of the warrant requirement). But see *Marron v. United States*, 275 U.S. 192, 198-99 (1927) (one example of how easily the Court could skirt the “requirement” when it wished). As Professor LaFare has noted:

[T]he Supreme Court’s assertion “that the police must, whenever practicable, obtain advance judicial approval of searches and seizure” must be taken with a grain of salt. The Court in fact has not been that demanding, but yet has failed to articulate clearly any basis for squaring the principle that warrants-when-practicable is the best policy with [its decisions which recognize the various exceptions].

W. LAFARE, SEARCH AND SEIZURE § 4.1(a) (1978) (citation omitted).

20. 456 U.S. 798 (1982).

21. 456 U.S. 798, 825 (1982) (footnotes omitted) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) which was, in turn, quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

22. Professor Haddad made a similar observation in 1977 before some of the newer exceptions had been created. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198 (1977).

23. See *Chimel v. California*, 395 U.S. 752 (1969).

ment);²⁴ border searches (both);²⁵ searches near the border (warrant and sometimes both);²⁶ administrative searches (probable cause exception);²⁷ administrative searches of regulated businesses (warrant);²⁸ stop and frisk (both);²⁹ plain view, open field seizures and prison "shakedowns" (both, because they are not covered by the fourth amendment at all);³⁰ exigent circumstances (warrant);³¹ search of a person in custody (both);³² search incident to nonarrest when there is probable cause to arrest (both);³³ fire investigations (warrant);³⁴ warrantless entry following arrest elsewhere (warrant);³⁵ boat boarding for document checks (both);³⁶ consent searches (both);³⁷ welfare searches (both, because not a "search");³⁸ inventory searches (both);³⁹ driver's license and vehicle registration checks (both);⁴⁰ airport searches (both);⁴¹ searches at courthouse doors (both);⁴² the new "school search" (both);⁴³ and finally the standing doctrine which, while not strictly an exception to fourth amendment requirements, has that effect by causing the courts to ignore fourth amendment violations.⁴⁴

24. *See* *United States v. Ross*, 456 U.S. 798 (1982); *see also* *United States v. Johns*, 105 S. Ct. 881 (1985) (extending *Ross* to a warrantless search, three days later, of packages taken from a vehicle).

25. *See* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

26. *Compare* *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (probable cause required for roving patrol searches for illegal aliens away from the border), *with* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (probable cause not required for "fixed checkpoint" stops).

27. *See* *Camara v. Municipal Court*, 387 U.S. 523 (1967).

28. *See* *United States v. Biswell*, 406 U.S. 311 (1972).

29. *See* *Terry v. Ohio*, 392 U.S. 1 (1968); *see also* *United States v. Hensley*, 105 S. Ct. 675 (1985) (extending *Terry* to cases where the police suspect a person, not of being armed or dangerous or engaged in or about to commit a crime, but of having committed a felony in the past).

30. *See* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion) (plain view); *Oliver v. United States*, 104 S. Ct. 1735 (1984) (open field); *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (prison shakedowns).

31. *See* *Warden v. Hayden*, 387 U.S. 294 (1967).

32. *See* *United States v. Edwards*, 415 U.S. 800 (1974).

33. *See* *Cupp v. Murphy*, 412 U.S. 291 (1973) (while probable cause to *arrest* is a prerequisite, probable cause to *search* is not).

34. *See* *Michigan v. Tyler*, 436 U.S. 499 (1978).

35. *See* *Washington v. Chrisman*, 455 U.S. 1 (1982).

36. *See* *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

37. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

38. *See* *Wyman v. James*, 400 U.S. 309 (1971).

39. *See* *South Dakota v. Opperman*, 428 U.S. 364 (1976).

40. *See* *Delaware v. Prouse*, 440 U.S. 648 (1979).

41. *See* *United States v. Moreno*, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

42. *See* *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972).

43. *See* *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

44. *See* *Rakas v. Illinois*, 439 U.S. 128 (1978).

As anyone who has worked in the criminal justice system knows, searches conducted pursuant to these exceptions, particularly searches incident to arrest, automobile and "stop and frisk" searches, far exceed searches performed pursuant to warrants.⁴⁵ The reason that all of these exceptions have grown up is simple: the clear rule that warrants are required is unworkable⁴⁶ and to enforce it would lead to exclusion of evidence in many cases where the police activity was essentially reasonable.

By its continued adherence to the warrant requirement in theory, though not in fact, the Court has sown massive confusion among the police and lower courts.⁴⁷ The automobile cases are paradigmatic of this trend. In *Carroll v. United States*,⁴⁸ the Court upheld a warrantless search of a car that prohibition agents had stopped with probable cause sixteen miles outside of Grand Rapids, Michigan. The Court did not consider the possibility of holding the car while one of the agents went for a warrant. Instead it recognized that the mobility of a vehicle, in contradistinction to a house or store, made it impracticable "to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."⁴⁹ However, the Court added that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used."⁵⁰

In *Chambers v. Maroney*,⁵¹ the Court dealt with a case in which a car had been seized by the police, its occupants arrested, and the car driven to the police station where it was searched without a warrant. While on the facts of *Chambers* it certainly would have been "practicable" to obtain a warrant, the Court obviously considered the police activity reasonable anyway. It therefore relied on the "cars are different from houses" language in *Carroll* to posit an exception to the war-

45. See MODEL CODE OF PRE-ARREST PROCEDURE 492-94 (1975) and sources cited therein. *E.g.*, "in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during that same year obtained only 19 search warrants." *Id.* at 493-94 (footnote omitted). The statement in the text also reflects the author's own experience as an Assistant United States Attorney in Washington, D.C.

46. At least as the term "warrant" is currently understood. But see the discussion of Model II, Part III *infra*.

47. For example, in the 1982-83 Term, seven of the Supreme Court's nine decisions were reversals of the highest courts below. In each of the seven cases the court below had excluded evidence, not because of a strong ideological commitment to the exclusionary rule, but rather, as the opinions of those courts make clear, because a prior decision of the Supreme Court seemed to demand such exclusion. See, *e.g.*, *Illinois v. Gates*, 462 U.S. 213, 227-30 (1983) (Supreme Court's discussion of the Illinois Supreme Court's decision).

48. 267 U.S. 132 (1925).

49. 267 U.S. at 153.

50. 267 U.S. at 156.

51. 399 U.S. 42 (1970).

rant requirement in cases involving automobile searches.⁵² Thus the "auto exception" grew to accommodate police behavior which, though violative of both the general warrant requirement and the express "practicability" holding of *Carroll*, seemed reasonable to the Court. Indeed, a contrary holding would have brought down a rain of criticism on the Court for suppressing evidence due to technicalities. Several other cases followed in which the Court, in approving what apparently seemed like reasonable behavior by the police, extended the automobile exception to the taking of paint scrapings from the outside of a car,⁵³ the search of a car at the station when no exigent circumstances had prevented an immediate search on the street (unlike *Chambers*),⁵⁴ and the full inventory search of a car being towed due to parking violations.⁵⁵

Most recently, in *United States v. Ross*,⁵⁶ the Court expanded the automobile exception even more by holding that not only may an automobile be searched on probable cause without a warrant regardless of whether it would have been practicable to obtain one,⁵⁷ but also that containers found therein, including locked suitcases, may be searched as well. In so holding, the Court overruled or modified previous cases that had granted suitcases, as repositories of personal effects, the same protection as houses, even when they were found in cars.⁵⁸

Thus the Court must constantly tinker with its rules as it is faced with the choice of either excluding evidence due to "technicalities" or upholding police behavior that fails to conform to the rules. In *Ross* the Court hit upon a solution to this dilemma — the very solution proposed, in broader terms, by Model I: abandon the warrant requirement. By doing this for a substantial body of cases the Court has freed two or three of its eighteen hands from the tarbaby. But such a partial effort has two problems. First, *Ross* leaves many questions un-

52. 399 U.S. at 48-49.

53. *Cardwell v. Lewis*, 417 U.S. 583 (1974).

54. *Texas v. White*, 423 U.S. 67 (1975) (per curiam).

55. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

56. 456 U.S. 798 (1982).

57. It may be that the admonition of *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971) (plurality opinion) that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears" still retains vitality as to a car parked on private property. See *Cardwell v. Lewis*, 417 U.S. 583, 593 (1974). However, Professor LaFave has pointed out that "given the fact that neither the 'practical consideration' nor the historical underpinnings stressed by the *Ross* majority are limited to vehicles actually on the move immediately prior to police intervention, it is highly unlikely that *Ross* will be construed to be so limited." W. LAFAVE, *supra* note 19, § 7.2, at 235 (Pocket Part 1985) (citation omitted).

