1986

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Recommended Citation

Wayne R. LaFave, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 MICH. L. REV. 427 (1986).

Available at: <https://repository.law.umich.edu/mlr/vol85/iss3/8>

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BEING FRANK ABOUT THE FOURTH: ON ALLEN'S "PROCESS OF 'FACTUALIZATION' IN THE SEARCH AND SEIZURE CASES"

Wayne R. LaFave*

Step aside, and I'll show thee a precedent. . . . Francis! . . . Thou art perfect. . . . Francis!

— *1 King Henry IV*, act ii, scene 4

I. INTRODUCTION

A. *Forthrightly About Frank*

An invitation to participate in a special issue for such an inestimable personage as Francis Allen is itself a distinct honor — so much so, in fact, that refusal seems out of the question no matter what risks may attend this undertaking. The principal risk, as I see it, is that if one's contribution were to be assessed by a reader who, by virtue of this collection of essays, was also reflecting upon the writings of Allen, one is bound to come out the loser in any comparison. But I assume this risk, as substantial as it doubtless is in my case, so that I may join in the celebration of the remarkable accomplishments of an outstanding law teacher and legal scholar over a career that has so far spanned almost forty years.

It is my particular good fortune to have known Frank Allen all of my professional life. Indeed, we first met while I was still a law student at the University of Wisconsin, courtesy of my mentor there, Frank Remington. Had I known then that I would someday be called upon for this performance, I most certainly would have chronicled the exact date of this initial encounter with one of the giants of the law teaching profession. But all that I can recall as I now peer back through the mists of antiquity is that this was an occasion (one of many) on which I did not distinguish myself.¹ A lesser man than Al-

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1. My recollection, such as it is, is that I had accompanied Remington to the University of Chicago Law School to hear a talk on some aspect of criminal justice which was a part of the dedicatory proceedings for their new law building. We went to Allen's office, into which he had just moved, and chatted with him there. In a desperate effort to contribute at least some small talk to the conversation, I commented, nodding in the direction of four water or steam pipes running from floor to ceiling through the office, that this would be a nice office when it was

len might have consigned me to some sort of Gehenna for the witless, but he did not. Indeed, in the intervening quarter of a century our paths have crossed on numerous occasions, often at his doing and always to my benefit.

I reveal no special insight when I assert that Frank Allen is truly an extraordinary individual. Putting aside his acute nomadism, which I have addressed on a prior occasion² and with which he is now afflicted once again,³ Allen has no fault known to me. He is an unpretentious man in a profession where humility is in short supply. Moreover, it can truly be said (to turn Churchill's oft-quoted quip inside out) that Frank is a modest man who has *nothing* to be modest about. Over the years, despite the burdens of a variety of administrative responsibilities he has assumed for his law school and his profession, Allen has been remarkably prolific. His writings, as I have already intimated, reflect a singular synthesis of erudition, elegance, and lucidity; no wonder, then, that his books and articles have so many admirers and so few equipollents. Allen is a man of grace, good humor, and uncommon common sense, and he always (well, *almost* always⁴) has about him an air of total unflappability.

finished. Allen responded that it was finished. So much for my introduction to the marvels of modern architecture.

I would like to believe that my faux pas had a subliminal effect upon Allen's career. Despite his vagabondage, *see* note 2 *infra*, Allen has had an uncommonly long tenure at a law school housed in what can only be described as a mausoleum.

2. It fell to me to introduce Allen when he delivered the David C. Baum Memorial Lecture on Civil Rights and Civil Liberties at the University of Illinois College of Law on April 10, 1975. I stated in part:

Allen graduated from Northwestern in 1946, from whence he moved to Washington to serve as law clerk to Justice Vinson during 1946-48, from whence he moved to Chicago to serve on the Northwestern faculty 1948-53, from whence he moved to Cambridge to be on the Harvard faculty 1953-56, from whence he moved to Chicago to be on the University of Chicago faculty 1956-62, from whence he moved to Ann Arbor to serve on the Michigan faculty 1962-63, from whence he moved to Chicago again to serve on the Chicago faculty 1963-66, from whence he moved to Ann Arbor once again to be on the Michigan faculty (initially as dean), from whence he moved to Boston in 1974 to serve as a visiting faculty member at Boston College, from whence he moved back to Ann Arbor and the University of Michigan, where to the best of my knowledge he is presently in residence. Allen recently received the prestigious Mayflower Award for his enthusiastic and assiduous support of the moving and storage business.

3. "Francis A. Allen, the Edson R. Sunderland Professor of Law and former dean at the University of Michigan Law School, will occupy a \$1 million endowed chair, the Huber C. Hurst Eminent Scholar Chair at the University of Florida College of Law this fall." SYLLABUS, June 1986, at 4.

4. Among my valued associations with Frank Allen is our work together on the Editorial Board for the four-volume *Encyclopedia of Crime and Justice*. One of the Board's meetings was held on the campus of Stanford University, and on the first day of this scheduled meeting I encountered Frank in the motel dining room at breakfast. He had a troubled look upon his visage, so uncharacteristic of one whose countenance customarily exudes unmitigated serenity. Allen then inquired as to my travels from the airport to the motel, explaining that he had paid what seemed to him an unduly stiff \$50 for his taxi ride. With my characteristic honesty, which perhaps I should have disengaged on this occasion, I confessed that I had grabbed a city bus at

B. Frank Writes About the Fourth

Elsewhere in these pages Yale Kamisar and Sanford Kadish thoughtfully examine the contributions of Francis Allen to the legal literature.⁵ Though I am one of the many who have profited from Frank's books and articles on a variety of topics, I wish to express a special debt of gratitude regarding his writings in my particular field of interest. For most of my life in academe, I have staked out as my favorite intellectual sandbox the fourth amendment — that is, the law concerning constitutional limitations upon search and seizure. This has long been the subject of my own (hopefully not Sisyphean) research and writing. I continue to mine this particular vein of constitutional law not merely because the subject fascinates me, but also because of my sense of the importance in our society of those rights guaranteed by the fourth amendment. In other words, I share the judgment of Justice Frankfurter that the fourth amendment occupies "a place second to none in the Bill of Rights."⁶ But whether one subscribes to this seemingly discrepant fourth-is-first numeration or, instead, is a literalist who believes that the fourth is really only fourth, there is no dissent from the conclusion that Frank Allen's contribution to the fourth amendment literature has been a most important and lasting one.

Allen's welcome intrusions onto the fourth amendment scene have typically been prompted by some momentous development in this realm of jurisprudence. The circumstances of his birth were such⁷ that he was unable to publish an article on the occasion of the Supreme Court's decision in *Weeks v. United States*,⁸ which erected a barrier in the federal courts to admission of evidence obtained in violation of the fourth amendment. But when the Court later, in *Wolf v. Colorado*,⁹

the airport and, upon depositing the paltry sum of fifty cents, had been transported to the street corner just steps from our motel. As Frank reflected on this 100:1 differential in the cost of this part of our respective travels, it was apparent that his bacon and eggs were not setting too well. This is about as flapped as I have ever seen Allen.

This incident, I hasten to add, also caused me untold concern. It later occurred to me that under these circumstances a man of Allen's punctiliousness doubtless would, in submitting his travel expenses to our publisher, list only an expenditure of fifty cents for his airport-to-motel journey. How I now wish that I had possessed the presence of mind to assure him that this would be unnecessary because, on the basis of what I had just learned from him, my statement of expenses was going to read \$50.

5. Kamisar, *Francis A. Allen: "Confront[ing] the Most Explosive Problems" and "Plumbing All Issues to Their Full Depth Without Fear or Prejudice,"* 85 MICH. L. REV. 406 (1986); Kadish, *Francis A. Allen — An Appreciation*, 85 MICH. L. REV. 401 (1986).

6. *Harris v. United States*, 331 U.S. 145, 157 (1947) (dissenting opinion).

7. The circumstance to which I refer is its timing; Allen was born five years after *Weeks* was handed down.

8. 232 U.S. 383 (1914).

9. 338 U.S. 25 (1949).

declined to recognize a similar constitutional barrier in the state courts, Allen responded with a masterful analysis of this development.¹⁰ So too when *Wolf* was overruled in *Mapp v. Ohio*,¹¹ Allen was again quickly on the scene with a penetrating assessment of this landmark case.¹²

Mention should also be made here of another fourth amendment piece¹³ penned by Frank Allen, a concise and pithy article based on remarks he delivered in 1960 at an International Conference on Criminal Law Administration.¹⁴ At this talk, which I attended and vividly recall, Frank addressed the subject in his customary eloquent style, but there was not so much as a hint that a few months down the road the Supreme Court would be making history with the *Mapp* decision (so much for the infallibility of Frank Allen).¹⁵ There was a good reason, of course, why Allen's crystal ball did not foretell this impen-dency. Until the Supreme Court's decision was announced, *Mapp* seemed to be nothing more than a grubby little obscenity case. But then, as the dissenters bitterly complained, the majority "reached out" to overrule *Wolf*. (How times have changed; nowadays the Court reaches out to constrict the *Mapp* exclusionary rule.¹⁶)

C. Frank's Right About the Fourth

The depth and breadth of the analysis in Frank Allen's writings on the subject are such that those of us who have since labored in the fourth amendment vineyards have, for the most part, been able to do

10. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

11. 367 U.S. 643 (1961).

12. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1.

13. It should also be noted here that Allen has also addressed fourth amendment issues in some of his other writings of broader scope. See, e.g., Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518.

14. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246 (1961).

15. The later-published article, however, included an addendum taking note of the intervening decision in *Mapp*. *Id.* at 253-54.

Not long thereafter, Allen attempted to vindicate himself with the palliation that the Court had sneaked up on him (and the rest of us). "The fact is that *Mapp* did not come as the climax to an extended process of gradual weakening or attenuation of the *Wolf* rule. After all the clues are marshalled, the sense of surprise induced by the announcement of the *Mapp* decision remains." Allen, *supra* note 12, at 11.

16. *United States v. Leon*, 468 U.S. 897, 961-62 (1984) (Stevens, J., dissenting):

It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*. Adherence to our normal practice following the announcement of a new rule would therefore postpone, and probably obviate, the need for the promulgation of the broad new rule the Court announces today.

no more than apply a contemporary sheen to Allen's pearls (except, of course, when we are busy mixing metaphors). I find it not at all remarkable that this should be so. Indeed, I would go so far as to say that *anyone* who has reason to address fourth amendment issues — and I would include here the members of that august body formerly known as "The Nine Old Men"¹⁷ — would be well advised to study and excerpt from Allen's timeless *Wolf* and *Mapp* articles.

I do not question for a moment the sapience of Robert Benchley's *bon mot* that "the surest way to make a monkey of a man is to quote him."¹⁸ Nor do I doubt that quoting what a man has written twenty-five or thirty-five years ago is the most likely route to this lower-primal state. But Frank Allen must be the exception who proves the rule, for his ratiocinations are just as cogent today as when they were written. Indeed, if the intervening years prove anything, they show that the fourth amendment would be in much better health if Allen's views had achieved greater acceptance by the courts. Before turning to the main business of this Article, I should like to provide just two illustrations, one from his 1950 *Wolf* critique and the other from his 1961 exegesis of *Mapp*.

1. *Standing (and) (for) Deterrence*

In a skillfully crafted paragraph in his *Wolf* piece, Allen pointed out the inherent inconsistency in having an exclusionary rule grounded largely in considerations of deterrence and also, as to that rule, a standing requirement that a defendant's own right of privacy must have been invaded by the challenged search.¹⁹ That antilogy

17. See Baker, *The Ages of Person*, N.Y. Times, July 18, 1981, at 23, col. 1, for a lucid explanation of why that term cannot be supplanted with any of the following: "eight old men and an old woman"; "eight old men and a spring chicken"; "eight old men and a lady"; and "eight old men and a person." He concludes: "Under the circumstances, . . . the only possible phrase is 'eight old persons and a person.' Thus dies another lively phrase."

18. R. FLESCHE, *THE NEW BOOK OF UNUSUAL QUOTATIONS* 311 (1966).

19. Perhaps the least justifiable of the limits on the scope of the exclusionary rule recognized by the federal courts is that sanctioning the introduction of evidence in a criminal proceeding seized in violation of the rights of privacy of a third party. This limitation doubtless reveals the thought that the exclusionary rule should be conceived as conferring a kind of personal privilege to be asserted only by the individual whose rights of privacy have been invaded and, perhaps, manifests the origin of the exclusionary rule as the offspring of the "mystic union" of the Fourth Amendment and the privilege against self-incrimination derived from the Fifth Amendment. But, obviously, the function of the exclusionary rule is not simply to confer a benefit upon the defendant in vindication of his rights of privacy which have already been invaded by governmental action, but to act as a restraining measure upon officials disposed to invade individual privacy in the future and, more broadly, to prevent the judicial power from being employed as an instrument for the lawless enforcement of the criminal law. Insofar as these latter considerations are of importance it can make little difference whether the evidence in question represents the fruits of an invasion of the defendant's rights of privacy or whether it has been obtained in a manner inconsistent with the rights of any other person entitled to the protections of the Fourth Amendment.

persists today, for in the intervening years the Supreme Court has repeatedly expressed its unwillingness to broaden standing and thereby permit deterrence-via-exclusion to be effectuated in a wider range of circumstances.

In *Alderman v. United States*,²⁰ the Supreme Court declined to adopt the version of standing accepted in *People v. Martin*,²¹ whereunder a defendant in a criminal case could have suppressed even that evidence obtained in violation of the rights of others. (That rule prevailed in the aptly-mottoed Eureka State until 1982, when it was referendumed into oblivion by Proposition 8.²²) The Court reasoned that whatever added deterrence would be gained by a *Martin*-type rule was not worth the "further encroachment upon the public interest" that would result.²³ *Alderman* was thus viewed as having marked the "point of diminishing returns"²⁴ of the exclusionary rule, which is an attractive way of looking at the question. If the fourth amendment exclusionary rule is viewed in terms of "its broad deterrent purpose,"²⁵ then, so the argument goes, it is "a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease."²⁶ How much is enough, however, is a hard question, and can lead to the kind of speculation about deterrence-in-fact objugated in the following subsection. But at least *Alderman* protected against certain results which had occurred under *Martin* that were themselves hard to swallow, such as that the defendant in a criminal case is entitled to have excluded at his trial evidence acquired by police in violation of the rights of his *victim*.²⁷

Allen, *supra* note 10, at 22 (footnotes omitted).

20. 394 U.S. 165 (1969).

21. 45 Cal. 2d 755, 290 P.2d 855 (1955). For a useful study of the experience in California under the *Martin* rule, see Simons, *California's Rule of Vicarious Exclusion: Who May Challenge the Constable's Errors?*, 19 SANTA CLARA L. REV. 319 (1979).

22. In 1982 California voters adopted an amendment to the state constitution providing, among other things: "[E]xcept as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d). This was construed as having "abrogated . . . the 'vicarious exclusionary rule' under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person." *In re Lance W.*, 37 Cal. 3d 873, 879, 694 P.2d 744, 747, 210 Cal. Rptr. 631, 634 (1985).

23. *Alderman*, 394 U.S. at 175.

24. Note, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947, 958 (1972).

25. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

26. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

27. *People v. Jager*, 145 Cal. App. 2d 792, 303 P.2d 115 (1956), cited as an "extreme example of the California position" in Note, *Standing Requirement of the Fourth Amendment — Anachronism or Necessity?*, 6 IDAHO L. REV. 131, 134 (1969), opposing the *Martin* rule. Compare Simons, *supra* note 21, at 346-47, taking the position that standing even in such circumstances is appropriate.

After *Alderman*, the question of whether a defendant should have standing because he was the target of a search directed at another was "regarded as an open question,"²⁸ but it was abruptly closed in *Rakas v. Illinois*,²⁹ which rejected any such notion. In a remarkable passage, the Court reasoned that the unprosecuted victim of that search could seek other remedies (thus turning the *Mapp* analysis on its head), and expressed concern about the "substantial social cost" attendant application of the exclusionary rule.³⁰ One might have expected some balancing of that supposed cost against the deterrent advantages of exclusion, by way of determining on which side of the "target" standing concept the "diminishing returns" of exclusion set in, but that did not happen. Instead, the Court adopted an individual rights approach to the fourth amendment,³¹ conveniently ignoring the fact that it had previously characterized the exclusionary remedy as "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."³²

"Target" standing makes eminently good sense if otherwise "the Supreme Court's 'standing' rules [would] constitute an incitement to the police to conduct unconstitutional searches against small fish in order to catch big ones."³³ Commentators have argued that there are recurring situations in which such trade-offs are made,³⁴ but any doubts on this point were certainly dispelled by the remarkable case of *United States v. Payner*.³⁵ There an IRS agent, knowing a Bahamian bank official would be in Miami, participated in a scheme whereby the banker's briefcase was stolen for a time to facilitate photographing of 400 bank records therein. This led to information establishing that Payner and others had money in that bank not reported on their tax returns. As was unmistakably clear in the findings of the district court,³⁶ undisturbed by the court of appeals and the Supreme Court,

28. *United States v. Mapp*, 476 F.2d 67, 71 (2d Cir. 1973).

29. 439 U.S. 128 (1978).

30. 439 U.S. at 137.

31. Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259, 262 (1983), notes that *Rakas* was another in a series of cases in which "the Court in recent years has oscillated between individual and collective views in the fourth amendment [exclusionary] rule area, but always in such a way as to narrow the amendment's effective ambit."

32. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

33. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433 (1974).

34. See Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 176-77 (1979); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 351-52 (1970).

35. 447 U.S. 727 (1980).

36. The findings were that

the Government and its agents, including Richard Jaffe, were, and are, well aware that

this criminal act and extreme violation of the banker's fourth amendment rights³⁷ was undertaken with full understanding by the IRS agent that a person such as Payner — precisely the kind of violator they were seeking — would have no standing to object. The Supreme Court, however, refused to reconsider its fourth amendment standing doctrine and then reversed the district court's exclusion of evidence under its supervisory power. As the three *Payner* dissenters quite correctly said of this holding that *compels* judicial impotency in the face of such scandalous conduct, it "effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person."³⁸

Allen's comments of over thirty-five years ago about deterrence and standing are most poignant when viewed against these more recent developments. The complaint is not that the Supreme Court has failed to squeeze the very last ounce of deterrence³⁹ out of the exclu-

under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties who's [sic] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. This Court finds that, in its desire to apprehend tax evaders, . . . the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel.

434 F. Supp. 113, 131-33 (N.D. Ohio 1977) (footnote omitted).

37. In a pre-*Payner* lecture on fourth amendment issues, I had occasion to discuss *United States v. Miller*, 425 U.S. 435 (1976), holding that the defendant could not object to subpoenas ordering production by banks of "all records of accounts, i.e., savings, checking, loan or otherwise, in the name of" defendant or his company, for the reason that he had no reasonable expectation of privacy as to what was in those documents, for they "contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." 425 U.S. at 437, 442. In expressing my lack of enthusiasm for the *Miller* rationale and result, I opined that if the Court's reasoning were taken seriously then this would mean the same result would obtain even if the police acquired the bank records without the bank's consent and by some extreme measures, such as burglary. The (admittedly hostile) audience almost hooted me from the podium for entertaining such flights of fancy. *Payner*, of course, is precisely such a case.

38. 447 U.S. at 738 (Marshall, J., joined by Brennan and Blackmun, JJ.).

39. The relevance in this context of the sempiternal verity that "an ounce of prevention is worth a pound of cure" is open to debate. Indeed, that is the very heart of the debate. The fourth amendment's exclusionary rule, the Supreme Court instructed in *Elkins v. United States*, 364 U.S. 206, 217 (1960), "is calculated to prevent, not to repair." If it is prevention we are talking about, then it might seem that every available ounce *should* be extruded from the exclusionary rule. But while it is indubitably accurate to say of the exclusionary rule that the "emphasis is forward," Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335, there is no escaping the fact that the apparent (even if not always actual) "immediate result is to free an obviously guilty person." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 331 (1973). It is the prospect of that more immediate consequence which doubtless has influenced the Supreme Court and lower courts to accept some-

sionary rule. Rather, it is that the standing doctrine has been fashioned in such a way that it is actually working at cross-purposes with the deterrence objective. Nor, it should be added, is this a consequence only of the Court refusing to enlarge upon previously recognized standing doctrine. It is also reflected in those cases, such as *Rawlings v. Kentucky*,⁴⁰ that rule on just what it takes to establish the "legitimate expectation of privacy" the Court said in *Rakas* was essential to standing. The *Rawlings* Court held defendant was without standing as to his then-companion's purse, into which he had placed narcotics, because he did not "have any right to exclude other persons from access to [that] purse."⁴¹ By thus using a consideration previously deemed relevant on the authority of a bailee to give valid consent,⁴² the Court produced the incredible result that whenever police could conduct a lawful search with the bailee's consent, they may instead make that search without the bailee's consent because the bailor will lack standing.⁴³ This is not only wrong, but also inconsistent with the Court's prior pronouncements on the law of standing.⁴⁴

2. Deterrence — Prove It!

In his 1961 *Mapp* article, Allen took note of the longstanding "[d]ebate over the efficacy of the exclusionary rule," a matter that "can ultimately be answered only by empirical demonstration," but not now, for "no effective quantitative measure of the rule's deterrent efficacy has been devised or applied."⁴⁵ Allen rightly saw this as an unhealthy state of affairs. As he put the matter on a subsequent occasion: "The reason why the deterrence rationale renders the exclusionary rule vulnerable is that the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one."⁴⁶

The wisdom of this Allenism has been amply demonstrated by Yale Kamisar in an article which, like the present one, is cognomened

thing less than every possible ounce of prevention. As Justice Traynor put it: "Of all the two-faced problems of the law, there is none more tormenting" than this. Traynor, *supra*, at 319.

40. 448 U.S. 98 (1980).

41. 448 U.S. at 105.

42. See 3 W. LAFAVE, SEARCH AND SEIZURE § 8.6(a) (2d ed. 1987).

43. As in *Sussman v. Commonwealth*, 610 S.W.2d 608 (Ky. 1980) (defendant had no standing regarding search of his girl friend's house, where he had left certain personal effects, including a stash of drugs, as he had not limited his girl friend's use of the premises).

44. For example, in *Mancusi v. DeForte*, 392 U.S. 364, 369-70 (1968), where the Court held an office worker had standing as to a search of records in an office used by him and his co-workers, it was properly said to be "irrelevant" that his employer and fellow employees "might validly have consented to a search of the area where the records were kept."

45. Allen, *supra* note 12, at 33-34.

46. Allen, *supra* note 13, at 537.

with Allen's distinctive prose.⁴⁷ That being the case, I shall not serve the reader a *réchauffé* here, but instead will offer only a few observations on the significance of Allen's point. One view is that it means the fourth amendment exclusionary rule must be seen as grounded not in notions of deterrence but rather in the broader proposition (as also stated in *Mapp*) that "no man is to be convicted on unconstitutional evidence." Kamisar argues this point with his characteristic bulldog tenacity,⁴⁸ while others have vigorously taken the contrary position.⁴⁹

Wherever the truth lies in this dispute (notice how I have ab-squatulated from that battleground with all haste), I would suggest that it is difficult to think about the fourth amendment exclusionary rule without also thinking about the objective of deterrence. (Even Kamisar once said — back when he was young and innocent, he might now protest — that he "would hate to have to justify throwing out homicide and narcotic and labor racket cases" if he "did not believe that such action significantly affected police attitudes and practices."⁵⁰) But the heart of the problem is exactly *how* one ought to think about deterrence and the fourth amendment.

Allen's concern is with deterrence as "an empirical proposition,"⁵¹ where an absence of hard proof of a deterrent effect in the particular case might well be taken as a reason for not excluding illegally obtained evidence in that case. But that, it seems to me, is a cockeyed way for courts to look at deterrence. I am comfortable in thinking about the exclusionary rule in deterrence terms, but that is because I see the deterrence principle somewhat differently. For one thing, I find the question of whether the exclusionary rule (did) (could) deter in the particular case irrelevant, for the "exclusionary rule is not aimed at special deterrence";⁵² instead it is intended "to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it."⁵³ Moreover, the claim that the deterrent effect must somehow be proved in a particular instance "is merely a way of announcing a predetermined conclusion,"⁵⁴ for with

47. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

48. *Id.*

49. E.g., Dripps, *Living with Leon*, 95 YALE L.J. 906, 918-22 (1986).

50. Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 179 (1962).

51. Allen, *supra* note 12, at 34.

52. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970).

53. *Stone v. Powell*, 428 U.S. 465, 492 (1976).

54. Dworkin, *supra* note 39, at 333.

the exclusionary rule (as with the death penalty) it is "difficult to measure the occasions on which the deterrent has been successful."⁵⁵ In the last analysis, then, I share the belief that deterrence "is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred."⁵⁶

For me, then, the ultimate proof of the wisdom of Allen's comment is the Court's insistence on treating deterrence as "an empirical proposition" in the sense discussed above. I have in mind such cases as *United States v. Janis*,⁵⁷ where, utilizing "common sense" in "the absence of convincing empirical evidence," the Court held the exclusionary rule inapplicable in a civil suit by or against a sovereign other than that employing the searching officer, though in fact (as the dissenters recognized) such a result could only fortify the existing pattern "of mutual cooperation and coordination"⁵⁸ whereby evidence illegally seized by state officers was being silver-plattered⁵⁹ to federal officials for use in enforcing their tax laws. Similarly in *INS v. Lopez-Mendoza*⁶⁰ the exclusionary rule was held inapplicable in a civil deportation hearing, in part because INS agents know "that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest,"⁶¹ though (as Justice White noted in dissent) so concentrating on deterrence of individual agents "neglects the 'systemic' deterrent effect that may lead the agency to adopt policies and procedures that conform to Fourth Amendment standards."⁶²

II. THE NEED FOR "FACTUALIZATION"

The inspiration for this Article comes from the following paragraph, written by Frank Allen in 1950:

So long as the Court feels itself compelled to resolve [fourth amendment] issues by choosing one set of social values to the exclusion of the other, *any* decision must inevitably leave the law in a state of unstable equilibrium. In other types of civil liberties litigation there may be evi-

55. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 739 (1972).

56. Dworkin, *supra* note 39, at 333.

57. 428 U.S. 433, 457, 459 (1976).

58. 428 U.S. at 462 (Stewart, J., dissenting).

59. The reference, of course, is to the so-called "silver platter" doctrine, under which state police could turn the fruits of their illegal searches over to federal authorities for use in federal courts; the doctrine was abolished in *Elkins v. United States*, 364 U.S. 206 (1960), and has now been partially revived in *Janis*.

60. 468 U.S. 1032 (1984).

61. 468 U.S. at 1044.

62. 468 U.S. at 1054 (White, J., dissenting).

dence that these tensions are relaxing due to the increasing ability of the Court to narrow the issues for adjudication, thereby eliminating choices between such drastic alternatives. Thus by a process of "factualization" it may be increasingly easier to recognize that the problem of freedom of speech in an industrial dispute is not altogether the same problem as that involving the right of the political candidate to make his views known to the electorate, and that the right of the unlicensed newspaper publisher to be free from governmental supervision in the circulation of ideas may not involve precisely the same implications as the issue of governmental supervision of the quality of programs put on the air by the licensee of a radio wave length. However that may be, this process of "factualization" in the search and seizure cases has not proceeded far. Consequently, those cases present in particularly stark relief a conflict of social values typical to a greater or lesser extent of the dilemmas faced by the Court in the whole movement toward increasing judicial protection of the basic individual liberties.⁶³

When those words were written, the fourth amendment landscape was rather barren. Thus it could quite accurately be said, as Allen does, that while the Court had come to appreciate that not all forms of speech were entitled to precisely the same kind and degree of first amendment protection, there had not yet developed a full understanding that not every form of search or of seizure should be subject to precisely the same kind and degree of fourth amendment limitation. Rather, the Court's decisions for the most part treated the fourth amendment "as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a 'search' or 'seizure' within the ambit of the amendment is to impose those restrictions upon it."⁶⁴

Moreover, at the time of Allen's 1950 assessment, the Court's efforts to erect at least some guideposts on the fourth amendment terrain had not been especially successful. Consider what the Court had said over a span of thirty-five years concerning the permissible scope of search incident to arrest: Dictum first approved search of the "person,"⁶⁵ then for what might be "found upon his person or in his control,"⁶⁶ and then more broadly of the person and "the place where the arrest is made."⁶⁷ This was followed by a holding allowing search of "all parts of the premises" where an arrest for contemporaneous criminal conduct was made,⁶⁸ which was succeeded in turn by the seeming

63. Allen, *supra* note 10, at 4-5 (footnotes omitted) (emphasis in original).

64. Amsterdam, *supra* note 33, at 388 (footnote omitted).

65. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

66. *Carroll v. United States*, 267 U.S. 132, 158 (1925).