58. See *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977) (distinguished in *Ross*).

answered which threaten to suck the Court back into the morass. For example, is a recreational vehicle, which has the privacy aspects of a house and the mobility of a car, subject to the automobile exception?⁵⁹ Is the scope of a search incident to arrest greater when one is arrested in an automobile than at home? And, the question reserved by *Ross*: What, after *Ross*, is the scope of "less-than-probable cause" searches of automobiles, such as inventory searches?⁶⁰

The second problem with *Ross* is that, while abandoning the warrant requirement, it has adopted a new rule which may lead to injustices in other cases. In *United States v. Chadwick*, the Court recognized that "[n]o less than one who locks the doors of his home against intruders, one who [locks his possessions in a footlocker] is due the protection of the Fourth Amendment Warrant Clause."⁶¹ The fact that such a suitcase or footlocker was found in a car did not diminish its privacy protection.⁶² Now every such container found in a car will be subject to a search,⁶³ notwithstanding *Chadwick's* recognition that such warrantless intrusions constitute serious invasions of personal privacy, because the Court felt that clear rules were necessary in this area, even at the expense of "reasonable expectations of privacy," which had previously been the (troublesomely flexible) basis of fourth amendment protections.

Thus the automobile exception, which was originally developed to allow a flexible response to the mechanistic warrant requirement when the police behavior seemed reasonable, has developed a life of its own as a mechanistic rule. Even if, in a particular case, it would not seem reasonable to search a car and its contents without a warrant, the automobile exception has created a new rule that can be applied mechanically to render patently unreasonable behavior "reasonable" under

59. The Court has recently addressed this question. In *California v. Carney*, 105 S. Ct. 2066 (1985), the Court found the automobile exception applicable to the reasonable search of a mobile motor home parked in a downtown lot. Reasoning that the motor home was readily mobile, licensed to operate on public streets, subject to extensive regulation, and "so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle," 105 S. Ct. at 2070, the Court held that the warrantless search did not violate the fourth amendment. It noted that "to fail to apply the exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity." 105 S. Ct. at 2070.

60. *Ross*, 456 U.S. at 809 n.11.

61. 433 U.S. 1, 11 (1977).

62. See *Arkansas v. Sanders*, 442 U.S. 753 (1979) (later modified by *Ross*, see note 58 *supra* and accompanying text; note 63 *infra*).

63. Unless the police have waited for a container that they wanted to search to be put into a car. *Arkansas v. Sanders*, 442 U.S. 753 (1979), apparently still maintains sufficient vitality to prevent this practice. See Y. Kamisar, *United States v. Ross: The Court Takes Another Look at the Container-in-the-Car Situation* in J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82*, at 71, 83 (1983).

the fourth amendment.⁶⁴ Suppose the police suspect *A* of committing a crime on a particular date. They have probable cause to believe that a suitcase belonging to *B*, which is locked in the trunk of *B*'s car, which is parked in front of *B*'s house, contains *B*'s locked diary, which has references to *A*'s whereabouts on that date.⁶⁵ Under the automobile exception, the police, having only probable cause, may conduct a warrantless search of the car for the suitcase and the suitcase for the diary even though they have no reason to believe that the car is about to be moved.⁶⁶ Yet there are few instances in which one would have a greater expectation of privacy than in a locked diary in a locked suitcase in the locked trunk of one's own car parked in front of one's own house.⁶⁷

64. As Professor Haddad has observed, "If [a] search is unreasonable under all the facts, it should not be upheld simply because the facts fall within one of the well-recognized exceptions. The United States Supreme Court, however, has not been true to this logic." Haddad, *supra* note 22, at 203. On the other hand, Justice Rehnquist has criticized the Court for *striking down* essentially reasonable searches or seizures because they fail to conform to the strict terms of one of the fourth amendment exceptions. See *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting) ("Analyzed simply in terms of its 'reasonableness' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence.").

65. It is clear that a car parked in such a "public place" is subject to the automobile exception. See *Cardwell v. Lewis*, 417 U.S. 583, 593-94 (1974).

66. After *Texas v. White*, 423 U.S. 67 (1975) (*per curiam*), we must assume that a warrantless search of a car is permissible upon probable cause even if the car is stopped just outside a building which houses both a police station and a court, even if the sole occupant of the vehicle is arrested, and even if a magistrate is (immediately) available. Haddad, *supra* note 22, at 203. This result would also be supported by the holding in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), that innocent third parties are not exempt from searches for evidence.

67. Consider also *Chimel v. California*, 395 U.S. 752 (1969), in which the Court made the definitive statement of the scope of searches incident to arrest:

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. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "*within his immediate control*" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.

395 U.S. at 762-63 (emphasis added).

In *New York v. Belton*, 453 U.S. 454 (1981), the Court found that "[a]rticles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item[.]'" 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763). Thus, in an effort to provide a "single familiar standard . . . to guide police officers," 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)), the Court upheld the search of a jacket

The "open fields doctrine," another exception to the warrant requirement, which was recently reaffirmed in *Oliver v. United States*,⁶⁸ further exemplifies the problems with the fourth amendment. In *Oliver*, the Court declared that a fenced, posted field behind a house was not a "person, house, paper or effect" within the meaning of the fourth amendment and consequently was not subject to the warrant requirement. The Court did not explain why a phone booth *was* such a "person, house, paper and/or effect," as held in *Katz v. United States*,⁶⁹ when a fenced, posted field was not, but based its decision on the not unreasonable proposition that it is necessary to give clear guidelines to the police,⁷⁰ viz., "You can search open fields; you can't bug phone booths." While it may or may not be true that, in general, one has a greater expectation of privacy in a phone booth than in the fields behind one's house, even the most ardent defender of the decision would admit that there will be some cases when the reverse is true. Surely if one has a twelve-foot high electrified fence around a thirty-foot-square piece of land with snarling attack dogs inside, one has a greater expectation of privacy than in a phone booth where one has stopped to call "Weather." Even the lowly automobile outranks the backyard as a haven for privacy (since it at least counts as an "effect," and is subject to the probable cause, though not the warrant, requirement).

By providing a "clear rule," *Oliver* will cause individual cases to be decided unjustly. Moreover, the "clear rule" is not so clear. *Oliver* fails to answer the question of whether a chicken house, tool shed, or cardboard box, when found in an open field, is covered by the fourth amendment. The tarbaby beckons.

In an effort to give "clear rules" to the police while maintaining a degree of flexibility, the Court has failed on both counts. Each "clear rule" has left unanswered questions which have turned it into an unclear rule. Yet the application of these rules as if they were bright line rules ("you can search cars without a warrant") leads to injustices in many cases — either the injustice of allowing governmental intrusions into areas where one reasonably expects privacy or that of excluding evidence based on "technicalities" where the police have tried to follow the unclear rules. The response of many critics to these problems

that was inaccessible to the defendant at the time of the search and generally approved the search of the passenger compartments of cars as incident to the arrest of people in those cars, regardless of whether the compartment was an "area within the immediate control" of the arrestee. 453 U.S. at 462-63. See W. LAFAVE, *supra* note 19, § 7.1 (Pocket Part 1985) for a detailed critique of *Belton*.

68. 104 S. Ct. 1735 (1984).

69. 389 U.S. 347 (1967).

70. See *Oliver*, 104 S. Ct. at 1742-43.

created by the Court's confused doctrine has been to suggest abolition of the exclusionary rule. Opposing critics suggest that to do so would be to sever a vital branch from the tree of liberty.