67. *Agnello v. United States*, 269 U.S. 20, 30 (1925).

68. *Marron v. United States*, 275 U.S. 192, 199 (1927).

discordancies that a search incident to arrest was impermissible when of the office where the arrest occurred,⁶⁹ permissible when of a four-room apartment in which the arrest was made,⁷⁰ impermissible when of a farm building in which the arrest happened,⁷¹ and permissible when of an office in which the arrest was accomplished.⁷² Little wonder that Justice Frankfurter was moved to aphorize, upon taking note of this remarkable bit of nonsequaciousness, that "the course of true law pertaining to searches and seizures . . . has not . . . run smooth."⁷³

In the succeeding thirty-five years or so the Court has added one more case to that series,⁷⁴ still another shift⁷⁵ which, however, seems to "have legs" in the show-biz sense.⁷⁶ During this same span the Court has handed down a profusion of cases which, collectively, have substantially accomplished a "factualization" of the fourth amendment. This more recent fourth amendment jurisprudence has not always "run smooth" either, though it is fair to say that in this modern era the Court's search and seizure decisions have been marked by a greater degree of consistency than is reflected in the above summary. These cases, or at least some of them, are not without their analytical and practical difficulties (about which more in a moment), but viewed in their totality they reflect a most desirable trend: the ongoing development and elaboration of two most important fourth amendment principles, namely (1) that not every search and not every seizure must be grounded in the traditional quantum of evidence suggested by the amendment's "probable cause" requirement, and (2) that not every search and not every seizure is "unreasonable" (in the sense in which that word is used in the amendment) merely because the warrant process was not utilized.

III. LESSER GROUNDS FOR SEARCHES AND SEIZURES

In recent years, the Supreme Court has on several occasions recognized that the police are entitled to conduct certain types of searches

69. *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

70. *Harris v. United States*, 331 U.S. 145 (1947).

71. *Trupiano v. United States*, 334 U.S. 699 (1948).

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

73. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

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

75. The Court in *Chimel* held the warrantless search of the arrest premises may not "go beyond the area from which the person arrested might obtain weapons or evidentiary items." 395 U.S. at 766.

76. Though *Chimel* might appear to be in at least some jeopardy as a consequence of the Court's adoption of a broader rule as to search of *vehicles* incident to arrest in *New York v. Belton*, 453 U.S. 454 (1981), *Belton* purports to be grounded in considerations unique to vehicles.

and seizures, though they are admittedly actions subject to the restraints of the fourth amendment,⁷⁷ upon a less demanding factual basis than had often been required theretofore. Though it is not at all uncommon for these situations to be characterized as searches and seizures conducted without probable cause,⁷⁸ it is much more precise to say that they are searches and seizures permitted on something less than the traditional quantum of probable cause.⁷⁹ These searches and seizures may be usefully further classified by placing them into three categories, the first two of which have a common antecedent.

Category (1) involves those searches and seizures allowed upon the basis of what is most commonly referred to as "reasonable suspicion" — a case-by-case ascertainment of some likelihood that the seizure or search will be fruitful, which, however, as a matter of probabilities need not rise to the level of traditional probable cause. Category (2) involves those searches and seizures which are permitted without any case-by-case suspicion at all, provided they are carried out pursuant to some established routine and in that sense are neither accusatory nor arbitrary in nature. Both categories are grounded in the Supreme Court's so-called "balancing test," and thus together raise difficult issues about just how and in what circumstances such balancing is to be conducted.

Category (3), on the other hand, has to do with certain searches and seizures which are permitted simply because of their nexus to other lawful fourth amendment activity. Most commonly found in this category are instances in which a search is allowed merely because it is contemporaneous with, or at least in some sense "incident to," the making of a seizure. Sometimes, however, it is a seizure that is permitted because of its adjunction to a coincident search. But all of the cases in this category are grounded in a common assumption: that this added authority must be "piggy-backed" in this way onto the power to make the underlying seizure or search because a more metic-

77. Another important part of the "factualization" process not discussed in this Article has to do with when the police conduct falls outside the fourth amendment and thus is subject to no constitutional restraints whatsoever. *See, e.g., INS v. Delgado*, 466 U.S. 210 (1984) ("factory surveys" in effort to find illegal aliens at their workplaces not a search or seizure); *United States v. Knotts*, 460 U.S. 276 (1983) (insertion of "beeper" in container before its sale and later use of same to follow car no search or seizure). It is this aspect of the Court's "factualization" process which perhaps has been least satisfactory. Many of the activities deemed outside the fourth amendment entirely, such as those involved in the two cases just cited, would better be viewed as inside the amendment but subject to lesser limitations, as with the activities discussed herein.

78. *See, e.g., Michigan v. Summers*, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting) (asserting there are "two types of seizures that need not be based on probable cause").

79. This circumvents the complaint made by Justice Douglas in *Terry v. Ohio*, 392 U.S. 1, 36 (1968) (dissenting opinion), that the majority had permitted the police on their own to do what a magistrate could not permit via warrant, as a warrant requires probable cause.

ulous definition of the "incident to" authority would unduly complicate an already complex situation. The cases in this third category, then, all involve the bedeviling question of when resort to "bright lines" is appropriate in defining police authority.

A. Reasonable Suspicion

1. Brief Seizure of Persons

Back in the "monolith" days of the fourth amendment, the lawfulness of a street encounter between an officer and a suspect was usually determined by the rather mechanical process of ascertaining whether an "arrest" had occurred.⁸⁰ But any seizure was treated as ipso facto and, to be sure, ipso jure an "arrest,"⁸¹ which resulted in a most unhealthy situation. Necessary police power to investigate suspicious circumstances was consequently unavailable, except as it was conferred by either of two less than desirable means: manipulation of the substantive criminal law to overcome this procedural difficulty;⁸² or watering-down of the grounds needed to make any arrest. It is thus fair to say that in its "factualization" of the fourth amendment, the Supreme Court's most profound contribution was its seminal decision of *Terry v. Ohio*.⁸³

As is now generally known, the Court in *Terry* utilized its balancing test, defined the year before in *Camara v. Municipal Court*⁸⁴ in terms of "balancing the need to search against the invasion which the search entails," by applying it now to the common police practice of detaining suspicious persons briefly on the street for purposes of investigation. The thrust of *Terry* and its progeny may be expressed in these terms: The requirement of probable cause is a compromise for accommodating the opposing interests of the public in crime prevention and detection, and of individuals in privacy and security.⁸⁵ The same compromise is not called for in all situations, and thus this balancing process should take account of precisely what lies in the bal-

80. *E.g.*, *People v. Esposito*, 118 Misc. 867, 194 N.Y.S. 326 (N.Y. Sp. Sess. 1922).

81. *E.g.*, *United States v. Mitchell*, 179 F. Supp. 636 (D.D.C. 1957) (holding the suspect had been arrested when taken by an officer to a nearby call box); *United States v. Scott*, 149 F. Supp. 837, 840 (D.D.C. 1959) (holding that the suspect had been arrested when taken from the street to his nearby apartment, as "the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued even for a short period of time") (quoting *Long v. Ansell*, 69 F.2d 386, 389 (D.C. Cir. 1934)).

82. See LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEXAS L. REV. 434, 451 & n.77 (1967).

83. 392 U.S. 1 (1968).

84. 387 U.S. 523, 537 (1967).

85. See *Brinegar v. United States*, 338 U.S. 160 (1949).

ance in a given case. Because one variable is the degree of imposition on the individual, it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious. Thus, it may be concluded that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion than the latter. This means that a *Terry* stop, as the Court none too helpfully put it in that case, is proper "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot."⁸⁶ As the Court later elaborated in *United States v. Cortez*,⁸⁷ though no "self-defining" verbal formula exists, the essence of the standard is that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."

If there are to be two tiers⁸⁸ of probable cause, a higher level for a full-fledged arrest and a lower one for a *Terry* stop, then quite obviously it is essential to the effective and fair functioning of this scheme that there exist a rational means for distinguishing between these two varieties of fourth amendment activity. *Terry* set the tone for developments along this line by making it clear that the matter was not to be decided merely on the basis of the labels chosen by the police or by the state; as one commentator put it, the Court in *Terry* "dissipated the notion that the search and seizure provisions of the fourth amendment are subject to verbal manipulation."⁸⁹ If it walks like a duck, quacks like a duck, and flies like a duck, then it must be a duck! The Court said as much in *Dunaway v. New York*,⁹⁰ where the defendant confessed after being picked up and brought to the station for a brief period of questioning. Though he had not been told that he was under arrest and had not been booked, the Court wisely rejected the state's claim that only the lesser quantum of evidence for a *Terry* stop was needed. The Court reasoned that "the detention of petitioner was in

86. 392 U.S. at 30.

87. 449 U.S. 411, 417-18 (1981).

88. Without necessarily suggesting that the balancing which permits something less than the traditional quantum of probable cause will inevitably require exactly the same amount of evidence, the Court has declined to adopt more than two verbal standards, reasoning that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985).

89. Remarks of Justice Walter V. Schaefer at Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," Ann Arbor, Michigan, July 19, 1968.

90. 442 U.S. 200 (1979).

important respects indistinguishable from a traditional arrest," as he "was not questioned briefly where he was found" but instead was "transported to a police station" and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody."⁹¹ Just as wisely, the Supreme Court has quite correctly concluded that it is appearances rather than intentions which should govern on this issue, so that a brief seizure may pass muster as a *Terry* stop even when the officer viewed the event as the initial stage of a full-fledged arrest.⁹²

This is not to suggest that placing a particular set of facts within the proper compartment of the now-dimerous "seizure" category is always easy. Consider *Florida v. Royer*,⁹³ where a suspected drug courier was lawfully questioned in an airport concourse and then required to accompany the police about forty feet to a small police office, where he consented to a search of his suitcases after they were obtained from the airline and brought to the room. Although the total lapsed time was fifteen minutes, the four-Justice plurality concluded that the consent was the fruit of an illegal arrest. Some of the plurality's language suggests these Justices viewed the situation as equivalent to a taking to a police station à la *Dunaway*, for it was stressed that Royer was held in "a police interrogation room." But they placed greater emphasis upon the asserted requirements that a *Terry* stop "last no longer than is necessary to effectuate the purpose of the stop" and that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."⁹⁴ These requirements were not met here, the plurality reasoned, as "the primary interest of the officers was . . . in the contents of his luggage,"⁹⁵ and thus they could have more expeditiously sought consent on the spot or could have used a narcotics detection dog, available at the airport, to check out the suitcase.⁹⁶ This "least intrusive means" inquiry has a great potential for mischief, especially if a court goes about it in the fashion of the *Royer* plurality. The plurality appears to have assumed that use of a detection dog is inevitably "more expeditious," though in fact such dogs are not always readily

91. 442 U.S. at 212.

92. *United States v. Hensley*, 469 U.S. 221 (1985).

93. 460 U.S. 491 (1983).

94. 460 U.S. at 500.

95. 460 U.S. at 505.

96. Brennan, J., concurring, while unwilling to concede that use of trained narcotics dogs would be less intrusive, expressed a view which — if anything — was even more demanding: "[A] lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop." 460 U.S. at 511 n.*.

available (as the Court learned later that Term⁹⁷). Similarly, the *Royer* plurality also implied that seeking consent is not expeditious. In fact, however, a consent might be very promptly obtained or, if not or if there is not time for a search before the suspect's flight departs, he might be allowed to go his way and the investigation continued at his destination (again, as the Court learned later that Term⁹⁸). Fortunately, the Supreme Court has more recently cautioned against "unrealistic second-guessing," and has declared that the "question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it."⁹⁹

2. *Brief Seizure of Effects*

Certainly the lesser-intrusion-ergo-lesser-suspicion concept of *Terry* has application in some other settings as well. Thus, for example, the Court in *United States v. Place*¹⁰⁰ properly applied the *Terry* balancing of interests approach in concluding that the luggage possessed by reasonably suspected drug couriers at airports could be seized and detained while further investigation (typically, exposure of the suitcases to a drug-detection dog) was conducted. *Place* illustrates the care with which the *Terry* balancing process must be undertaken. The Court most wisely cautioned that "in the case of detention of luggage within the traveler's immediate possession,¹⁰¹ the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary," in that "such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return."¹⁰² For this reason, the Court concluded in *Place*, "the limitations applicable to investigative detentions of the person" also apply here.¹⁰³ In other words, the container may be detained without full probable cause only as long as could the sus-

97. In *United States v. Place*, 462 U.S. 696 (1983), the suspect's luggage was held for 90 minutes so that it could be taken from LaGuardia Airport to Kennedy Airport where such a dog was available.

98. In *Place*, the suspect promptly consented to a search of his bags in Miami, but he was allowed to depart instead because his flight was about to leave; the investigation was continued in New York City. 462 U.S. at 698-99.

99. *United States v. Sharpe*, 470 U.S. 675, 687 (1985).

100. 462 U.S. 696 (1983).

101. As compared to a situation like that in *United States v. Van Leeuwen*, 397 U.S. 249 (1970), upholding a longer detention of a mailed package because the invasion did not intrude upon either a privacy interest in the contents of the packages or a possessory interest in the package.

102. 462 U.S. at 708.

103. 462 U.S. at 709.

pect from whose possession it was taken, so that the suspect at his option may also remain at the place of the seizure for that length of time and then reclaim the container, unless in the interim the suspicion has blossomed into probable cause.

3. *Limits of the Category*

Just how far the *Terry* balancing approach should be pushed so as to permit certain seizures or searches on reasonable suspicion rather than full probable cause is unclear, though it would seem that in *New Jersey v. T.L.O.*¹⁰⁴ the Court reached — if it did not surpass — the limit. *T.L.O.* holds that "the Fourth Amendment applies to searches conducted by school authorities,"¹⁰⁵ but that such warrantless searches are permissible if the search of the student was justified at its inception (*i.e.*, by "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school") and reasonable in scope (*i.e.*, by measures "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction").¹⁰⁶ But the Court's reasoning leaves much to be desired.