The manner in which this debate and the Court's energies have been misfocused can be illustrated by a parable: Suppose there is a sporting contest in which the rules provide that "anyone guilty of unreasonable smucking shall be expelled from the game" (the expulsionary rule). "Smucking" is defined as jabbing another player "in an area where he has an expectation of privacy," but no one knows what "unreasonable" smucking is. Everyone is agreed that at least some of the more egregious smucking must be punished and that no other way to deter such conduct has proved effective. This rule is unpopular with the fans as it interferes with the game (of course, they aren't the ones being smucked), so the Rules Committee has endeavored to set up more detailed standards such as "smucking is permitted under exigent circumstances" and "the expulsionary rule won't apply if the smucking is done in good faith" in order to limit more carefully what conduct is and is not prohibited. Unfortunately, this attempt has only led to more confusion which the Committee has tried to alleviate by promulgating even more standards and exceptions which, far from clarifying the rules, have only made them more confusing. In response, a group of fans has urged abolition of the expulsionary rule, arguing that "it's stupid to expel the smucker because we can see that a lot of people are thrown out unjustly and anyway, by the time he is thrown out, the injury to the smuckee is complete." Others respond, "yes, but that's the only way to deter smucking" or "the integrity of the game demands it." Studies have been conducted to see if expulsion really does deter smucking, and it is asked how often smuckers are thrown out, as if the answer proved something about the efficacy of the rule. (If smuckers are thrown out a lot does it prove that the rule is bad because it expels a lot of players unjustly or desperately needed because there are so many dirty smuckers these days?) In all of the fuss about the expulsionary rule, everybody has lost track of the fact that the real problem is the Rules Committee's failure either to define "unreasonable" smucking in such a way that players and referees can readily understand and follow the rules or to abandon the attempt and simply leave it to the judgment of the referees, on a case-by-case basis, to determine whether smucking was unreasonable or not, much as a baseball umpire determines what conduct justifies the expulsion of an argumentative manager.

To be sure, defining "unreasonable" searches and seizures clearly is more difficult than defining behavior that occurs in the more nar-

rowly circumscribed confines of a game. Still, the argument that since the *rules* are difficult to formulate we ought to abolish the *penalty* or create unclear exceptions to the (unclear) rules is a non sequitur. Certainly the primary focus of attention should be on clarifying the rules rather than making them increasingly unclear by focusing attention on penalties and exceptions. The Models that follow attempt to accomplish this.

II. MODEL I

Model I, no lines, demands only that searches be reasonable, based upon a consideration of the *facts* of each individual case.⁷¹ In determining the factual question of reasonableness, the Court should consider not only whether there was a warrant, probable cause, or exigent circumstances, but also such factors as the nature of the intrusion (*i.e.*, was it a search for private papers or narcotics, a search of a house or of a barn, etc.), the strength of the evidence possessed by the police, the dangerousness of the defendant, and the seriousness of the crime.⁷² Given the long tradition of the warrant and probable cause requirements, the presence or absence of these factors should probably be the most important, but not necessarily the controlling, elements. A lesser intrusion, such as a seizure of evidence in a fenced field behind the defendant's house, would be unlikely to require a warrant, whereas a search of a house probably would. Yet, as discussed above, one can conceive of a case where the suspect's expectation of privacy in his field is so clearly announced, or the need to search a house so great, that rules developed in other cases would not be applicable. Consequently, fixed criteria such as the "warrant requirement," the "exigent circumstances exception," and the "open fields doctrine" should be avoided. Rather, each case must be evaluated on its own facts, recognizing that, because no two cases will have completely identical facts, prior decisions may only be indicative but not dispositive of future cases.⁷³ This model is drawn from European criminal procedure and

71. Dean Erwin Griswold, in his book *SEARCH AND SEIZURE* (1975), described his "working rule" in deciding whether, as Solicitor General, he should seek review of adverse search and seizure cases: "If the police officer acted decently, and if he did what you would expect a good, careful, conscientious police officer to do under the circumstances, then he should be supported." *Id.* at 58. While Griswold did not propose this as the constitutional rule, he obviously felt that such a "reasonableness" approach should underlie the rules.

72. This is not to say that the police *must* consider a complicated list of factors before they can act. See Professor LaFave's criticism of *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) in LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 454-58 (1984). Rather, it is to suggest that all relevant factors of which the police should reasonably have been aware should be taken into account by the courts in their subsequent evaluation of the police conduct.

73. The statement that "reasonableness" is based on the facts of the individual case should

American tort law. It frankly recognizes that it gives no guidance to police as to how to behave, beyond admonishing them to act reasonably, because such guidance is inherently impossible to give.

The Supreme Court has frequently referred to reasonableness as the "fundamental inquiry in considering Fourth Amendment issues"⁷⁴ and has described its decisional process as "balancing [the] intrusion [of a particular law enforcement practice] on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁷⁵ Such an inquiry and balancing is precisely what is proposed here. However, when the Court speaks of "reasonableness" and "balancing" it means deciding whether a particular practice, such as "stop and frisk," is reasonable when performed without a warrant in a particular case and, having once decided that it is, allowing it in all future cases.⁷⁶ This is an exercise fraught with obvious peril. The Court does not mean that such balancing should be engaged in on a case-by-case basis as Model I proposes.⁷⁷ Indeed, the Court recently firmly rejected the possibility of determining "reasonableness" case by case:

Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions"⁷⁸

This criticism, however, is far more applicable to current doctrine, in which the Court has "iffed, anded, and butted" the fourth amend-

not be taken as characterizing "reasonableness" as a question of fact that precludes appellate review. On the contrary, "reasonableness" is a legal question decided by the trial judge, out of the presence of the jury and fully subject to appellate review. However, by the time such a fact-bound decision would come to the Supreme Court it is likely that the Court would only rarely consider such a case to have sufficient general import to warrant a grant of certiorari.

74. *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *see also Terry v. Ohio*, 392 U.S. 1, 9, 19 (1968).

75. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (citation omitted); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983).

76. The Court's discussion of the need to provide clear rules to police in *New York v. Belton*, 453 U.S. 454, 458-60 (1981), is a good example of this process at work.

77. Justice Rehnquist has, however, advanced a notion of case-by-case reasonableness similar to that suggested by Model I: "[T]he constitutionality of a *particular* search [or seizure] is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security'" *Mincey v. Arizona*, 437 U.S. 385, 406 (1978) (Rehnquist, J., concurring in part and dissenting in part) (emphasis added) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). *See also* note 64 *supra*.

78. *Oliver v. United States*, 104 S. Ct. 1735, 1742-43 (1984) (quoting LaFare, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142); *see also New York v. Belton*, 453 U.S. 454, 458 (1981).

ment into hopeless confusion, than it is to a case-by-case reasonableness test. Such a test requires an evaluation of the *facts* of each case, not a "sophisticated set of rules," to determine whether the police have acted reasonably. "Reasonable" police behavior should not depend on their ability to conform to a complex set of rules as they are currently required to do. It makes no sense to say that, because it was reasonable for a policeman to search a car in one case without a warrant, an "automobile exception" is now created whereby if police follow the rules (*i.e.*, have probable cause) they can always search cars without warrants. The richness of the facts of each search renders it impossible to create a rule in one case that will be readily applicable to all later cases. Yet all of the exceptions to the warrant requirement previously noted were created in just this way. An example will show how a case-by-case approach can help to eliminate the irrational results that the present system requires.

Suppose the police have a certain amount of evidence that a crazed murder suspect armed with a submachine gun is at his summer cottage with a captive. Because they contemplate an arrest in a house, a warrant based on probable cause is normally required. The police, not sure of the precise definitions of either of the following terms, conclude that they have "probable cause" and "exigent circumstances" and consequently they enter without a warrant and arrest the suspect. On the motion to suppress the court concludes that the police were absolutely right about exigent circumstances — this was a true emergency. However, they were wrong about probable cause — they did not actually have enough (whatever "enough" is after *Illinois v. Gates*⁷⁹) to conclude that the suspect was at the summer house.

Since, under the current rules, the exigent circumstances do not affect the issue of probable cause (only the need for a warrant if probable cause is otherwise established),⁸⁰ the submachine gun and any other evidence seized incident to the arrest as well as, possibly, any statements made by the suspect at the time of arrest⁸¹ must be excluded.⁸² In order to avoid this distasteful result, the courts will be tempted to tinker with the definition of probable cause, stretching it,

79. 462 U.S. 213 (1983).

80. *But see* *Michigan v. Long*, 463 U.S. 1032 (1983) (finding "exigencies" to justify a search of the passenger compartment of a car even though there was no warrant, no probable cause, and no arrest).

81. *See* *Brown v. Illinois*, 422 U.S. 590 (1975).

82. The Court has not always taken this view. In *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931), a unanimous Court held: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *See also* *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (later overruled by *Chimel v. California*, 395 U.S. 752 (1969)).

just a little more, to accommodate this case.⁸³ To simply examine all relevant factors and conclude that here the police acted reasonably seems far more sensible.

The folly of trying to develop rules in one case which will then apply to all others was recognized long ago in tort law. In 1927 the Supreme Court, per Justice Holmes, endeavored to "la[y] down [a standard] once for all" regarding "reasonable" conduct of an automobile driver when approaching an unmarked railroad crossing — the "stop, look, and listen" rule.⁸⁴ As every student of torts knows, this attempt failed because the rule simply made no sense when the courts attempted to apply it to the many unforeseeable fact situations that developed.⁸⁵ After eight years the Court abandoned the attempt, emphasizing the "need for caution in framing standards of behavior that amount to rules of law." "Extraordinary situations," the court observed, "may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal."⁸⁶

Prosser has elaborated on the problem:

A decision of an appellate court that under certain circumstances a particular type of conduct is clearly negligent, or that it clearly is not negligent, . . . establishes a precedent for other cases where the facts are identical, or substantially the same. To that extent it may define the standard of reasonable conduct which the community requires. Unfortunately, the inevitable tendency [is] to crystallize the law into mechanical rules . . . of universal application. Almost invariably the rule has broken down in the face of the necessity of basing the standard upon the

83. *Michigan v. Long*, 463 U.S. 1032 (1983), is a good example of where the Court has, once again, stretched doctrine to justify what is considered to be reasonable behavior by police, despite the fact that that conduct was plainly inconsistent with prior holdings. In *Long* the police saw a car swerve into a ditch. When they asked the driver for the registration and he went to get it from the car, the police noticed a knife on the floor. One of the officers then stopped and frisked Long while the other searched the passenger compartment of the car, finding marijuana.

It is easy to agree with the Court that this police behavior was not unreasonable under all the circumstances. It is, however, difficult to accept the Court's claim that this decision follows from *Terry v. Ohio*, 392 U.S. 1 (1968). As Justice Brennan pointed out in his *Long* dissent, 463 U.S. at 1054-56, *Terry* approved only a very limited frisk of the outer clothing for weapons. See *Terry*, 392 U.S. at 30. In *Long*, based on a combination of reasonable suspicion and exigent circumstances, the Court approved a full search of a car's passenger compartment when the suspect was not in, and could easily have been kept out of, the car. Because the Court felt the need to stretch old doctrine to accommodate the next case, it has now created a new rule, apparently justifying the search of cars (and purses, briefcases, and luggage?) anytime the police reasonably suspect a weapon to be within. See W. LAFAVE & J. ISRAEL, 1 CRIMINAL PROCEDURE § 3.8(e), at 310 (1984).

84. *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927).

85. Prosser describes the impact of the "stop, look, and listen" rule of *Goodman*:

A long series of cases in which gates were left open, or the driver relied upon the absence of a flagman, or it was clear that the conduct specified would have added nothing to the driver's safety, made it quite apparent that no such inflexible rule could be applied.

W. PROSSER, THE LAW OF TORTS 218 (W. Keeton 5th ed. 1984) (citations omitted).

86. *Pokora v. Wabash Ry.*, 292 U.S. 98, 105-06 (1934).

particular circumstances, the apparent risk, and the actor's opportunity to deal with it.⁸⁷

In fourth amendment law the inquiry is essentially the same as in tort law: "Did the authorities act as reasonable policemen?"⁸⁸ The Court's many exceptions to the warrant requirement are a recognition of the difficulty of actually enforcing a hard and fast rule that warrants must always be used, subject to a few "well-delineated exceptions."⁸⁹ As noted, in the course of dealing with new fact situations these exceptions tend to become many and ill-defined.⁹⁰ Consequently no realistic guidance is provided to the police because such guidance could only come from a very simple, straightforward rule. An *ad hoc* approach which seems to have created little controversy may be found in the Court's test for whether a pretrial photographic identification is admissible in evidence: whether the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."⁹¹ While it is unquestionably easier to determine whether a photo identification was impermissibly suggestive than to determine if a search was unreasonable, the two tests do operate in a similar fashion; neither gives much guidance to the police and both avoid the unpalatable result of patently reasonable and responsible police work leading to evidentiary exclusion while allowing exclusion in every case where the police have acted irresponsibly.

To be sure, Model I will require that the fourth amendment be read somewhat differently than it has been in the past. The first phrase, forbidding unreasonable searches and seizures, will take over,

87. W. PROSSER, *supra* note 85, at 217-18 (footnotes omitted). Similarly, in applying the fifth amendment injunction against the taking of private property without just compensation, the Court has recognized its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." Instead, the decisions are "ad hoc, factual inquiries" in which "several factors that have particular significance" are considered. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

88. Thus, the approach suggested by Model I is the same as that used in determining the liability of police in search and seizure cases, wherein a variety of factors, including the seriousness of the crime, the chance of escape, etc., are considered. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 119, 121 comments (1965). This test is phrased in terms of the reasonableness of the police behavior rather than the reasonableness of the suspect's expectations of privacy, because it seems to ask too much of the police to require them to determine what the suspect's expectations may be. Normally the two tests will produce the same result. However, one can conceive of a case where they will not. Thus, it may seem perfectly reasonable for the police to search an apparently abandoned house without a warrant for evidence of a homicide. If, in fact, the house is *not* abandoned, such a search may be unreasonable from the defendant's point of view. To the extent that the "reasonable expectation of privacy" test of *Katz v. United States*, 389 U.S. 347 (1967), still survives, it would have to be overruled under Model I.

89. *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) which was, in turn, quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

90. *See generally* notes 22-44 *supra* and accompanying text.

91. *Simmons v. United States*, 390 U.S. 377, 384 (1968).

rendering the requirement that warrants must issue on probable cause less important since warrants would no longer be a precondition of reasonableness. The difficulties which the Court has created for itself by adoption of the fictitious warrant requirement have already been discussed. Moreover, there is considerable historical evidence that the view of the fourth amendment suggested by Model I is exactly what the framers of the Constitution had in mind and that the warrant requirement, (as well as its myriad exceptions), as imposed by the Court, has "‘stood the fourth amendment on its head’ from a historical standpoint."⁹² According to one authority on the history of the fourth amendment, the purpose of the requirement that warrants be based upon probable cause and specify the "place to be searched, and the persons or things to be seized" was designed to *limit* the use of warrants, which had been widely abused, and not to imply that a warrant was a fundamental criterion of a reasonable search, as the Court now maintains.⁹³

Because the warrant requirement is largely a sham anyway, a detailed historical justification for doing away with it hardly seems necessary. The more important inquiry is whether such a proposal would prove workable. A compelling argument for Model I can be found in German practice where such an approach is used successfully, generating far less litigation and controversy than the American system. Under the German system, the question of the reasonableness of the search as such is not relevant, there being no precise equivalent to the fourth amendment. However, when the question of whether to admit or exclude seized evidence is considered, a balancing or reasonableness test is employed in virtually every case.⁹⁴ The fact that the search may have violated the rules for searches set forth in the Code of Criminal Procedure is only one factor to be considered. More important is whether the intrusion on the defendant's privacy (whether caused by the search for the evidence or its use in court) is *proportional* to the

92. *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (quoting T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23-24 (1969)).

93. Taylor summarized his examination of the historical evidence in T. TAYLOR, *supra* note 92, at 43:

[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches.

See also Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 873 (1960).

94. The only exception is where evidence has been obtained through brutality or deceit, in which case exclusion is automatic. Bradley, *supra* note 16, at 1039-42.

seriousness of the offense, *i.e.*, a case-by-case balancing test is applied. Thus, an individual's diary was excluded from evidence in a perjury case even though it was properly seized because the case did not warrant such a serious intrusion (the exposure of the diary's contents in court) into the private sphere of the individual.⁹⁵ However, the court noted that the result might have been different in a murder case.⁹⁶ In another case the court refused to issue an order to take spinal fluid from a suspect in a misdemeanor case to determine his possible insanity, despite the fact that such a taking was authorized by the Code of Criminal Procedure. The court reasoned that such a drastic intrusion was out of proportion to the seriousness of the crime.⁹⁷

If the Supreme Court were to opt for Model I, infinite flexibility, then it would not have to decide whether recreational vehicles (RVs) are subject to the "automobile exception" or what the scope of a search incident to arrest might be. The infinite variety of possibilities which each search presents makes it impossible to declare with confidence that RVs or automobiles or boats or suitcases are or are not entitled to the protection afforded by a warrant in every case. It may even happen that if police are enjoined to think about the facts of each case and act appropriately, rather than to follow an incomprehensible set of rules, they will prove capable of exercising more judgment than had previously been believed.⁹⁸

95. Contrary to the German practice, this Article does not propose excluding reasonably seized evidence on the ground that its use in court would cause an additional, impermissible intrusion on the defendant's privacy. However, the effect of Model I would be much the same since it would be harder to justify the seizure of a diary, as opposed to a gun, as being reasonable in the first place.