For one thing, the Court justified its departure from usual fourth amendment standards by noting that "drug use and violent crime in the schools have become major social problems,"¹⁰⁷ but yet promulgated a search standard (as Justice Stevens bemoaned) that makes "a search for curlers and sunglasses in order to enforce the school dress code . . . just as important as a search for evidence of heroin addiction and violent gang activity."¹⁰⁸ For another, the *T.L.O.* majority simply assumed that the "school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search,"¹⁰⁹ an assumption not justified by the facts of *T.L.O.* itself (or, indeed, the reported school search cases generally¹¹⁰), where the available evidence sufficed to meet the traditional probable cause test. Finally, the majority's balancing analysis is largely silent on the degree-of-intrusion point, understandably prompting the dissenters to say of the case, which involved a vice principal's search into a female student's purse,

104. 469 U.S. 325 (1985).

105. 469 U.S. at 337.

106. 469 U.S. at 342.

107. 469 U.S. at 339.

108. 469 U.S. at 377 (Stevens, J., dissenting).

109. 469 U.S. at 340.

110. See 4 W. LAFAVE, *supra* note 42, at § 10.11(b).

that it cannot be squared with the principle "that probable cause is a prerequisite for a full-scale search."¹¹¹

B. *Standardized Procedures*

1. *Inspection of Premises*

The seminal standardized-procedures case is *Camara v. Municipal Court*,¹¹² where the Court ruled that a search warrant was required for nonconsensual health and safety inspections of residential premises, but then held that such a warrant could issue despite the absence of any facts tending to show that code violations existed in the premises to be inspected. Specifically, the Court decided

that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multifamily apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.¹¹³

In the companion case of *See v. City of Seattle*,¹¹⁴ the same result was reached as to commercial premises.

The result reached in *Camara*, arrived at by "balancing the need to search against the invasion which the search entails,"¹¹⁵ is sound. The case thus stands as another very important contribution to the "factualization" of the fourth amendment. However, the Court's discussion of the "persuasive factors" in the balance leaves something to be desired, and reflects just how easy it would be for courts to run amuck with this balancing test and, in the process, to balance the fourth amendment away entirely. Consider, for example, the statement in *Camara* that "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results."¹¹⁶ It is difficult to accept this asserted need for "universal compliance" with housing code standards as a justification for a diluted probable cause test; one might just as cogently argue that there is a need for universal compliance with the criminal law and that the public interest demands that all dangerous offenders be convicted and punished. As four of the

111. 469 U.S. at 358 (Brennan, J., dissenting).

112. 387 U.S. 523 (1967).

113. 387 U.S. at 538.

114. 387 U.S. 541 (1967).

115. *Camara*, 387 U.S. at 537.

116. 387 U.S. at 537.

Camara majority had noted on an earlier occasion: "Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements."¹¹⁷ A more fruitful line of analysis, therefore, would focus instead upon the *Camara* Court's asserted need for "acceptable results." Criminal law enforcement typically is directed toward aggressive conduct, most often occurring in public places, which usually leaves a trail of discernible facts. As a consequence, the traditional probable cause test has not proved to be a bar to an acceptable level of criminal law enforcement, as the instances are rare in which the preparation, commission, and all evidence of an offense are confined to the offender's private premises. By comparison, most housing code violations occur within private premises, cannot be detected from outside, and are not brought to the attention of the authorities by complaint. It is these facts which support the Court's expression of doubt "that any other canvassing technique would achieve acceptable results."

Another *Camara* factor is that "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime" and consequently "involve a relatively limited invasion of the urban citizen's privacy."¹¹⁸ Though this might be read to mean that a lesser quantum of evidence will suffice when the object of the search is not criminal prosecution, such an interpretation would be unfortunate and erroneous. As four members of the *Camara* majority put it in an earlier case, an individual's interest in privacy "would not appear to fluctuate with the 'intent' of the invading officers."¹¹⁹ Thus a more appropriate interpretation of this *Camara* factor is that a lesser quantum of evidence suffices for these inspections because the search involved is less of an intrusion on personal privacy and dignity than that which generally occurs in the course of criminal investigation. This is a real and meaningful distinction. Code inspections (in contrast to the typical search for evidence of crime) are completed quickly, involve no rummaging through the private papers and effects of the householder, and do not result in a seizure. Also, while a police search for evidence brings with it "damage to reputation resulting from an overt manifestation of official suspicion of crime,"¹²⁰ a routine inspection that is

117. *Frank v. Maryland*, 359 U.S. 360, 382 (1959) (Douglas, J., dissenting, joined by Warren, C.J., and Black and Brennan, JJ.).

118. *Camara*, 387 U.S. at 537.

119. *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting, joined by Warren, C.J., and Black and Douglas, JJ.).

120. Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 701 (1961).

part of a periodic or area inspection plan does not single out any one person as the object of official suspicion.

The third "persuasive factor" stated in *Camara*, that code inspection "programs have a long history of judicial and public acceptance,"¹²¹ is vulnerable from the point of view of both accuracy and cogency. As for longstanding judicial acceptance, the fact of the matter is that before *Camara* the few cases reaching the appellate courts focused almost exclusively on the warrant-no warrant issue. As for the longstanding public acceptance, it is more accurately described (as it was on an earlier occasion by four members of the *Camara* majority) as a "history of acquiescence."¹²² In any event, a similar or even greater showing of judicial and public acceptance did not deter the Court in *Camara* from finding warrantless search procedures constitutionally deficient. (Just as vulnerable is the assumption that if a business is "pervasively regulated" it may for that reason be inspected without traditional probable cause. As Justice Rehnquist has noted, the Court would inexorably invalidate an inspection scheme to check premises for drug activity, "despite the fact that Congress has a strong interest in regulating and preventing drug-related crime and has in fact pervasively regulated such crime for a longer period of time than it has regulated mining."¹²³)

2. Operation of Checkpoints

A standardized-procedures rationale has the most going for it when, by virtue of those procedures, the resulting lesser intrusion (be it seizure or search) (i) is not perceived by the individual affected or by others as accusatory in nature, and (ii) is not open to the possibility that it was either a consequence of arbitrary selection or the manifestation of some ulterior motive. This is why what might be characterized as the "all who pass here" variety of standardized procedures constitutes the epitome of this genre of fourth amendment activity. Illustrative is the operation of a highway checkpoint at which all vehicles are stopped for brief questioning of the occupants about their possible illegal alienage, upheld in *United States v. Martinez-Fuerte*,¹²⁴ and the stopping of all traffic at a roadblock for the purpose of checking driver's licenses and vehicle registration, approvingly viewed in *Delaware v. Prouse*.¹²⁵ On the basis of *Martinez-Fuerte* and *Prouse*, lower

121. 387 U.S. at 537.

122. *Frank v. Maryland*, 359 U.S. 360, 384 n.2 (1959) (Douglas, J., dissenting).

123. *Donovan v. Dewey*, 452 U.S. 594, 608 (1981) (concurring opinion).

124. 428 U.S. 543 (1976).

125. 440 U.S. 648, 663 (1979) (dictum).

courts have not surprisingly upheld such other checkpoint procedures as the airport hijacker detection system,¹²⁶ roadblocks to detect drunk drivers,¹²⁷ and the screening of persons entering public buildings where security is a legitimate concern.¹²⁸

3. *Limits of the Category*

Quite clearly, as is apparent from Justice Rehnquist's observation quoted above, this standardized-procedures approach cannot be extended to all forms of investigative activity so as, in effect, to subvert totally the fourth amendment's probable cause requirement. But the Court's process of "factualization" has not identified as yet the boundaries of the *Camara* principle, and suggestions are to be found that it might sometimes be applied in more traditional law enforcement contexts. In *Brown v. Texas*,¹²⁹ holding the random and groundless stopping of a person on the street for questioning unconstitutional, the Court asserted that for such activity to pass constitutional muster there must be either reasonable suspicion or "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."¹³⁰ Just how seriously this language should be taken is unclear; *Martinez-Fuerte* and *Prouse* are cited in support, but in those cases (as with *Camara* itself) the Court was dealing with some special and unique governmental and public interests which could not be adequately served if even a case-by-case reasonable suspicion standard were required. It is thus to be doubted that neutral "plans" dealing generally with certain constant law enforcement concerns, such as drug trafficking, will emerge and be found sufficient under the *Camara* principle. More likely, as some lower court cases illustrate,¹³¹ is that a stopping without individualized suspicion but pursuant to a plan will be upheld if the plan addresses a somewhat "special" problem existing at a certain time and place.

C. *Nexus to Other Lawful Fourth Amendment Activity*

1. *On "Bright Lines"*

This third category of seizures and searches without traditional probable cause is of the "piggy-back" variety; that is, the search or the

126. *E.g.*, *People v. Hyde*, 12 Cal. 3d 158, 524 P.2d 830, 115 Cal. Rptr. 358 (1974).

127. *E.g.*, *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983).

128. *E.g.*, *Commonwealth v. Harris*, 383 Mass. 655, 421 N.E.2d 447 (1981).

129. 443 U.S. 47 (1979).

130. 443 U.S. at 51.

131. *E.g.*, *People v. Meitz*, 95 Ill. App. 3d 1033, 420 N.E.2d 1119 (1981); *see also* *United States v. Palmer*, 603 F.2d 1286 (8th Cir. 1979).

seizure is deemed permissible, even absent any probable cause showing *as to it*, because it accompanied some other lawful seizure or search. The so-called "search incident to arrest" is the prime example. The recognition of this "piggy-back" authority has commonly been justified on the ground that a more particularized statement of authority to make an incidental search or seizure would of necessity be so complicated and ambiguous as to be beyond the comprehension of the police. This third category, then, raises the profoundly important question of whether this "process of 'factualization'" that Allen talks about should always entail a very particularized and thorough evaluation of the unique facts of the individual case, or whether on the other hand it is sometimes appropriate to set out the rules for police conduct in terms of general categories — that is, by employing "bright lines."

There are some settings in which it is quite apparent that having the constitutional limits on police authority set out by bright lines is meritorious. The Supreme Court has often spoken favorably of its *Miranda* doctrine as "a bright-line rule,"¹³² which it most certainly is and which unquestionably is one of its greatest virtues. The police know exactly what is expected of them. But when the Court-declared bright line is not stated in terms of an obligation on the police to do something to protect a person's rights, as is the case in *Miranda*, but rather in terms of authority in the police to take some affirmative action beneficial to them in a general category of cases (e.g., that the person of an arrestee may *always* be searched incident to arrest), then the wisdom of the bright line is less apparent. One view, as I have elsewhere expressed it, is that

if our aim, as stated in the fourth amendment, is to ensure that "the people" are "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," then it may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication. And thus, as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former. As someone once put it, an ounce of application is worth a ton of abstraction.¹³³

But this is hardly a universally acclaimed proposition. Professor Alschuler, for one,¹³⁴ has responded to the above with this: "Not only

132. E.g., *Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (1985).

133. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 321 (1982).

134. Some members of the Supreme Court have also expressed concerns, such as that "ini-

do categorical fourth amendment rules often lead to substantial injustice; in addition, their artificiality commonly makes them difficult, not easy, to apply."¹³⁵ I shall not renew that debate here; suffice it to note that I still believe (to put the proposition in Justice White's words) that "[b]right-line rules are indeed useful and sometimes necessary," but that "the Court should move with some care" in creating them.¹³⁶

Doubtless one's affinity for a particular bright line depends to some extent on whose ox is being gored. Thus Justice Rehnquist, author of the seminal bright-line decision in *United States v. Robinson*,¹³⁷ was nonetheless moved to declare via dissent in another case "that probably any search for 'bright lines' short of overruling *Mapp v. Ohio* is apt to be illusory. Our entire profession is trained to attack 'bright lines' the way hounds attack foxes."¹³⁸ But even apart from where one's predilections or prejudices lie, certainly some bright-line rules have more going for them than others. The point may be illustrated by comparing *Robinson* with *New York v. Belton*.¹³⁹

2. *How Bright and How Right?*

In *Robinson*, the Court held that the "general authority" to search a person incident to arrest is "unqualified." In other words, incident to a custodial arrest the police may make a full contemporaneous search of the person of the arrestee, without regard to the likelihood in the individual case that the search was necessary (*i.e.*, to find and secure evidence, to seize weapons and thus prevent escape). This result is sound, for such a bright-line rule is to be preferred over a case-by-case-determination approach when the police activity at issue involves relatively minor intrusions into privacy, occurs with great frequency, and virtually defies on-the-spot rationalization on the basis of the facts of the individual case. Search of an arrested person is precisely that kind of police activity: (a) it is the most common variety of police search practice and occurs under an infinite variety of circumstances; (b) despite probable cause to arrest, it does not necessarily follow that

tially bright-line rules" ultimately disappear "in a sea of ever-finer distinctions," *Illinois v. Gates*, 462 U.S. 213, 265 (1983) (White, J., concurring), which themselves may be unsound because the bright line, by its nature detached from principle, fails "to guide the police and the courts in their application of the new rule to nonroutine situations." *New York v. Belton*, 453 U.S. 454, 471 (1981) (Brennan, J., dissenting).

135. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 231 (1984).

136. *Washington v. Chrisman*, 455 U.S. 1, 15 (1982) (White, J., dissenting).

137. 414 U.S. 218 (1973).

138. *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting).

139. 453 U.S. 454 (1981).

there is also probable cause the arrestee *presently* has evidence of that crime with him or *presently* is armed, which are much more complex and difficult determinations; (c) the decision to search an arrestee's person cannot be made with the degree of forethought and reflection possible for most other search decisions, as the circumstances arise from the arrest itself, which is often unanticipated, and the fact of arrest produces an immediate need to search if the self-protective and evidence-saving functions are to be realized; and (d) search of the person is a relatively minor intrusion upon a person who, by hypothesis, has already been subjected to the more serious step of arrest. Moreover, the frisk alternative put forward by the court of appeals would not suffice to accomplish the self-protection objective during the arrestee's subsequent transportation to the station.

Before any supposed bright-line rule is adopted by the Court, it would be well to test the proposed rule by asking these questions: (1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forgo case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse? The supposed "workable rule" of *Belton*, namely, "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," including "the contents of any containers found within the passenger compartment,"¹⁴⁰ flunks on all counts.

On the first point, the *Belton* line is none too bright, for it leaves unresolved such questions as how close to the time of arrest such a search may be made and whether "interior" includes such places as a locked glove compartment or the interior of door panels. As for the second point, *Belton* accepts "the generalization that articles 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 ite[m],' "¹⁴¹ while the truth of the matter is that any number of commonplace events¹⁴² can put the passenger compartment beyond the arrestee's control. And with respect to the third point, the fact of

140. 453 U.S. at 460 (footnotes omitted).

141. 453 U.S. at 460 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

142. Including immediate removal of the arrestee to a patrol car or some other place away

the matter is that applying the *Chimel* test¹⁴³ is actually *easier* in automobile cases than in others, as the police typically can and do remove the arrestee from the vehicle and thereby ensure that he has no further control over the passenger compartment. That is, the "difficulty" and "disarray" alluded to by the *Belton* majority has been more a product of the police seeing how much they could get away with than of their being confronted with inherently ambiguous situations. Finally, and concerning point four, the new rule is open to manipulation and abuse; as Justice Stevens correctly noted, now an officer may opt to make a custodial arrest "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation," as he thereby gains "the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant."¹⁴⁴ *Belton*, then, is the consummate example of the "piggy-back" bright-line approach gone awry, and proof positive of the adage that "the chief cause of problems is solutions."¹⁴⁵

It is worth noting at this point that there are some search and seizure rules which can be said to involve a combination of this "piggy-back" category and the previously discussed standardized-procedures category. Illustrative is the holding in *South Dakota v. Opperman*¹⁴⁶ that a vehicle may be inventoried incident to its lawful seizure, but only "in accordance with *standard procedures* in the local police department"; and the ruling in *Illinois v. Lafayette*¹⁴⁷ that an arrestee's effects may be inventoried at the station, but only pursuant to "standardized inventory procedures." Though even as so limited the *Opperman* and *Lafayette* holdings are not beyond question, there is no denying the fact that the mandating of standardized procedures in addition to the "piggy-back" relationship marks a significant limitation upon the power the police might otherwise exercise. Indeed, it is fair to say that were the Court in other circumstances to combine the "piggy-back" and standardized-procedures requirements in other ways, the results would again be a more meaningful accommodation of law enforcement and privacy interests. For example, in *Robinson*

from his own vehicle, handcuffing the arrestee, closure of the vehicle, and restraint of the arrestee by several officers.

143. In *Chimel v. California*, 395 U.S. 752, 763 (1969), the Court upheld "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."

144. *Robbins v. California*, 453 U.S. 420, 452 (1981) (Stevens, J., dissenting).

145. I owe this observation to Eric Severeid.

146. 428 U.S. 364, 375 (1976) (emphasis in original).

147. 462 U.S. 640, 647 (1983).

— or, more precisely in its companion case of *Gustafson v. Florida*,¹⁴⁸ where the issue was more directly presented — the Court might well have required that the arrest itself, albeit on probable cause, be in accordance with standardized procedures. That is, the Court might have required that this “custodial arrest,” to which it was attaching an automatic right to search the person, have been made pursuant to either legislation or police department regulations which established some rational scheme for determining when a noncustodial alternative (*i.e.*, a citation) should and should not be utilized as the means for invoking the criminal process.¹⁴⁹

The Court’s failure to do so — the failure to perceive the difference between *Robinson*, where the officer was acting pursuant to detailed police regulations,¹⁵⁰ and *Gustafson*, where the officer was free to arrest or ticket as he saw fit — meant that it missed the chance to make “the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761.”¹⁵¹ This is because absent such a limitation there exists the significant risk that police will arrest for minor offenses merely to avail themselves of the opportunity to make a valid search despite their lack of either a warrant or probable cause. Experience has shown that such pretexts are difficult to uncover,¹⁵² and in any event — as the Supreme Court now views matters — the unlikely establishment of an illegitimate police motivation would not itself invalidate the incidental search.¹⁵³ That being the case, if the Court *had* imposed a standardized-procedure requirement onto the custodial arrest itself, the “piggy-back” rule of the *Robinson* case would have been much more palatable, and that of the *Belton* case would have been at least less objectionable.

3. *Limits of the Category*

As with the first two categories of seizures and searches without probable cause, it may appropriately be asked of this “piggy-back” category how far the concept may legitimately be pushed without seri-

148. 414 U.S. 260 (1973).

149. See Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321 (1979).

150. The regulations are set out in *United States v. Robinson*, 471 F.2d 1082, 1097 n.23 (D.C. Cir. 1972).

151. Amsterdam, *supra* note 33, at 416.

152. The pretext is not likely to be acknowledged by the police, and the circumstantial evidence (*e.g.*, in *Robinson* that the officer apparently knew of the defendant’s prior narcotics convictions) is typically inconclusive.

153. See *Scott v. United States*, 436 U.S. 128 (1978).

ously undercutting the fourth amendment's usual probable cause requirement. Worth noting on this point is *Michigan v. Summers*,¹⁵⁴ where, in contradistinction to such cases as *Robinson* and *Belton*, it was a seizure that was "piggy-backed" onto a search. The police in that case stopped defendant as he was about to leave premises at which they had just arrived to execute a narcotics search warrant, detained him within while the warrant was executed, arrested him when narcotics were found on the premises, and then found heroin in his pocket. In holding the heroin admissible, the *Summers* majority ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."¹⁵⁵

Although the Court in *Summers* relied on *Terry* (rather than *Robinson* and *Belton*) in support of that holding, it is important to note at the outset that the Court did not merely extend the *Terry* reasonable suspicion rule to the search warrant context. That is, *Summers* is truly a category (3) case, not a category (1) case, for what the Court's holding does is to "piggy-back" the occupant's detention onto the search warrant execution, rather than to justify it by the level of suspicion in the particular case. As the *Summers* majority emphasized, the rule there promulgated "does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."¹⁵⁶ To state the proposition another way, while the Court explains its rule in terms of three significant government interests ("the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm to the officers," and "the orderly completion of the search, [which] may be facilitated if the occupants of the premises are present"),¹⁵⁷ the police need not assess whether detention is necessary to serve those interests in the particular case. This is because, once again, by the "piggy-back" approach the Court has ruled that the police may *always* detain persons found at the premises named in a search warrant, provided only that (i) the warrant authorizes a "search for contraband," and (ii) the persons detained are "occupants" (elsewhere referred to by the Court as "residents," and thus

154. 452 U.S. 692 (1981).

155. 452 U.S. at 705 (footnote omitted).

156. 452 U.S. at 705 n.19.

157. 452 U.S. at 702-03.

apparently meaning not anyone present¹⁵⁸ but rather occupants in the literal sense¹⁵⁹).

If *Summers* is assayed in the fashion I have previously examined *Robinson* and *Belton*, it comes off rather well. The "piggy-backed" authority in those cases was a full search of the person and of the passenger compartment of a vehicle, respectively, while here it is the temporary detention of a person within his own home. Such a detention, even if longer than that permissible on the street corner under *Terry*, still might be characterized as a relatively minimal intrusion, though it is fair to say that the undefined temporal aspect of the *Summers* rule¹⁶⁰ is its weakest point. That problem aside, the *Summers* rule makes a good deal of sense, for it describes a general category in which the government interests identified by the Court (especially the first and most important of the three) are likely to be served. It is not certain that the contraband named in the warrant will be found, nor is it certain that its discovery and other relevant facts will in every instance add up to probable cause to arrest the then-present occupant.¹⁶¹ But the likelihood of these consequences in all cases falling within the general rule of *Summers* is sufficiently strong to permit the detention for some period of time in the interest of "preventing flight in the event that incriminating evidence is found."¹⁶²

Yet the three dissenters¹⁶³ in *Summers* challenge the majority's analysis every step of the way. In response to the majority's assertion that *Terry* and subsequent stop-and-frisk cases establish that "some seizures" which constitute "limited intrusions" may "be made on less than probable cause,"¹⁶⁴ the *Summers* dissenters argue that such a departure from the probable cause standard is permissible only in special circumstances, namely, when there is present "some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects, an interest important enough to overcome the presumptive constitutional restraints on police conduct."¹⁶⁵ They

158. The Court referred to the category as "residents" who ordinarily would in any event "remain in order to observe the search of their possessions." 452 U.S. at 701.

159. The dictionary definition is one "who occupies," that is, resides as an owner or tenant at a "particular place or premises." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1560 (1971).

160. As the dissenters pointed out, execution of a warrant even in a limited space can take considerable time. *See, e.g., Harris v. United States*, 331 U.S. 145 (1947) (FBI search of one-bedroom apartment for burglary tools and pair of checks consumed five hours).

161. *See* 2 W. LAFAVE, *supra* note 42, at § 3.6(c).

162. *Summers*, 452 U.S. at 702.

163. Stewart, J., joined by Brennan and Marshall, JJ.

164. 452 U.S. at 699.

165. 452 U.S. at 707 (Stewart, J., dissenting).

found only "two isolated exceptions" in the Court's prior decisions: in *Terry*, the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him";¹⁶⁶ and in *United States v. Brignoni-Ponce*,¹⁶⁷ "the unique governmental interest in preventing the illegal entry of aliens."¹⁶⁸

But this simply is not so. *Terry* and its progeny cannot be explained simply as frisk cases; they are stop-and-frisk cases. As Justice Harlan wisely pointed out in his concurring opinion in *Terry*, "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous."¹⁶⁹ Thus, *Terry* cannot be distinguished in terms of the "special" interest in self-protection,¹⁷⁰ for that interest arises only if it is already concluded that there is a basis to seize a suspect without full probable cause in the interest (to use the words of the *Summers* dissent) of "investigating crime and apprehending suspects."¹⁷¹ And it has not been seriously contended that *Terry* stops may be made only when it is suspected that the person being investigated is "armed and dangerous."¹⁷²

Having said all that, however, it may be suggested that the dissenters' objections would have carried somewhat greater force if they had not been misled by the majority into viewing *Summers* as of the *Terry* genre. Once again, it is not; *Terry* permits detention upon reasonable suspicion, while *Summers* permits detention when "piggy-backed" onto execution of a search warrant for contraband. Its consanguinity is thus with *Robinson* and *Belton*, not *Terry*. Had the *Summers* dissenters appreciated that fact, they could have made their argument more convincingly, for the *Robinson* and *Belton* cases *do* rest in large part on the premise that broadly stated search authority is appropriate when the risk of error under a case-by-case-evaluation-of-facts approach is a bullet in the gut and not just the loss of evidence. This suggests that in the Court's future efforts at "factualization" of the

166. 452 U.S. at 707 (Stewart, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968)).

167. 422 U.S. 873 (1975).

168. *Summers*, 452 U.S. at 706 (Stewart, J., dissenting).

169. 392 U.S. at 32.

170. Indeed, the first government interest relied upon in *Terry* was "that of effective crime prevention and detection." 392 U.S. at 22.

171. Any notion that *Terry* is limited to prevention of as yet uncommitted crimes has been rejected by the Court. See *United States v. Hensley*, 469 U.S. 221 (1985).

172. Even possible limitations where the stop is for a past crime, pondered in *Hensley*, do not go this far.

fourth amendment, the issue which ought to be addressed regarding the boundaries of category (3) is whether "piggy-backing" (which, after all, makes unnecessary not only traditional probable cause but also reasonable suspicion) should be permitted *only* to serve the interest of self-protection, or whether other interests may also be taken into account, at least when (as in *Summers*) the police activity onto which the added fourth amendment power is being "piggy-backed" has the prior authorization of a magistrate.

IV. WARRANTLESS SEARCHES AND SEIZURES

The fourth amendment declares a proscription against "unreasonable searches and seizures," and then states that "no Warrants shall issue" except upon a certain showing and with certain specificity. As with constitutional provisions generally, the amendment has "both the virtue of brevity and the vice of ambiguity."¹⁷³ Among these ambiguities is whether seizures and searches are (sometimes) (always) unreasonable because made without a warrant.

Resort to the warrant process can be beneficial to a fair and effective system of criminal justice in a variety of ways. For one thing, it permits the critical probable cause determination to be made in relatively calm circumstances by a judicial officer, a person the Supreme Court has usually perceived as more knowledgeable on these matters than the cop on the beat.¹⁷⁴ The warrant process, the Court instructs, "interposes an orderly procedure"¹⁷⁵ involving "judicial impartiality"¹⁷⁶ whereby a "neutral and detached magistrate"¹⁷⁷ can make "informed and deliberate determinations"¹⁷⁸ on the issue of probable cause. To leave such decisions to the police, says the Court, is to allow "hurried action"¹⁷⁹ by those "engaged in the often competitive enterprise of ferreting out crime."¹⁸⁰

Even assuming that this judicial scrutiny is not all that it is cracked up to be, the process of obtaining a warrant serves an important recording function. By the very fact that the police must commit them-

173. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42 (1966).

174. *But see* Illinois v. Gates, 462 U.S. 213, 235 (1983), asserting that warrants are "issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'"

175. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

176. *Jeffers*, 342 U.S. at 51.

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

178. *Aguilar v. Texas*, 378 U.S. 108, 110 (1964).

179. *Aguilar*, 378 U.S. at 110.

180. *Johnson*, 333 U.S. at 14.

selves in advance to a statement of facts, usually in writing,¹⁸¹ the warrant process serves "to facilitate review of probable cause and avoid justification for a search or an arrest by facts or evidence turned up in the course of their execution."¹⁸² Absent this pre-search or pre-seizure memorialization of the facts being relied upon to justify the fourth amendment activity, there is the risk that the police will engage in post hoc manipulation of the facts in an effort to justify their action. Also, even if the police are paragons of virtue, there is nonetheless a significant chance that the probable cause facts will not be accurately reported if the occasion for communicating them to a judge comes only months later in the context of a suppression hearing.¹⁸³

By virtue of the Supreme Court's recent narrowing of the exclusionary rule in *United States v. Leon*,¹⁸⁴ the warrant process now serves yet another function: that of substantially reducing the chances that evidence acquired by a search or a seizure will later be suppressed. This is because *Leon* holds that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."¹⁸⁵ This good faith exception, provided it is confined to without-warrant cases,¹⁸⁶ would thus seem to "give law enforcement officers some solid encouragement to employ the warrant process for all searches and arrests which are not made on an emergency basis."¹⁸⁷

The Supreme Court has long expressed a strong preference for searches made pursuant to a search warrant.¹⁸⁸ Indeed, the Court asserted on one occasion "that the police must, whenever practicable, obtain advance judicial approval of searches and seizures."¹⁸⁹ But this is far from being an accurate portrayal of current law or practice.¹⁹⁰

181. This is the prevailing practice, though apparently it is not required by the fourth amendment. See *United States v. Goyett*, 699 F.2d 838 (6th Cir. 1983).