96. Bradley, *supra* note 16, at 1042-43 (citing Judgment of Feb. 21, 1964, 19 BGHSt 325, 331 (decision of the High Federal Court)).

Last term, for the first time, the Court lent some support to the notion that the seriousness of the crime is a factor to be considered in search and seizure cases. In considering whether an individual could be arrested in his home without a warrant, the Court declared that "the presumption of unreasonableness that attaches to all warrantless home entries . . . is difficult to rebut" when "the government's interest is only to arrest for a minor offense." *Welsh v. Wisconsin*, 104 S. Ct. 2091, 2098 (1984) (footnote omitted). It would seem to follow, therefore, that in serious felony cases, warrantless entries might be more likely to be considered reasonable than in misdemeanor cases, all other things being equal.

Similarly, there is some support in Supreme Court cases for the notion that the nature of the thing to be seized — a diary versus a gun — may affect the reasonableness of a search, but thus far the Court has not explicitly endorsed such a distinction. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 400 n.7 (1976) (approving an IRS summons for the tax records of petitioners' accountants and noting that "[s]pecial problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here"). *See generally* Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981) (arguing that a constitutional distinction should be drawn between private papers and other items which the government may wish to seize).

97. Bradley, *supra* note 16, at 1041 (citing Judgment of June 10, 1963, 16 BVerfG 194, 202 (decision of the Constitutional Court)).

98. Adoption of a "reasonableness" test would allow the Court to apply a "least intrusive

What are the advantages and disadvantages of Model I? The most obvious advantage is that it will extract the Court from the tarbaby of fourth amendment law. While an occasional decision on a lower court's determination of reasonableness may be in order, the Supreme Court will generally find it unnecessary to involve itself in decisions that are unique to the facts of each case. To free the Court from a series of decisions that has brought it both disruption and a degree of disrepute is no small gain. Furthermore, exclusionary law can be restored to the common sense proposition that evidence obtained unreasonably must always be excluded and evidence obtained reasonably should always be admitted. Such a rule makes far better sense than the rather bizarre rule established recently in *Leon*⁹⁹ that if an unreasonable search is performed reasonably then the evidence will be admissible anyway.¹⁰⁰

The second, and greater, advantage is that evidence will neither be excluded *nor admitted* due to legal technicalities. A minor error by the police in drafting or executing a warrant or in assessing whether adequate cause exists for an automobile search will probably not lead to exclusion, at least in more serious cases. But such legal technicalities as the "automobile exception," the "open fields doctrine" or "standing" which currently prohibit exclusion, even in the face of gross violations of individual expectations of privacy in particular cases, need not stand in the way of exclusion due to unreasonableness.

The principal disadvantage of Model I is that warrants may be used less if they are not strictly required. As pointed out, however, they are not really strictly required or frequently used now. Moreover, there may be institutional factors, such as the prosecutor's desire to oversee police activities, fear of tort suits,¹⁰¹ ease of conducting

means" analysis which would require the government to obtain evidence in ways which impinged as little as possible on the suspect's rights. Thus, if evidence could be obtained by subpoena, a subpoena should be employed instead of a search. *But see* *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (authorizing searches of innocent third parties even though the evidence could have been obtained by subpoena). The Court currently rejects such an approach on the ground that "it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). Yet such an approach is employed satisfactorily in Germany. *See* *Bradley*, *supra* note 16, at 1041. *See also* *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion), in which such an approach was required in investigative detentions. It is also standard law in first amendment cases. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 685 (1978). Of course, failure to employ the least intrusive means should not be dispositive of the reasonableness calculation, but simply a factor to consider.

99. *United States v. Leon*, 104 S. Ct. 3405 (1984).

100. *See* *Bradley*, *supra* note 8. Justice Stevens emphasized the contradictory nature of the *Leon* rule in his concurring and dissenting opinion in *United States v. Leon*, 104 S. Ct. 3430, 3446 (1984).

101. *See* *United States v. Ross*, 456 U.S. 798, 823 n.32 ("In choosing to search without a

searches when the householder is presented with a warrant, etc., which would deter the police from cutting back warrant use substantially from current levels, especially if courts make it clear that the presence of a warrant is an important factor in the reasonableness determination.¹⁰² To the extent that society concludes that certain police activities, such as wiretapping, are so threatening that they should be regulated in more detail, the legislature can prescribe the necessary rules. Such rulemaking would seem to be a more appropriate activity for the legislative than the judicial branch in any case. Indeed, state legislatures or Congress could, if they desired, promulgate detailed guidelines governing police behavior in diverse situations, as does the German Code of Criminal Procedure. But there is no compelling reason that the failure to follow such guidelines in a given case should necessarily lead to the conclusion that the federal constitutional standard of "reasonableness" has been violated.¹⁰³

The other major argument against Model I is that the police, given no guidelines, will be hopelessly confused, and trial courts will render decisions dependent largely on the predilections of the individual judge. On the contrary, enjoining the police to use their common sense and judging them by that standard, while not an ideal guideline, seems more likely to produce sensible responses than does a set of fictitious rules and vague exceptions that the Supreme Court itself, not to mention the cop on the beat, cannot consistently apply or understand.¹⁰⁴ Moreover, the decisions of the courts will at least be based upon a comprehensible standard, which goes farther down the road to "justice" than the current vehicle.¹⁰⁵ A judge's personal opinion as to

warrant on their own assessment of probable cause, police officers of course lose the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the search was unconstitutional.").

102. The Supreme Court may be said to have supported this notion in the recent *Leon* decision because it created an exception to the exclusionary rule only in cases where warrants are obtained. Thus the police are encouraged to use warrants. See Bradley, *supra* note 8.

103. The Court has already taken this approach with regard to violations of the wiretapping statute. See *Scott v. United States*, 436 U.S. 128 (1978).

104. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 269 (1973) (Powell, J., concurring) ("Searches and seizures are an opaque area of the law There is a vast twilight zone with respect to which one Justice has stated that our own 'decisions . . . are hardly notable for their predictability,' and another has observed that this Court was 'bifurcating elements too infinitesimal to be split.'") (citations omitted) (quoting *Ker v. California*, 374 U.S. 23, 45 (1963) (Harlan, J., concurring in result), and *Coolidge v. New Hampshire*, 403 U.S. 443, 493 (1971) (Burger, C.J., dissenting in part) (quoting Justice Stone of the Minnesota Supreme Court)).

105. There are those who would claim that allowing such a decision on a difficult-to-review, case-by-case basis would lead not only to arbitrary, but also to largely anti-defendant, decisions because of the biases built into the "establishment-oriented" judicial system. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970). But see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1422 n.433 (1977) (arguing that the judicial systems of many areas are now

"reasonableness," subject to appellate review, is more likely to produce a sensible result than is his personal opinion as to whether a recreational vehicle is an automobile, or a chicken house part of an open field, from which flows, mechanically, his decision that certain police conduct was "reasonable" or not.

It may be argued that this "reasonableness" formulation of the fourth amendment is too much like the pre-*Miranda* "voluntariness" standard in fifth amendment cases that was widely deplored as being useless and "downright misleading."¹⁰⁶ While Model I is admittedly as vague as the voluntariness test, it is not misleading because it focuses on the ultimate question of fourth amendment law — whether the search is reasonable. Voluntariness, on the other hand, did not "focus directly on either the risk of untrue confessions nor the offensiveness of police interrogation methods."¹⁰⁷ Secondly, some of the major practical arguments against the voluntariness test, such as "[t]he weak were manipulated" and "[a]pplication of the standard was fatally dependent upon resolution of 'the swearing contest,'"¹⁰⁸ are not applicable to a reasonableness test for searches. Indeed, depriving the police of such useful, determinative catchphrases as "furtive gesture" and "plain view" might serve to reduce the "swearing contest" aspect of many exclusionary hearings that exists under the current system (*i.e.*, it's harder for the police to lie if they can't be sure just what "facts" will be determinative). Nevertheless, some (or many) readers will undoubtedly believe that failure to give guidelines to the police is a fatal flaw in any proposal for reform of search and seizure law. These

also populated with former defense attorneys, minorities, and others who may be expected to be sympathetic to defendants). Justice Powell's observation, concurring in *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972), seems apt: "[T]his Court should not assume that the past insensitivity of some state courts to the rights of defendants will continue."

See also Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 309-20 (1984), for further discussion of perceived problems with a "reasonableness" approach. I do not follow Professor Wasserstrom's argument that it "makes little or no sense" to apply the exclusionary rule to a search deemed unreasonable on a case-by-case basis. *Id.* at 319. On the contrary, it makes more sense to suppress evidence on the basis of all information available to the policeman than it does to suppress it because, as under the current system, the trial court disagrees with the policeman's judgment that a chicken house is part of an open field. Contrary to Professor Wasserstrom's assertion, I see no reason why the fact that evidence actually was or was not found should influence a court's determination of reasonableness any more than it influences a judgment as to the existence of probable cause under the present system.

106. *E.g.*, Kamisar, *What Is an "Involuntary" Confession?*, in *POLICE INTERROGATION AND CONFESSIONS* 1, 15 (Y. Kamisar ed. 1980).

107. *Id.*

108. Schulhofer, *Confessions and the Court* (Book Review), 79 MICH. L. REV. 865, 869-72 (1981). Schulhofer summarized the principal arguments against the voluntariness standard as (1) it left police without needed guidance, (2) it impaired the effectiveness and legitimacy of judicial review, (3) its application was fatally dependent upon resolution of "the swearing contest," (4) considerable interrogation pressure was allowed, (5) the weak were manipulated, and (6) physical brutality was not adequately checked.

readers should turn, as did the Supreme Court in *Miranda*, to a Model II, "bright lines," approach.

To summarize, Model I gives both the police and the reviewing court the opportunity to consider all relevant factors in determining whether a search, with or without a warrant, is appropriate in a given case. Such traditionally important factors as whether the police have a warrant, whether there is probable cause, and whether a home is being searched must weigh most heavily in the calculus. Other possible factors include the seriousness of the offense, the need to act quickly, the strength of the evidence (*i.e.*, evidence even more certain than probable cause would more readily justify a warrantless search), the nature of the property to be seized (*e.g.*, a diary versus the contents of a garbage can), the nature of the entry (day or night; forcible or peaceful), the scope of the search, etc. This is not to suggest that the police must carry around a checklist and account for all of these factors before searching. These are simply common sense matters that the police will naturally tend to consider. The bottom line is all that matters. If the police acted reasonably, the evidence is admitted. If they acted unreasonably, the evidence must be suppressed, whether or not they had a warrant. If they acted unreasonably they could not, by definition, have acted in "reasonable good faith," so the contradictory result of *Leon*, where police could conduct an "unreasonable" search "reasonably," is eliminated. Much of the language in *Leon* and *Gates* seems to recognize the need for such a "reasonableness" approach, but the Court's continued adherence to the warrant requirement and its exceptions as providing necessary "guidelines" to the police has prevented it from adopting anything approaching such a straightforward test.

III. MODEL II

Model I is founded on a belief that the officials charged with operating our criminal justice system — the police and the courts — will be better off if enjoined to act reasonably and reviewed on that basis, than if, as under the current arrangement, they are expected to obey a set of incomprehensible rules. This view flies in the face of the Supreme Court's recent criminal procedure jurisprudence which assumes that giving more or less exact guidelines to the police is the overriding function of the Court's decisions.¹⁰⁹ If the Court and the

109. In *United States v. Rabinowitz*, 339 U.S. 56 (1950), the majority and dissenting opinions came very near to advancing the two models suggested here. In approving extensive warrantless searches incident to arrest, the majority held that:

What is a reasonable search is not to be determined by any fixed formula. The Constitution

legal community at large cannot give up this long held view of criminal procedure law, then it is necessary to develop a rule which really does give guidance to the police and the courts. That is, a simple, easily obeyed rule that will actually apply in most cases.¹¹⁰ Model II will accomplish this by requiring a warrant in all but genuine emergencies but by allowing the warrant to be granted orally on the basis of an oral (telephoned or radioed) submission, provided only that the submission be tape recorded so that its sufficiency can later be tested at a motion to suppress.¹¹¹ Under the recent holding in *United States v. Leon*,¹¹² technical problems with this procedure, such as the failure of the magistrate to record the call, breakdown of the recorder, etc., as well as defects in the content of the application would be subject to the good-faith exception to the exclusionary rule.

Model II proposes that a warrant truly be *required* except when absolutely prevented by an emergency. This means twenty-four-hour-a-day availability of magistrates (assuming the police want to search twenty-four hours a day). It means that before searching an automo-

does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.

339 U.S. at 63 (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)).

In dissent, Justice Frankfurter insisted that "a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." 339 U.S. at 70. *Rabinowitz* was overruled in *Chimel v. California*, 395 U.S. 752 (1969), because it gave too much leeway to searches incident to arrest. While the Court currently pays lip service to Justice Frankfurter's view, as discussed above, the reality of current decisions is a failed compromise between the two views advanced in *Rabinowitz*.

110. In a recent article in the *Wall Street Journal*, an attorney from the (conservative) Mountain States Legal Foundation opined that the Court's recent efforts to "help" the police by creating more and more exceptions to the exclusionary rule are only making matters more confusing, and therefore worse for police and public alike.

Police will increasingly err, often through no fault of their own, on the wrong side of the law. Evidence will be thrown out that could have been properly secured and our interest in punishing the guilty will drown in a heated sea of argument *because of the [C]ourt's failure to draw clear rules.*

.....

In eight years of representing police unions and instructing officers on the laws of search and seizure, I learned how vital it is for the courts to provide meaningful guidance as to what officers can and cannot do. In the absence of firm rules the police will err on the wrong side of the line. Although it is a widely perceived myth that police officers detest the exclusionary rule, most I know have accepted the rule well — it enhances police training and has raised the level of police professionalism.

Oade, *The High Court Sows Confusion*, Wall St. J., July 13, 1984, at 18, col. 4 (emphasis added).

111. Oral search warrants are already allowed in several states and in the federal system but have not been approved by the Supreme Court. *See, e.g.*, FED. R. CRIM. P. 41(c)(2); W. LAFAVE, *supra* note 19, § 4.3(c) (Professor LaFave sees no valid constitutional objection to this practice). Professor Grano has proposed that warrants be required in all but exigent circumstance cases. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982). However, Grano does not propose the use of oral warrants, thus running the risk that his exigent circumstance exception will consume his rule.

112. 104 S. Ct. 3405 (1984).

bile, the police must radio in for a warrant. In short, Model II does for the fourth amendment what *Miranda v. Arizona*¹¹³ did for the fifth: it establishes a relatively simple,¹¹⁴ straightforward rule that can be applied in virtually every case. Just as in fifth amendment cases, there would be litigation as to whether or not the rule were applicable at all (*i.e.*, "is this a search?" vs. "is this a custodial interrogation?") but far less confusion than at present. Also, just as with *Miranda*, the declaration of such a rule by the Court would lead to much hair-tearing and teeth-gnashing by police, who would complain that they were being "handcuffed." But the police could get used to radioing for permission before conducting a search, just as they have gotten used to "reading the rights" before questioning a suspect. The advantage of knowing that they must act according to fixed guidelines in most circumstances and of knowing that their plan of action, having been approved by the magistrate, is appropriate and will virtually always render the evidence admissible, will soon outweigh their temporary feeling of being hamstrung by legal rules.

To be sure, in terms of protection of individual rights, a traditional written warrant is better than an oral one. The traditional warrant procedure forces the police to take more time and to be more careful. It allows the magistrate an opportunity to deliberate and to be sure that everything is in its proper place. But it is precisely this deliberativeness that is the downfall of the present system. The written warrant requirement of the eighteenth century simply cannot apply to most police-citizen encounters in the highly mobile twentieth century. It is this cumbersomeness that has led the Court to declare so many exceptions to the warrant "requirement." It is time to take advantage of such technological advances as readily portable two-way radios (including wrist radios) and tape recorders to bring the warrant requirement up to date.

113. 384 U.S. 436 (1966).

114. The *Miranda* rule was relatively simple until the two recent decisions in *New York v. Quarles*, 104 S. Ct. 2626 (1984), and *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), began to create the sorts of exceptions to the *Miranda* requirements that have gotten the Court into so much trouble in the fourth amendment cases. As Justice Brennan, dissenting in *Elstad*, pointed out:

[T]he Court . . . suggest[s] that, "[u]nfortunately," *Miranda* is such an inherently "slippery," "murky," and "difficult" concept that the authorities in general, and the police officer conducting the interrogation in this case in particular, cannot be faulted for failing to advise a suspect of his rights and to obtain an informed *waiver*. . . . *Miranda* will become "murky," however, only because the Court's opinion today threatens to become a self-fulfilling prophecy. Although borderline cases occasionally have arisen respecting the concepts of "custody" and "interrogation," until today there has been nothing "slippery," "murky," or "difficult" about *Miranda* in the overwhelming majority of cases. The whole point of the Court's work in this area has been to prescribe "bright line" rules to give clear guidance to the authorities.