182. *Jones v. United States*, 5 Crim. L. Rep. (BNA) 2124, 2126 (D.C. Cir. 1969) (Leventhal, J., dissenting), *revd. on rehearing sub nom. Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970).

183. See, for example, the situation discussed by Ely, J., dissenting in *Boyer v. Arizona*, 455 F.2d 804 (9th Cir. 1972).

184. 468 U.S. 897 (1984).

185. 468 U.S. at 900.

186. Some members of the Court are prepared to go further. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (White, J., dissenting).

187. P. Johnson, *New Approaches to Enforcing the Fourth Amendment* 10 (Working Paper, Sept. 1978).

188. See, e.g., *United States v. Ventresca*, 380 U.S. 102 (1965).

189. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

190. See Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50

Though there exists some degree of confusion as to just when a warrant is required,¹⁹¹ it is fair to say that warrantless searches and seizures are the norm and that resort to the warrant process is the exception.

This branch of the Supreme Court's "factualization" of the fourth amendment conveniently divides into two categories. Category (1) has to do with those instances in which the warrant requirement is impractical, that is, when there exist what the Court likes to call "exigent circumstances." As we examine that category, we shall see that the Court's measurement of the exigencies has not been entirely consistent. Also, we shall see another "bright-lines" problem — now, whether ascertaining when exigent circumstances are present in a certain category of cases is so difficult that the warrant requirement must be forgone entirely as to those cases.

Category (2), on the other hand, has to do with those instances in which the protections of the warrant process are deemed unnecessary. Initially, that might seem to be a contradiction in terms. After all, if the police activity in question *is* encompassed within the fourth amendment's protections, if the warrant process *is* the preferred manner of proceeding, and if by definition the case *is* one in which exigent circumstances are admittedly lacking, then why not require a warrant? The Supreme Court has never answered this question, and perhaps there exists no completely satisfactory answer. It may be, however, that this state of affairs makes some sense in terms of not overloading the warrant process. A greatly expanded warrant system — that is, one which *truly* adhered to the principle that arrest and search warrants are required whenever practicable — might convert that process into somewhat of a mechanical routine, one in which the judiciary would "not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exist grounds for a search."¹⁹² Simply stated, the proposition being suggested here is this: as a practical matter, it may well be that the warrant process can serve

TENN. L. REV. 231 (1983); Bloom, *Warrant Requirement — The Burger Court Approach*, 53 U. COLO. L. REV. 691 (1982).

191. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985), takes note of this confusion and then puts forward as an alternative the following:

[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.

Id. at 1471.

192. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 120 (1967).

as a meaningful device for the protection of fourth amendment rights only if used selectively to prevent those police practices which would be most destructive of fourth amendment values. If there is at least something to that point, then it is useful to examine the Supreme Court's decisions in this category (2) for the purpose of identifying and assessing just what it is that the Court takes into account in prioritizing various fourth amendment interests.

A. *Warrant Requirement Impractical*

Whatever benefits or advantages are thought to inure from resort to the warrant process, quite clearly it makes no sense to require a warrant when the very act of obtaining it would in all likelihood frustrate the purpose of the intended seizure or search. The Supreme Court has thus long recognized that when such "exigent circumstances" are present, the police may forgo a warrant and instead immediately make a warrantless search or seizure. An especially apt illustration of this point is *Schmerber v. California*,¹⁹³ where the Court held that though a search warrant is ordinarily required "where intrusions into the human body are concerned," no warrant was needed to take a blood sample from an apparently intoxicated driver for the simple reason that the percentage of alcohol in the blood would be significantly diminished if testing were delayed until a warrant could be obtained. But not all cases are as easy as *Schmerber*, and as a consequence the Court has sometimes experienced difficulty in gauging the existence or nonexistence of the requisite "exigent circumstances," and on other occasions has rightly or wrongly created a "bright-line" rule to obviate the necessity for police and courts to assay exigencies on a case-by-case basis.

1. *Overstated and Underestimated Exigencies*

That the Supreme Court's exigent circumstances assessments are not all of a kind is perhaps not surprising; indeed, it may well be argued that this is the way it should be, for exigencies cannot be weighed in the abstract but must be considered in the context of the particular fourth amendment interests which would be invaded by the intended arrest or search. One would expect, therefore, as has been the case, that any claimed exigencies would receive the closest scrutiny when the challenged police conduct was entry of private premises. Many years ago the Court acknowledged that a warrantless search of premises might be upheld upon a showing of "exceptional circum-

193. 384 U.S. 757, 770 (1966).

stances,"¹⁹⁴ but no such circumstances were found to exist in that case or in others that soon followed.¹⁹⁵ The issue lay dormant for several years, as in the pre-*Chimel* days the problem was usually overcome by the simple expedient of making an arrest on the premises and then searching the place incident to arrest.

Then came *Vale v. Louisiana*.¹⁹⁶ Police set up a surveillance of a house in which Vale was thought to be residing, because they had two warrants for his arrest issued after his bond had been increased on a pending narcotics charge. When another person drove up to the house and sounded his horn, Vale came out, walked to the car and had a conversation with the driver, looked about cautiously, entered his house, came back out a few minutes later, looked about again, and proceeded to the car. Convinced that they had just witnessed a sale of narcotics, the officers approached. Vale hurried back toward the house while the driver of the car started away. The driver was apprehended, but not before he swallowed some object. Vale was arrested on his front steps, after which the police took him inside and made a cursory inspection of the house to ascertain if anyone else was present. Minutes later, Vale's mother and brother entered the premises, at which point the police searched the house and found a quantity of narcotics in a rear bedroom. The state argued the search was supportable as one made on probable cause and in response to the risk that someone in the premises might dispose of the narcotics before a warrant could be obtained, but the Supreme Court disagreed:

Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises. But entirely apart from that point, our past decisions make clear that only in "a few specifically established and well-delineated" situations, . . . may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation. . . . And the record before us discloses none.

....

The officers were able to procure two warrants for Vale's arrest. They also had information that he was residing at the address where they found him. There is thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well.¹⁹⁷

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

195. *E.g.*, *United States v. Jeffers*, 342 U.S. 48 (1951); *McDonald v. United States*, 335 U.S. 451 (1948).

196. 399 U.S. 30 (1970).

197. 399 U.S. at 34-35.

This is a truly remarkable passage. What is the significance of the fact "that no one else was in the house when they first entered"? If the notion is that the risk of destruction of the evidence by Vale's brother or mother was somehow lessened by the fact the officers beat them into the premises by a few minutes, then it seems totally indefensible. If it means that the police, now having discovered the premises were empty, could have maintained that condition until a warrant was obtained, then surely something more specific about the authority of police to bar persons from their own homes was in order.¹⁹⁸ As for the contention that the police could have obtained "a search warrant as well" when they got the two arrest warrants, the facts support precisely the opposite conclusion. A search warrant for narcotics could not have been obtained on that prior occasion, as the probable cause had just developed minutes before the search. Precisely because the Court plays fast and loose with the facts in this way, *Vale's* contribution to Allen's "process of 'factualization'" is virtually nil. Perhaps the Court believed, as a lower court put it on a later occasion,¹⁹⁹ that the risk of destruction of evidence by a family member should not count as an exigent circumstance because that kind of risk is so prevalent that it would virtually wipe out the warrant requirement for premises searches. But if that is the point of *Vale*, it would have been well for the Court forthrightly to assert it.

As it is, the Court does not clearly state in *Vale* just what it takes to amount to exigent circumstances in this context, though it may be that a limitation was intended to be expressed in the observation that in the instant case the "goods ultimately seized were not in the process of destruction."²⁰⁰ But even this part of *Vale* can hardly be said to be a useful "factualization." Lower courts have found it so unrealistically narrow that they have in the main not accepted it as controlling. Rather, they have stated the exception in broader terms, such as a "great likelihood that the evidence will be destroyed or removed before a warrant can be obtained,"²⁰¹ that the evidence is "threatened with imminent removal or destruction,"²⁰² or that the police "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant."²⁰³

198. Even today clear guidance is lacking. See *Segura v. United States*, 468 U.S. 796 (1984).

199. *United States v. Davis*, 423 F.2d 974 (5th Cir.) cert. denied, 400 U.S. 836 (1970).

200. 399 U.S. at 35.

201. *State v. Patterson*, 192 Neb. 308, 316, 220 N.W.2d 235, 240 (1974).

202. *United States v. Blake*, 484 F.2d 50, 54 (8th Cir. 1973).

203. *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973).

Vale is as sophistic in one direction as *Chambers v. Maroney*²⁰⁴ is in the other. As a prelude to *Chambers*, it should be noted that many years before, in *Carroll v. United States*,²⁰⁵ the Court upheld a warrantless search of a vehicle being driven on the highway and reasonably believed to contain contraband, reasoning that it was "not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."²⁰⁶ That was a fair conclusion on the facts of that case, for the car's travels could not have been interrupted by the expedient of arresting the occupants; the suspected crime was only a misdemeanor, and at that time and place a misdemeanor arrest not directly observed could be made only with a warrant, which the police lacked. But in *Chambers* the Court applied the *Carroll* rule to a situation in which true exigent circumstances were lacking. The occupants of the vehicle had already been arrested and were incarcerated, and the search of the vehicle was undertaken at the station after it was in the custody of the police and not accessible to anyone but the police. That, however, did not deter the Court from this astonishing statement: "The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."²⁰⁷ The failure of *Chambers* to then address the "unless" portion of that sentence left a mile-wide hole in the Court's analysis, just as was true of the omission in *Vale* of any discussion of a police power to impound the premises. Fortunately, as we shall see shortly, the Court ultimately dropped the exigent circumstances pretext in *Chambers*-type cases and now allows warrantless searches of vehicles on another theory.

2. *Impossible or Unnecessary?*

What the very last observation in the preceding paragraph means is that of the divaricate bases for forgoing a warrant, the automobile cases now belong in category (2) rather than category (1). It is well to note, however, that this transfer has not occurred in other circumstances where most likely it should, so that there persist situations in which the Supreme Court claims that exigent circumstances are the reason why warrantless searches are being permitted, when in fact some other consideration would provide a more convincing explana-

204. 399 U.S. 42 (1970).

205. 267 U.S. 132 (1925).

206. 267 U.S. at 153.

207. 399 U.S. at 52.

tion for why a warrant is not necessary. Witness the line of cases having to do with inspection of business premises, where again there has been a tendency to overstate what circumstances are in fact "exigent." *Donovan v. Dewey*,²⁰⁸ upholding a warrantless inspection scheme for mines, is illustrative. Starting with the congressional finding that safety hazards in mines can be easily concealed, the Court took this to mean that "unannounced, even frequent, inspections" were necessary, which in turn led the Court to the conclusion that therefore a warrant requirement would "frustrate inspection."²⁰⁹ Because the execution of a warrant is ordinarily "unannounced," in the sense that the suspect is not earlier advised of the application for or issuance of the warrant, the Court's frustration contention must relate to the need for "frequent" inspections. But if, as the Court earlier noted in *Marshall v. Barlow's, Inc.*,²¹⁰ a need for frequent inspections does not mean frequent search warrant applications because most businessmen will cooperate and permit the inspection when the inspector first appears *sans* warrant, then it is still not apparent that a warrant requirement, limited to the few cases in which the inspector is turned away, would "frustrate" the program. This may mean, then, that cases such as *Dewey* actually stand for the proposition that in this area the feasibility of obtaining a warrant has little or nothing to do with whether a fourth amendment warrant requirement should exist. That may be a rational conclusion, but if it is, the proposition needs to be expressed via a process of "factualization" different from that found in these inspection cases to date.

If that *is* a rational conclusion, presumably it is because the constitutional necessity for a search warrant in this context is best judged by an inquiry into whether a warrant requirement would be of any significant *benefit* to businessmen, rather than into whether it would impose any significant *burden* on the government. The *Dewey* decision suggests this approach, for the Court there found it "difficult to see what additional protection a warrant requirement would provide."²¹¹ This lack of benefit, the Court said in effect, was because the regulatory scheme itself sufficiently cautioned the inspector and forewarned the businessman of the frequency and scope of the inspections instead of "leaving the frequency and purpose of inspections to the unchecked discretion of Government officers."²¹² Even if this latter conclusion is

208. 452 U.S. 594 (1981).

209. 452 U.S. at 603.

210. 436 U.S. 307 (1978).

211. 452 U.S. at 605.

212. 452 U.S. at 604.

not free from doubt, the approach of inquiring into the *benefits* of a search warrant in a particular business inspection scheme is a promising one. This is especially so if the Supreme Court disentangles the need-for-warrant and standard-for-inspection issues as to business inspections, which it has not yet done.²¹³ Once they are separated, making it clear that whatever grounds are needed to inspect must be present either with or without a warrant, cases like *Dewey* would be easy. A warrant is clearly of no benefit where by statute or accepted practice a superior procedure — a pre-search adversary hearing — is utilized in lieu of the ex parte application.

3. More on “Bright Lines”

As noted earlier,²¹⁴ one of the most troublesome and at the same time most important issues which exists about how Allen’s “process of ‘factualization’ in the search and seizure cases” should be accomplished has to do with the utility and fairness of using “bright lines” to define the boundaries of permissible fourth amendment activity. We have already examined the use of such bright lines to describe deviations from the traditional probable cause test. What remains at this point is to take note of the bright-lines approach in demarcating ex-cusal of the warrant process.

In *United States v. Watson*,²¹⁵ the Supreme Court held that no warrant was ever needed to make an arrest in a public place,²¹⁶ no matter how easy it might have been in a particular case for the police to have armed themselves with an arrest warrant in advance. The main thrust of the case was that such a conclusion was consistent with the common law, a point hotly disputed by the *Watson* dissenters. It could be said of *Watson*, then, what one commentator said of a related Supreme Court decision:²¹⁷ “The tedious debate between majority and dissent on the common law’s treatment of [the matter] proved only that, when source materials are ambiguous, historical inquiries can produce more confusion than understanding.”²¹⁸ That makes even more significant the Court’s ultimate attempt to provide a reasoned explanation for the *Watson* result: a desire not “to encumber

213. In cases like *Dewey*, where the battle has been fought solely in terms of a claimed search warrant requirement, the grounds-for-search issue is either ignored or, worse still, alluded to as if it had absolutely no relevance in a no-warrant context.

214. See text at note 132 *supra*.

215. 423 U.S. 411 (1976).

216. As the Court later made clear, absent exigent circumstances a warrant is needed to arrest inside private premises. *Payton v. New York*, 445 U.S. 573 (1980).