105 S. Ct. at 1319-20 (citations omitted).

Will it work? Consider first the exceptions to the current warrant requirement discussed earlier. Unless Model II can eliminate many of these exceptions, the light it provides will not be worth the candle. But it will readily be seen that it can. Searches incident to arrest, for example, can be eliminated as an exception to the warrant and probable cause requirements. All arrests must necessarily entail a frisk for weapons which does not depend on probable cause and therefore cannot be subject to a warrant requirement. However, searches of the "area within the immediate control"¹¹⁵ of the suspect should only be performed after probable cause has been called in to the magistrate. (If there is no probable cause why should an arrest justify such a search?)¹¹⁶ Similarly, the automobile exception can be scrapped. When a car is stopped on the highway and the occupants arrested, as in *Chambers v. Maroney*,¹¹⁷ there is no reason not to call for judicial approval before searching the car. Even if the occupants have not been arrested, the normal case will not present an emergency of such immediacy that calling for judicial authorization is precluded. Finally, many warrantless searches currently justified under the "exigent circumstances" exception need no longer be performed without a warrant since circumstances so "exigent" as to prevent the police from radioing for a warrant will rarely occur. For example, in *Warden v. Hayden*,¹¹⁸ the classic exigent circumstances case, once the police had chased Hayden into his house they could have surrounded the house and stopped for the five minutes or less that it would have required to describe the situation to the magistrate over the radio and receive his authorization before entering.

This almost universal warrant requirement would benefit both the police and the citizenry. If the police can receive prompt judicial input into the propriety of their proposed conduct, they can normally

115. See *Chimel v. California*, 395 U.S. 752 (1969). The area which may be searched incident to arrest is broad. In the automobile context, it includes the entire passenger compartment that the suspect occupied before the arrest. *New York v. Belton*, 453 U.S. 454 (1981). In the home context, many courts have concluded that it includes the entire room in which the suspect was arrested. See, e.g., *People v. Perry*, 47 Ill. 2d 402, 266 N.E.2d 330 (1971).

116. What of a search for evidence on the person of the suspect which goes beyond a *Terry* frisk, as in *United States v. Robinson*, 414 U.S. 218 (1973)? While it is true, as Professor LaFave points out, W. LAFAVE, *supra* note 19, § 5.2, at 266-67, that the Court has always recognized that such a search is appropriate, there is really no need to allow it. The police can protect themselves with a frisk. If the suspect is to be placed in custody, his pockets can be emptied in a pre-custody (non-probable-cause and therefore warrantless) search. But if, as in *Robinson*, he is not to be jailed, then the clear rule of Model II can and should apply: no search without a warrant. As Justice Frankfurter argued in *Rabinowitz*, "it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest." 339 U.S. at 70-71 (Frankfurter, J., dissenting).

117. 399 U.S. 42 (1970).

118. 387 U.S. 294 (1967).

avoid later suppression of evidence at trial (especially under the new, more lenient treatment of errors in warrant cases recently announced in *United States v. Leon*¹¹⁹). In cases where the magistrate disapproves the proposed search due to lack of probable cause the police may be able to bolster their "affidavit" with additional investigation, thus avoiding later suppression due to an error that could have been corrected in advance. The citizen, of course, will benefit from the fact that, in virtually all cases, the judgment of a "neutral and detached magistrate" will be interjected into the search process. Moreover, the police will be forced to commit themselves, in advance, as to what evidence they have to support the search, thus avoiding the possibility of the search being justified *post facto* by evidence that is found in the search itself.

Such an exercise may seem unduly restrictive of effective police work. Since it goes against police nature to cease pursuit of a suspect to observe the niceties of criminal procedure, it will undoubtedly mean that, at first, Model II will lead to more, not less, exclusion of evidence. However, once the police realize that warrant use will be rewarded *and* that warrantless searches will be penalized by automatic exclusion of evidence, they will quickly learn to adhere to the Model II requirements.

Certainly there was a time when one could have reasonably argued that to deny the authorities the use of thumb screws and, later, rubber hoses went so much against "police nature" that it was futile to try to forbid such practices.¹²⁰ Yet today the police seem to get along well enough without these aids and have even gotten used to informing suspects of their legal rights before questioning. They could similarly get used to obtaining magisterial authorization before searching, so long as the process did not substantially interfere with their ability to do a good job. This warrant requirement, with its emergency exception, is designed to be quick enough not to interfere with legitimate police activities, yet demanding enough to check abuses of the rights of

119. 104 S. Ct. 3405 (1984). But see Bradley, *supra* note 8, for a more detailed discussion of the problems that *Leon's* extreme deference to the magistrate's decision may cause.

120. In 1931, Zechariah Chafee, the coauthor of the Wickersham Report on lawlessness in law enforcement, averred that bad as the third degree is, we should be very cautious about disrupting the police department and the courts in the hope of abolishing it. Chafee, *Remedies for the Third Degree*, ATL. MONTHLY, Nov. 1931, at 621, 625-26, 630, cited in Y. KAMISAR, *supra* note 106, at 63-64.

In the early twenties, after a state court excluded a defendant's confession because it had been obtained through use of the third degree, a Chicago police official announced that 95% of the department's work would be rendered useless if the decision were allowed to stand. "We are permitted to do less every day," the chief complained. "Pretty soon there won't be a police department." C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 172 (1978) (footnote omitted).

the citizenry. Indeed, such a system might prove very attractive to police. Unlike the *Miranda* warnings, which tend, however ineffectively, to interfere with what the police are trying to do (get confessions from suspects), a warrant requirement is a neutral higher authorization that should make a functionary in a hierarchical police organization comfortable. If the magistrate authorizes the search, the policeman cannot be criticized for conducting it. If the magistrate refuses the search, the policeman cannot be criticized for not searching. Much of the uncertainty that currently plagues police would thus be eliminated.

If such a readily enforceable warrant requirement were adopted, the Court might be tempted to expand the fourth amendment's coverage. As discussed, a search of an "open field" frequently intrudes on areas in which people have a reasonable expectation of privacy. Yet the Court has excluded open field searches from the coverage of the fourth amendment, presumably to reduce the burdens that would be placed on law enforcement by a contrary holding. Since it would be a simple matter for police to radio for a warrant before searching open fields, the Court could feel more free to restore "reasonable expectation of privacy" as the test of fourth amendment protected interests and require warrants for all searches of "fields" which bear indications that they are private property from which the public is excluded.

Model II is necessarily limited to "probable cause" searches because searches that are not based on probable cause could not be subject to a warrant requirement unless the Constitution, which requires that "no warrants shall issue, but upon probable cause,"¹²¹ were amended.¹²² Thus, border searches, driver's license checks, and car inventory searches, which are not based on probable cause, and which principally serve other societal interests than the discovery of the evidence of crime, must necessarily remain free of any warrant requirement. Similarly, stop and frisk encounters on the street, which are based not on probable cause but upon a reasonable suspicion that a suspect is "armed and dangerous,"¹²³ must be excepted both because a probable cause warrant could not issue under the current standards for stop and frisk and because the "armed and dangerous" requirement implies an emergency such that the policeman would not have time to radio for authorization before dealing with such a suspect.

121. U.S. CONST. amend. IV.

122. The Supreme Court, with its endorsement of administrative warrants issued upon "area probable cause" in *Camara v. Municipal Court*, 387 U.S. 523 (1967), did, in effect, amend the Constitution for a limited class of cases.

123. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

Model II revitalizes the proposition of Justice Frankfurter in his dissent in *United States v. Rabinowitz*¹²⁴ that “a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by *absolute necessity*.”¹²⁵ Despite the Court’s claim to having adopted Frankfurter’s view, the current automobile and search incident to arrest exceptions go far beyond what anyone could reasonably consider to be “absolute necessity.” Since an automobile *sometimes* presents the police with a situation where there is not time to get a warrant, the Court has declared that automobiles *always* may be searched without warrants. Far more sensible is a rule that automobiles, houses, stores, garages, and fields may *never* be searched without a warrant unless absolutely necessary. In most cases it will be possible to discern easily enough whether the police were correct in their assertion that absolute necessity prevented the procurement of a warrant. In cases in which it is not clear, at least the debate will be focused on the correct issue — whether there really was an emergency — rather than, as is currently the case, on whether a recreational vehicle is an “automobile” or whether the glove compartment or the back seat of a car in which a person was arrested is an “area within his immediate control.”