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

218. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 182 (1980) (footnote omitted).

criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like."²¹⁹ In short, a bright-line rule is needed here because of the difficulty in sorting out these arrest cases in terms of *actual* exigent circumstances.

Whether this is so, whether — as Justice White once put it — it is not possible to make a reasonable judgment about an intended arrestee's future availability because it is "very difficult to determine the probability of his flight,"²²⁰ is certainly not beyond dispute. At a minimum, it would seem that a different bright line, circumscribing the no-warrant category more narrowly, would be possible. This is because empirical evidence indicates that while nearly fifty percent of all arrests are made within two hours of the crime as a result of a "hot" search of the crime scene or a "warm" search of the general vicinity of the crime, very few additional arrests occur immediately thereafter. Rather, there is a delay while further investigation is conducted; about forty-five percent of all arrests occur more than a day after the crime, and nearly thirty-five percent of all arrests are made after the passage of over a week.²²¹ In these latter instances, the risk is negligible that the defendant would suddenly flee between the time the police solve the case and the time which would be required to obtain and serve an arrest warrant. The bright line thus might have been drawn to exclude these latter cases. That the Court did not do so may reflect its perception that the fourth amendment interests involved in *Watson* were not that substantial, a point to which I shall return later. Suffice it to note here that when the Court in *Chimel v. California* was considering instead the search of premises incident to arrest, the majority summarily rejected²²² the dissenters' claim that the Court's earlier "bright-line" rule was necessary because there often is "a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search."²²³

Chimel must in turn be distinguished from the question of how to define the circumstances in which police may forgo the warrant requirement for arrests inside private premises.²²⁴ This bit of "factualization" remains to be done by the Supreme Court, though the Court

219. 423 U.S. at 423-24.

220. *Chimel v. California*, 395 U.S. 752, 779 (1969) (White, J., dissenting).

221. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96 (1967).

222. 395 U.S. 752, 766 n.12 (1969).

223. 395 U.S. at 774 (White, J., dissenting).

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

has hinted at acceptance of the *Dorman v. United States*²²⁵ test and has in one case applied a *Dorman* factor to achieve a rather questionable result.²²⁶ *Dorman* is the antithesis of a bright line, for it requires the weighing and balancing of a list of imprecise factors, an exercise which experience has shown boggles the minds of police and judges.²²⁷ The Court would thus be well advised to consider some sort of bright-line formula here, perhaps one which distinguishes "planned" arrests²²⁸ from those which the police make as a direct result of being out in the field seeking or investigating criminal conduct.

B. *Warrant Protections Unnecessary*

In sharp contrast to the kind of warrant excusal discussed above, where the operating assumption is that the warrant process is desirable but unfortunately not feasible given the exigencies, other Supreme Court decisions permit warrantless fourth amendment activity on the apparent theory that the protections of the warrant process are simply unnecessary. As suggested earlier, the best light in which to view these cases is as grounded in the notion that the warrant process works best if it is not overloaded but instead preserved for the protection of those fourth amendment interests most deserving of protection.

Of course, just what those interests are is a matter on which reasonable minds might disagree. In *United States v. Chadwick*,²²⁹ the Court finally "fessed up" that its warrantless-search-of-vehicle cases were not grounded in exigent circumstances, as it had theretofore claimed, but instead in the "diminished expectation of privacy" in vehicles. But when the government's attorney in the very same case had the temerity to suggest that this diminished expectation extended to everything but homes, offices, and private communications, the Court came down on him like a ton of bricks.²³⁰ Apparently the Solicitor General had bitten off more than the Court was willing to chew, for as matters have developed there are now a considerable number of fourth

225. 435 F.2d 385 (D.C. Cir. 1970).

226. *Welsch v. Wisconsin*, 466 U.S. 740 (1984) (holding a warrantless entry to arrest for a just-completed act of misdemeanor drunk driving was unconstitutional, despite a need to obtain evidence of defendant's blood alcohol level).

227. See Harbaugh & Faust, "Knock on Any Door" — *Home Arrests After Payton and Steagald*, 86 DICK. L. REV. 191, 224-25 (1982).

228. As illustrated by the facts of *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chimel v. California*, 395 U.S. 752 (1969).

229. 433 U.S. 1 (1977).

230. The majority deemed it "a mistake," 433 U.S. at 8; Blackmun and Rehnquist, JJ., dissenting, deemed it an "unfortunate" and "extreme view of the Fourth Amendment," 433 U.S. at 17; Brennan, J., concurring, agreed "wholeheartedly" with that characterization, 433 U.S. at 16.

amendment interests which do not receive the protections of the warrant process.

But before we examine just what those interests are, it is necessary first to take note of another subset of this category (2): those instances in which no warrant is required simply because, given the theoretical basis of the contemplated activity and the consequent requisite factual basis needed to justify it, there would be no meaningful role for the magistrate to perform. Yet another subset, discussed herein following the other two because it has some characteristics of both, has to do with warrantless searches of effects on a "virtual certainty."

1. *Magisterial Inutility*

Perhaps the clearest case of an instance in which the interposition of a magistrate would serve no particularly useful purpose is that concerning the inventory of a vehicle in police custody. In *South Dakota v. Opperman*,²³¹ in which the Court upheld warrantless vehicle inventories, Justice Powell touched on this particular point in his concurrence:

The routine inventory search under consideration in this case does not fall within any of the established exceptions to the warrant requirement. But examination of the interests which are protected when searches are conditioned on warrants issued by a judicial officer reveals that none of these is implicated here. A warrant may issue only upon "probable cause." . . . Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate.²³²

(Like considerations may determine, in situations where a warrant *is* required, what type is necessary. The fact that an arrest warrant is needed to arrest in one's own premises²³³ while a search warrant is needed to take custody of a person then in a third party's premises²³⁴ can be explained on the ground that in the latter instance but not the former the nexus-with-the-premises question calls for judicial scrutiny.)

Just when it is that going the warrant route would have no utility is not always apparent, and on occasion has sharply divided the Court.

231. 428 U.S. 364 (1976).

232. 428 U.S. at 382-83 (Powell, J., concurring) (footnote omitted).

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

234. *Steagald v. United States*, 451 U.S. 204 (1981).

In *Camara v. Municipal Court*,²³⁵ the Court, as discussed earlier, held that a housing inspection could be conducted without the traditional probable cause so long as a particular inspection conformed to "reasonable legislative or administrative standards for conducting an area inspection."²³⁶ The Court also ruled that absent the householder's consent a warrant was required, though it seems that the magistrate's role in this setting is a very limited one. He need not weigh facts as with the usual warrant application, as traditional probable cause is unnecessary; he is not to evaluate the inspection program itself, as the majority says judicial review is to occur "without any reassessment of the basic agency decision to canvass an area";²³⁷ and he apparently is not to address the particularities of what to search for and seize, as no particular type of code violation is suspected at the time of warrant issuance. This leaves only a determination of whether the particular inspection fits within the general scheme, which is not all that unlike deciding whether a particular car inventory conforms to standardized procedures, a matter the Court later in *Opperman* appears to have concluded was not worth a magistrate's time. It is not too surprising, therefore, that the *Camara* dissenters saw involvement of the magistrate as a meaningless act: "These boxcar warrants will be identical as to every dwelling in the area, save the street number itself. I daresay they will be printed up in pads of a thousand or more — with space for the street number to be inserted — and issued by magistrates in broadcast fashion as a matter of course."²³⁸

This is not to suggest, however, that *Camara* cannot be squared with the later *Opperman* decision. Having a judicial determination of whether the particular contemplated vehicle inventory fits within an established plan or procedure may be less necessary because (a) the privacy interest in vehicles falls below that in houses; and (b) the inventory risk is not to all vehicles (as inspection is to all residences), but only to those already in police custody. But the most likely basis of distinction is that the warrant itself serves a function in *Camara* that is unnecessary in an *Opperman* type of case. As the *Camara* majority stressed, requiring that the inspector have a warrant reassures the householder that "the inspector himself is acting under proper authorization."²³⁹ The dispossessed owner of a car needs no like assurance as to the inventory of his vehicle when it is already in police custody.

235. 387 U.S. 523 (1967).

236. 387 U.S. at 538.

237. 387 U.S. at 532.

238. 387 U.S. at 554 (Clark, J., dissenting).

239. 387 U.S. at 532.

That this reassurance aspect of the warrant process is an important, perhaps dominant, consideration in *Camara* is suggested by subsequent events. In *Donovan v. Dewey*,²⁴⁰ authorizing warrantless inspection of mines, the court reasoned, in effect, that the operator of a pervasively regulated business needed no comparable assurance because the regulatory scheme itself forewarned the businessman of the frequency and scope of the inspections. And in *Michigan v. Clifford*,²⁴¹ where a majority of the Court rejected the Court's earlier view²⁴² that an inspection warrant was required for a with-notice post-fire inspection into the cause of a fire, the conclusion as to the inutility of magisterial participation was grounded in the fact that such inspections are triggered only by an uncontrovertible prior event: a fire of unknown origin. The householder therefore has no reason to doubt the inspector's authority or to fear he has been arbitrarily selected as the focus of official scrutiny.

2. Lesser Fourth Amendment Interests

In considering the possible justification of warrantless seizures on the ground that the fourth amendment interests involved are "second-tier" and thus not in need of the added protections of the warrant process, it is useful to begin with *United States v. Watson*.²⁴³ *Watson*, upholding warrantless arrests made in public places, is woefully short on analysis, except for the previously discussed asserted need for a bright-line rule because of undetectable exigencies.²⁴⁴ But the case may be grounded in part in an unstated assumption that taking physical custody of a person is not a "major" fourth amendment intrusion and thus is not in need of advance judicial scrutiny. Such a view of *Watson* helps square it with *Gerstein v. Pugh*,²⁴⁵ which requires a judicial probable cause determination as a prerequisite "to extended restraint of liberty following arrest" because the "consequences of prolonged detention may be more serious than the interference occasioned by arrest."

If this is in fact an undercurrent in *Watson*, it might be thought to reflect a rather distorted set of fourth amendment priorities. As Professor Barrett pointed out some years ago, a "police decision to arrest an individual and initiate the process of criminal prosecution is in it-

240. 452 U.S. 594 (1981).

241. 464 U.S. 287 (1984).

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

243. 423 U.S. 411 (1976).

244. See text at note 219 *supra*.

245. 420 U.S. 103, 114 (1975).

self a significant invasion of personal liberty even though the individual's innocence is ultimately established":²⁴⁶ there is the indignity of arrest, the process of booking and fingerprinting, etc., the acquiring of an arrest record, and the subsequent detention until released on bail or via *Gerstein*. By contrast, when only a search is involved, "in terms of practical consequences the damage suffered is primarily to property interests and is not significantly different from the damage resulting from illegal entries by burglars or other criminals."²⁴⁷ For this reason, so his argument proceeds, one would expect "that the Fourth Amendment would be applied today in a manner which would give primary protection against illegal arrests and similar deprivations of personal liberty."²⁴⁸

Whether Barrett has his priorities straight is not entirely clear. If I were given a multiple-choice test in which my options were either to be arrested and tossed in jail or to have my manse subjected to a full search, and there was not also a "none of the above" option, I'm not quite sure what my choice would be. But even accepting that Barrett's assessment of the respective intrusions of arrest and search is correct, it does not inevitably follow that the *Watson* rule is wrong. Given the fact that this enterprise of identifying certain lesser fourth amendment interests can be justified, if at all, on a desire to keep warrant review meaningful by not overburdening the process, there is another ingredient which belongs in the equation at this point. It is, interestingly enough, an ingredient which Barrett himself later supplied: that the volume of arrests is so high that if a warrant were required for each one except when genuine exigent circumstances were present, the courts could not "cope with the added burden."²⁴⁹ In other words, in determining whether a warrant should ordinarily be required for a particular variety of fourth amendment activity, it is necessary to consider not only the magnitude of the fourth amendment interests involved but also the magnitude of the burden which a warrant requirement would place upon the judiciary. This may explain why, notwithstanding *Watson*, the Supreme Court on two occasions went out of its way to encourage the practice of taking persons to the station on reasonable suspicion for purposes of fingerprinting or possibly other identification — but then emphasized that a warrant would be

246. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46.

247. *Id.* at 47.

248. *Id.*

249. Barrett, *Criminal Justice: The Problem of Mass Production*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 85, 118 (1965).

required for this even less intrusive but certainly less frequent practice.²⁵⁰

As noted earlier, the Supreme Court finally abandoned the fiction of exigent circumstances as the justification for warrantless searches of vehicles, even those in police custody, and now explains the warrant excusal primarily on a lesser fourth amendment interests theory. Particularly noteworthy in this respect is *United States v. Chadwick*,²⁵¹ for the Court there found it necessary to specify exactly what it was that produced "the diminished expectation of privacy which surrounds the automobile" and then to determine whether those characteristics were likewise attributable to the footlocker subjected to warrantless search in that case. As for a vehicle's second-class status, the Court stressed these facts: (i) "its function is transportation and it seldom serves as one's residence or as the repository of personal effects"; (ii) it "travels public thoroughfares where both its occupants and its contents are in plain view"; (iii) there exist "extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways"; and (iv) cars "periodically undergo official inspection, and they are often taken into police custody in the interest of public safety."²⁵² A warrant was required for the footlocker, the court next concluded, for none of those four characteristics was applicable to it; rather, luggage is "not open to public view," is "not . . . subject to regular inspections and official scrutiny on a continuing basis," and "is intended as a repository of personal effects."²⁵³

The distinction may have seemed not totally implausible in *Chadwick*, where the luggage was a 200-pound footlocker secured by both a padlock and a regular trunk lock. But it began to dissolve when the Court thereafter decided *Arkansas v. Sanders*,²⁵⁴ holding a warrant was required for search of the luggage in that case as well. For one thing, unlike *Chadwick*, where it could be said the luggage had a tenuous connection with the vehicle because it had been placed into the open trunk just moments before its seizure, *Sanders* involved a suitcase earlier placed in the trunk of a cab which was later stopped by the police. For another, and more important, the suitcase was unlocked, and thus there was no basis for asserting (as one might have as to the situation in *Chadwick*) that a higher privacy expectation could be attributed to the rather extraordinary security measures taken. If, as

250. *Hayes v. Florida*, 470 U.S. 811 (1985); *Davis v. Mississippi*, 394 U.S. 721 (1969).