As with any clear rule, examples of cases in which Model II would not yield satisfactory results, or where its operation seems unclear, can be readily imagined. What if the magistrate is unavailable when the police call in? Can an “emergency” be created by the failure of the police to call for a warrant at the earliest possible moment? Should the standards for an acceptable warrant affidavit be loosened in recognition of the difficulty of making a coherent and comprehensive presentation over the radio, possibly in the presence of the suspect who is to be searched?¹²⁶ Moreover, while Model II is as stringent and effective a warrant requirement as one can reasonably imagine, recognition of the practical difficulties of police work demands that that requirement contain significant exceptions (the “emergency” and “non-probable-cause search” exceptions), with concomitant litigation over whether one of those exceptions applies in a given case. Still, by limiting the number of exceptions and, hopefully, creating a rule which will not require further exceptions, Model II represents a distinct improvement over the current system. Finally, if police get used to calling for

124. 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting) (case later overruled by *Chimel v. California*, 395 U.S. 752 (1969)).

125. 339 U.S. at 70 (Frankfurter, J., dissenting) (emphasis added).

126. *United States v. Leon*, 104 S. Ct. 3405 (1984), by providing a reasonableness standard for testing the admissibility of evidence seized pursuant to defective warrants, would prove most helpful in resolving disputes arising out of problems with Model II warrants.

warrants, then they may do so in doubtful situations so that close cases will rarely arise.

IV. THE MODELS AT WORK

The test of any proposal is whether it can resolve real cases better than they are currently being resolved. An acid test is provided by the case of *New York v. Belton*,¹²⁷ where the Court found itself confronted with the task of integrating *two* of its confusing doctrines, the automobile exception (to the warrant but not the probable cause requirement) and the search incident to arrest exception (to both) into a single decision. In *Belton*, a highway patrolman stopped a speeding car, smelled marijuana, and saw an envelope on the floor marked "Supergold" which he associated with marijuana. He then ordered the four occupants out of the car, informed them that they were under arrest, and searched the passenger compartment of the car, finding marijuana in the envelope and cocaine in the zippered pocket of a black leather jacket.

The Court upheld the search, citing the need for "a set of rules which, in most instances, makes it possible [for the police] to reach a correct determination beforehand as to whether an invasion of privacy is justified."¹²⁸ Accordingly, the five-to-four majority held that the passenger compartment of an automobile may always be searched "incident to arrest" of the occupants (*i.e.*, without a warrant or probable cause to search) because that compartment is "generally, even if not inevitably," an "area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]."¹²⁹

Thus *Belton*, like *Ross*,¹³⁰ tried to make things easier for the police by establishing a "bright line" that was applicable in a limited class of cases (arrests from automobiles). Such an effort is doomed to failure because the class of cases in which the "bright line" is to apply does not itself have clear boundaries. As Justice Brennan argued in dissent, the new rule

leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers.

Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be

127. 453 U.S. 454 (1981).

128. 453 U.S. at 458 (quoting LaFave, *supra* note 78, at 142).

129. 453 U.S. at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

130. *United States v. Ross*, 456 U.S. 798 (1982).

valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? . . . [W]hat is meant by "interior"? Does it 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"? . . .

The Court does not give the police any "bright-line" answers to these questions. More important, because the Court's new rule abandons the justification underlying *Chimel*, it offers no guidance to the police officer seeking to work out these answers for himself.¹³¹

Beyond leaving unanswered questions, the result in *Belton*, as in *Ross*¹³² and *Oliver*,¹³³ will lead to unjust results in many cases. While the Court continues to assert that one has a constitutional right not to have his automobile searched without both a warrant and probable cause unless there is some good reason for doing so, *Belton* converts the fact that there may be a good reason to permit such warrantless, non-probable-cause searches in *some* cases into a rule permitting such searches in *all* cases.¹³⁴ The "clear rule" of *Belton* is neither clear nor just.

By contrast, either of the two models suggested here can resolve the *Belton* issues easily and, more importantly, without creating a precedent that will cause mischief in the future. Under Model II the resolution is simple. There is nothing to indicate that the patrolman had any sense of emergency in the case. He could have radioed his evidence (which clearly constituted probable cause) to the magistrate at his convenience (presumably after help had arrived), obtained an authorization, and searched the car. (Of course, the original, non-probable-cause traffic stop would not require a Model II warrant, nor would the non-probable-cause plain view of the "Supergold" envelope.) If Model II were in effect, it could readily have been complied with in this case, and the extensive litigation that *Belton* engendered would have been avoided. Of course, if Model II were not complied with, the evidence would have to be suppressed. In a case in which

131. 453 U.S. at 469-70 (Brennan, J., dissenting) (emphasis in original).

132. *United States v. Ross*, 456 U.S. 798 (1982).

133. *Oliver v. United States*, 104 S. Ct. 1735 (1984).

134. For a detailed criticism of *Belton* see LaFave, *supra* note 19, § 7.1, at 208-14 (Supp. 1985).

there is probable cause to arrest the occupant of a car but not to search it (e.g., a suspect is arrested on a fugitive warrant), under Model II police would not, and should not, be able to search the car just because they could not get a warrant (*Belton* allowed such a search).¹³⁵ It is difficult to imagine an automobile case where an emergency would justify dispensing with a Model II warrant.

The application of Model I to this case is less clear cut but still not difficult. Here the patrolman had evidence amounting to a virtual certainty that marijuana was present in the car. Moreover, he was dealing with a car and not a house. On the other hand, the suspected offense was a minor one and there was no emergency. One could resolve this case either way, and, since the resolution would have little precedential value, it is not terribly important what that resolution might be. In my view the stronger argument is that the intrusion on protected interests was sufficiently slight and the probable cause so strong that the policeman acted reasonably. If he had proceeded to demand the keys to the trunk and to go through suitcases found therein, I would conclude that he should have obtained a warrant before doing so.¹³⁶ Had he opened a locked container in the passenger compartment, judges undoubtedly would split as to whether this was "reasonable" or not.¹³⁷ When the goal of providing definitive answers in advance is demonstrably unachievable, tolerance for uncertainty is the only alternative. A system which tolerates uncertainty only in relatively close cases is far preferable to a system in which, as in *Belton*, clear rules dictate unjust results. At least if the evidence is suppressed under Model I, it will be suppressed on the basis of the bottom line of the fourth amendment — that the search was unreasonable — and not because a court determines that a locked container is not part of the passenger compartment of the car. This latter question, which *Belton* forces the courts to ask, is an irrelevant abstraction that completely loses track of the fundamental fourth amendment requirement of "reasonableness."

CONCLUSION

Fourth amendment law, to be effective in limiting inappropriate

135. Of course, a mistake by the magistrate in his assessment of probable cause would be subject to the good faith exception to the exclusionary rule recently announced in *United States v. Leon*, 104 S. Ct. 3405 (1984).

136. Of course, the adoption of Model I would not preclude the use of Model II (radioed, tape-recorded) warrants. *Ross* currently seems to allow such a warrantless search. See text at notes 56-58 *supra*.

137. This assumes they would ignore the *Belton* holding itself, which allowed a search of "any containers found within the passenger compartment." *Belton*, 453 U.S. at 460.

police behavior while at the same time allowing for effective law enforcement, must be a coherent and relatively simple doctrine that a policeman can readily understand and apply. No one could seriously argue that the current law even remotely approaches this ideal. On the contrary, it is so full of fictitious rules and multifaceted exceptions (and exceptions to those exceptions) that the most that could be said of anyone's grasp of the doctrine is that "he sees where most of the problems are." The two models suggested in this Article can each be summed up in a single terse command that every policeman can understand: "Act reasonably!" or "Get a warrant whenever you can!" Model I may seem a shocking and unacceptable solution to civil libertarians; Model II, to law and order advocates. But both groups, as well as those in between, would agree that strong solutions are necessary if a workable doctrine is to be developed. The Court's efforts to tread a tightrope between two extremes has resulted in a morass of confusion that can satisfy nobody. In discussing these models I have endeavored to show that they are *neutral* proposals which will have some benefits for law enforcement, for defendants, and for public perception of the exclusionary process, which is currently regarded as erratic and irrational. If the Court does not embrace one of these solutions, it is destined to sink ever deeper into the mire of contradiction and confusion.