251. 433 U.S. 1 (1977).

252. 433 U.S. at 12-13.

253. 433 U.S. at 13.

254. 442 U.S. 753 (1979).

Sanders held, that suitcase in the trunk of the vehicle was entitled to the protections of the warrant process, then it was difficult to see why the result should be any different had the contents of that suitcase (but not the case) been in that trunk. This is because, to put the matter in terms of the four points made in *Chadwick*, (i) people *do* use the trunks of cars as "the repository of personal effects"; (ii) what is in the trunk is not "in plain view"; (iii) limits on how cars may be operated have little to do with what is in the trunk of a car; and (iv) "official inspection" does not, at least without advance notice, result in scrutiny of places in cars where personal effects might be stored.

What *Chadwick* and *Sanders* did have in common was that in both instances there was probable cause to search the container only and not the vehicle at large, and that turned out to be the point of limitation on the warrant-for-luggage-in-cars requirement. Such was the holding in *United States v. Ross*,²⁵⁵ about which it will suffice to say that the curious distinction drawn there is probably about the best that could be done if the Court was unwilling to turn away from either *Chadwick-Sanders* on the one hand or *Chambers v. Maroney*²⁵⁶ and its progeny on the other. But there is a moral to all this: when the explanation for characterizing something as a lesser fourth amendment interest is no more convincing than it was in *Chadwick*, trouble further down the path of fourth amendment "factualization" is to be expected.

Further reflection upon the Supreme Court's decisions concerning the warrant requirement as it relates to effects reveals another distinction, one which has considerably more going for it than that drawn in *Chadwick*. The general point is that the protection of privacy interests is deemed more important than the protection of possessory interests, so that a warrant is generally required as to the former but not the latter. Illustrative of this point is *Coolidge v. New Hampshire*,²⁵⁷ where the Court elaborated the "plain view" doctrine. The essence of the Court's explanation was that if in the course of the lawful execution of a search warrant the police find an item not named in that warrant (and not improperly omitted therefrom),²⁵⁸ they may seize it on probable cause without first obtaining a magistrate's authorization. This is because, the Court explained, "the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause,"²⁵⁹ not a

255. 456 U.S. 798 (1982).

256. 399 U.S. 42 (1970).

257. 403 U.S. 443 (1971).

258. This is the most rational interpretation of the *Coolidge* requirement that the discovery have been "inadvertent."

259. 403 U.S. at 467.

problem on such facts because the search had already been authorized and conducted. This left only the pending act of dispossession, that is, the seizure from the defendant's custody or control, which presented only a "minor peril to Fourth Amendment protections"²⁶⁰ and thus could proceed without a warrant.

Much the same reasoning was involved in the "controlled delivery" case of *Illinois v. Andreas*,²⁶¹ holding that where the contents of a package were lawfully examined by the authorities as it passed through customs and a delivery of that package was arranged by police, promptly after which the recipient was arrested and the package taken from him and opened, no warrant was needed. There was a seizure, but given the prior lawful viewing "the subsequent reopening . . . is not a 'search.'"²⁶² If the situation is the reverse of that in *Coolidge* and *Andreas*, that is, if the police make a privacy intrusion but not a possessory one, then chances are a warrant is required. Such is the teaching of *Walter v. United States*,²⁶³ holding that if a private party to whom a package was misdelivered turns it over to the police, the police still need a warrant to scrutinize more closely²⁶⁴ the contents of that package. This is because, the Court explained in *Walter*, under the *Sanders* rule²⁶⁵ "an officer's authority to possess a package is distinct from his authority to examine its contents."²⁶⁶

3. "Virtual Certainty" of Contents

The third subset of this category (2) — concerning, again, when the warrant process is deemed unnecessary — combines characteristics of the preceding two. For one thing, the fourth amendment interests involved are of a lesser variety, though the situations fall slightly short of the *Coolidge* plain view. For another, though it cannot be said that there would be no role for the magistrate to perform in the *Opperman* sense, the circumstances are such that error seems unlikely even absent antecedent judicial scrutiny. The starting point here is now-notorious footnote 13 of the *Sanders* case:

260. 403 U.S. at 467.

261. 463 U.S. 765 (1983).

262. 463 U.S. at 772.

263. 447 U.S. 649 (1980).

264. In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court held it was no search for the police to open the container to the extent it had previously been opened by the private person turning the container over to them.

265. The Court there, though holding the suitcase in the vehicle could not be searched without a warrant, indicated a warrantless seizure of it while a warrant was sought would be permissible. 442 U.S. at 761-62.

266. 447 U.S. at 654.

Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.²⁶⁷

Putting aside the *truly* plain view situation in which the officer's senses directly perceive the contents (including where the container is partly open or transparent),²⁶⁸ what is footnote 13 intended to cover? Certainly it makes sense to include here plain view once-removed, as where, to use the language of the plurality in *Robbins v. California*,²⁶⁹ "the distinctive configuration of a container proclaims its contents." This covers the "gun case" paradigm in *Sanders* but not the "kit of burglar tools" illustration, for the latter has no "distinctive configuration." The "factualization" in footnote 13 thus includes an inherent ambiguity: was the burglar tools hypothetical merely an ill-considered example, or was it intended to suggest there are still other situations in which no warrant is required?

The *Robbins* case illustrates the significance of this question, for each of the packages searched in that case resembled "an oversized, extra-long cigar box with slightly rounded corners and edges," "wrapped or boxed in an opaque material covered by an outer wrapping of transparent, cellophane-type plastic," and "sealed on the outside with at least one strip of opaque tape."²⁷⁰ The state court declared these packages had the appearance of wrapped bricks of marijuana and thus fell within footnote 13, but the *Robbins* plurality in concluding to the contrary asserted that to come within footnote 13 "a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer."²⁷¹ Given the result in *Robbins*, the "or otherwise" part of the language just quoted seems to mean *at least* this: even if the contents of the container are not in plain view or plain view once-removed (*i.e.*, because of a "distinctive configuration"), the protections of the warrant clause of the fourth amendment still do not come into play when there is (i) a high degree of certainty about the

267. 442 U.S. at 764 n.13.

268. See, e.g., *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982), *cert. denied*, 459 U.S. 1201 (1983) (garment bag partially open); *Commonwealth v. Irwin*, 391 Mass. 765, 463 N.E.2d 1178 (1984) (marijuana visible through container).

269. 453 U.S. 420, 427 (1981).

270. 453 U.S. at 422 n.1.

271. 453 U.S. at 428.

contents of the container, and (ii) this certainty is ascertained from the nature of the container itself.

The first of these possible requirements leads to *Texas v. Brown*,²⁷² where after a lawful stopping of a car an officer saw the driver drop a knotted opaque party balloon onto the seat and then observed several small plastic vials, quantities of loose white powder and an open pack of party balloons in the glove compartment. As to defendant's objection to the warrantless seizure of the balloon, the *Brown* plurality upheld it as based on probable cause, which at first blush looks as if footnote 13 of *Sanders* had hypertrophied to the point of consuming the *Sanders* holding. But this is not so. The defendant in *Brown* inexplicably challenged only the warrantless seizure of the balloon, and thus the case fits comfortably with those discussed earlier concerning warrantless seizure of effects. Of significance here, however, is the statement of three Justices in *Brown* that what would justify a warrantless search of a container, absent either exigent circumstances or probable cause to search the car in which the container is found, is "a degree of certainty that is equivalent to the plain view of the heroin itself," that is, a "virtual certainty that the balloon contained a controlled substance."²⁷³

Whether upon further "factualization" of the fourth amendment this "virtual certainty" test will evolve as the standard under footnote 13 remains to be seen. (Shortly after *Brown*, the Court in a somewhat analogous situation utilized a less demanding — and, it would seem, more ambiguous — test.)²⁷⁴ At least on a theoretical level, this "virtual certainty" approach has something going for it; given the other situations now well established as falling into category (2), it certainly may be argued that the warrant process is just as unnecessary when the fourth amendment interests are low and the certainty about the container's contents is high. Whether it would work well in practice is

272. 460 U.S. 730 (1983).

273. 460 U.S. at 751 (Stevens, J., joined by Brennan and Marshall, JJ., concurring). As they observed:

Sometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in a particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, "virtual certainty" is a more meaningful indicator than visibility.

460 U.S. at 751 n.5.

274. *Illinois v. Andreas*, 463 U.S. 765 (1983), where the question was whether a container, previously lawfully opened and then the subject of a controlled delivery, could be reopened without a warrant when there had been a short break in the police surveillance. The court answered in the affirmative, holding "that absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority." 463 U.S. at 773.

another matter, which naturally raises for consideration the second possible requirement enumerated earlier: that this virtual certainty must arise from (to use the words of footnote 13) the "very nature" of the container. Although this might seem to be one way to keep the "virtual certainty" category within meaningful bounds, such a limitation would appear to be the likely source of a great deal of mischief. The fact of the matter, as both *Robbins*²⁷⁵ and *Brown*²⁷⁶ convincingly illustrate, is that it is not easy to separate out the nature of the container from the circumstances of its possession or transportation.

Does this mean that a "virtual certainty" category should be limited not at all by the source of the information so that, for example, it could exist when the container is totally innocuous but the police gained information about its contents from an informant with extraordinary credentials? Probably not. For one thing, such an opened warrant exception, not limited to first-hand perception of the police concerning the container and the circumstances of its use, would increase the risk of erroneous police decisions on the "virtual certainty" question. For another, it would outrun the rationale of footnote 13, which is that a person can lose any reasonable expectation of privacy in a container by the way in which he uses it.

What then of incriminating admissions by the defendant as to the contents of a container? This should suffice, Justice Rehnquist concluded in *Robbins*, for the defendant "could have no reasonable expectation of privacy in the contents of the garbage bags" in light of his admissions to the police that they contained marijuana.²⁷⁷ This is an attractive conclusion, for the act of stating to police the contents of the container is much like revealing the contents by using a transparent container.²⁷⁸ An unequivocal incriminating admission regarding the contents of the container leaves virtually no doubt as to what those contents are; by contrast, whether the officer's expertise and experience permit the conclusion that certain types of containers are very

275. If one were to ask in that case whether there was a "virtual certainty" that the packages contained marijuana, certainly one would consider not only that they were found in the luggage compartment after the officers had already discovered marijuana in the passenger compartment, but also defendant's statement that "[w]hat you are looking for is in the back." 453 U.S. at 442 (Rehnquist, J., dissenting).

276. If one were to ask in that case whether there was a "virtual certainty," one would consider not only the knotted balloon but also the fact that it had been seen within a car in which there were also observed several small plastic vials and quantities of loose white powder.

277. 453 U.S. at 442 (Rehnquist, J., dissenting).

278. The analogy is most compelling when the statement is as to the entire contents of the container. If a person tells the police he has a stolen diamond ring in his suitcase, it might be argued that this is not a surrender of his privacy expectation regarding the contents of the case generally.

likely used only to hold illegal drugs arguably is precisely the kind of question as to which the judgment of a neutral and detached magistrate would be beneficial.

V. DENOUEMENT

Back in 1950, Frank Allen — having noted that the Supreme Court, by distinguishing various forms of speech activity, had brought a degree of rationality to first amendment jurisprudence decidedly lacking in the Court's fourth amendment decisions — suggested the need for a "process of 'factualization' in the search and seizure cases."²⁷⁹ In the intervening years, the Court has pursued that process in a multitude of cases, generally with favorable results. Recognition that "probable cause" should be variegated has contributed substantially to a more meaningful balancing of privacy and law-enforcement interests. Likewise, appreciation that a warrant-unless-absolutely-impossible approach is unsound and that in fact warrants are impracticable or unnecessary in diverse circumstances has also had a salubrious effect upon fourth amendment jurisprudence.

This is not to say that I agree with the result in each of the cases discussed herein, for I do not. Nor is this to suggest that I subscribe to the Court's "factualization" reasoning in each instance, for I do not. But merely because I and others might not concur in all of the Supreme Court's efforts in this direction hardly suggests that the "factualization" undertaking has not been worthwhile. Rather, it is merely a natural manifestation of the difficulty of the enterprise. A "monolith"²⁸⁰ style fourth amendment, away from which we have moved over a course of years, is hardly desirable, but then "a fourth amendment with all of the character and consistency of a Rorschach blot"²⁸¹ is no less pernicious. Steering between such Scylla and Charybdis is no mean task. It requires, *inter alia*, careful assessment of the respective merits of bright-line and *ad hoc* style "factualization"; comparative evaluation of the reasonable suspicion, standardized-procedures, and "piggy-back" modes of departure from traditional probable cause; and thoughtful calculation of just what makes the warrant process feasible and efficacious.

Allen expressed the hope in 1950 that by a process of factualization there would result, among other things, a relaxing of tensions. The extent to which this has occurred may be open to dispute; I am

279. Allen, *supra* note 10, at 4.

280. Amsterdam, *supra* note 33, at 388.

281. *Id.* at 375.

sure some would point to the fact that most of the cases discussed earlier evoked rather sharp divisions on the Court. But this again may reflect nothing more than the inherent difficulty of the "factualization" process. Certainly the tensions are not what they would have been if, for example, full-fledged arrests and street-corner encounters were still subjected to precisely the same fourth amendment limitations.

Allen also saw the process of "factualization" as a way to move fourth amendment law out of its then "state of unstable equilibrium."²⁸² Here, too, I am sure not all observers of the fourth amendment scene would reach the same conclusion about the extent to which this desirable end has been achieved. Certainly not all of the Court's cases can be reconciled, and there remain significant doubts as to just how the Court would or should come out on a variety of unresolved fourth amendment issues. But certainly there has been nothing in recent years (not even the Court's difficulties with the cars versus containers distinction) which even approaches the *Marron* to *Go-Bart* to *Harris* to *Trupiano* to *Rabinowitz* vacillation²⁸³ which prompted Allen's comment. A significant degree of stability *has* been achieved. Moreover, as the Court takes on more fourth amendment cases and continues with the process of "factualization," so that it may to an even greater degree "see in the round rather than the flat, and . . . gain some understanding of the whole in action,"²⁸⁴ there is every reason to hope that greater stabilization and reduction of tensions will occur.

As Frank Allen has put it: "There is ground for optimism. It is high time."²⁸⁵

282. Allen, *supra* note 10, at 4.

283. See text at notes 65-72 *supra*.

284. K. LLEWELLYN, *THE COMMON LAW TRADITION* 263 (1960).

285. Allen, *supra* note 13, at 542.