The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock

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One way to regard what the Supreme Court has done in the cases it has decided under the Fourth Amendment is to say that it has created a specialized discourse of adjudication, a language in which it can talk about and dispose of the repeated conflicts that arise between an officer engaged in the process of crime control and a citizen upon whose freedom or security he intrudes. The events which bring these two figures together are bewildering in their variety and complexity, and the claims on each side are deeply felt and strenuously made. It has not been easy for the Court to work out a coherent way of addressing these conflicts, and the cases accordingly reflect a considerable amount of uncertainty and confusion, especially if one examines the particular results. Can there be found,
behind the complex and inconsistent surface of the cases, any general continuities of attitude, any agreed-upon and more or less permanent ways of defining the roles of officer and suspect and of regulating the relationship between them? Such definitions—if they existed in forms of which one could approve—would constitute an important social and intellectual resource, potentially serving as an expression of value and attitude of a far more stable and enduring kind than might at first be thought possible from examination of the cases themselves. I propose to trace some of the difficulties the Court has faced in trying to fashion a coherent discourse of Fourth Amendment adjudication, and to identify certain continuities of attitude. It is against this background that I examine *United States v. Robinson*¹ and *United States v. Matlock*,² as contributions to the discourse of the Fourth Amendment.

What I mean by a “discourse of adjudication” that defines and regulates the relationship between officer and suspect may perhaps be made clearer if one imagines a typical Fourth Amendment case: a serious crime has occurred, such as robbery or rape; a policeman has stopped a suspect, and searched him and his car, perhaps finding evidence, perhaps not. The person searched wants to talk about this event in a language of legal significance, in a motion to suppress or in a civil action against the officer. The discourse of the Fourth Amendment—the conventional ways of characterizing facts, stating values, and articulating criteria of judgment—constitutes the language he must use, and he will demand of it that it speak to the situation in a way that he can respect. On the other side, the representative of the state, speaking for the officer and the victim in opposition, must use the same language, and he will likewise demand that it respect what he regards as the important concerns he stands for. One way to conceive of the task of the Court in this field, then, is to say that it is to define and regulate the relationship between policeman and citizen, through the thousands of different forms and factual situations in which conflicts can arise between them, by affording a language in which their representatives can carry on intelligible argument about the transaction that they share, and in which, so far as possible, justice is done to the legitimate claims and expectations of both sides. Central to the process of creating such a language are judgments as to what claims and expectations are

"legitimate," and in making these the Court defines the citizen and officer in important ways. Indeed the making of such a language of adjudication, setting the terms in which argument will proceed, is one way in which the Court contributes to the definition and the education of a national community.

To the extent that the officer, the suspect, and those who readily identify with either, can find in that language an expression or recognition of what they regard as their important concerns, the discourse functions as an important force of social definition and cohesion, placing the individual or official in a comprehensible public world in ways that he can respect. But to the extent that the individual or official faces a public world defined by a language he cannot speak, in which he cannot locate himself, which does not deal in intelligible ways with claims he regards as important, the discourse can be said to be one of authority rather than community, its force divisive rather than cohesive.³

To put it slightly differently, the decision of a Fourth Amendment case is a point at which a judgment is made as to how people will be talked about in our public world. In deciding a case, the Court makes an example of a certain set of people and the transaction in which they have participated; it writes a drama, as it were, of public significance. The language in which this is done should be regarded as much more than a technical or professional language, to be evaluated by its clarity, precision, and efficiency. It is a social and intellectual force of enormous significance, a critical expression of value and attitude in some ways more important to the quality of the community it defines than the particular decisions taken under

³ It is worth emphasizing that this language is compulsory in a very practical way. Anyone who wishes to employ the machinery of the law to assert a right or to protect an interest must speak it. He need not mean what he says, of course, but he is nevertheless forced to participate in a rhetorical process designed to express certain more or less clearly articulated values, whether or not he agrees with them. It can even be said that one of the functions of the law is to provide a rhetorical coherence to public life, to compel those who disagree about one thing to speak a language which expresses their actual or pretended agreement about everything else. By compelling agreement in this way the law makes the disagreement both intelligible and amenable to resolution; it establishes in the real world an idealized conversation. I do not suggest that this compulsion is a bad thing—indeed it seems essential unless every case is to raise as a wholly new question how our society and its members are to be talked about—but it does seem important to recognize its force, and that it has both highly creative and highly fictional aspects.
it. Such a discourse of adjudication is a measure of a civilization. In attempting to define and regulate the relationship between officer and suspect, through example and principle, the Court does not of course start with a clean slate, free to invent what it will, but must function within an existing intellectual tradition. First, then, I shall identify briefly the major characteristics of the rhetorical situation in which the Court finds itself, the principal "givens" with which it must deal—by which I mean more than the matters that are authoritatively disposed of by others (for these are not many); I mean the structural tensions and problems that are built into the role and situation of the Court when it comes to the adjudication of Fourth Amendment questions.

4 Perhaps I should say in slightly greater detail why I put such emphasis on the condition of the discourse. It would, after all, be possible to take the view that what really matters in our world is not the way lawyers and judges talk about the rights of citizens under the Fourth Amendment, but what they do about them. On this view, one interested in the state of our civilization ought not look to the way these matters are thought and argued about but to the ways in which policemen and judges and prison officials behave in fact. I am far from suggesting that such investigations are of no importance—they may among other things show that a particular public rhetoric is in important ways hypocritical or false to experience—but I think the suggested line between "saying" and "doing" cannot be drawn in the simple way suggested. For one thing, the investigator of the "reality," who disregards what the legal system "says" and examines what it "does," must himself have a language in which to describe and judge what he sees, and his language can be criticized and evaluated, much as I suggest legal discourse can. That is, he must make distinctions as to fact and value, and these can be argued about. Also, common experience tells us that there must be some ways, however elusive and difficult to trace, in which the quality of legal discourse affects the nature of the "real-world" decisions taken under it. While no one claims that differences in language work themselves out automatically in judgment, we can imagine languages of adjudication—using criteria of race or height, for example—which would be less likely to lead to results of which we would approve than our own relatively civilized system, however imperfect it might be. And there are effects of the discourse beyond mandatory limitation or direction; a good system trains its judges and lawyers to certain standards and ideals; it legitimizes certain sets of claims and appeals—which can then be employed as resources of thought and argument; and it disapproves of others. One possible response to a person who insists upon the importance of what he calls "reality" over mere language is to say that a public system of discourse, such as the law is, is itself an important reality, a social and intellectual fact in the life of our society with independent force and significance. And the significance, especially of constitutional discourse, can be claimed to run far beyond the courtroom, for this language has as its most general purpose the definition both of a national community and of the relationship between that community and its members. It is not too much to say that legal discourse functions as a force that educates, for good or evil, those who must employ it.
I. THE SPECIAL CHARACTER OF THE DISCOURSE OF THE FOURTH AMENDMENT

A. ADDRESSING THE OFFICER AND CITIZEN UNDER THE FOURTH AMENDMENT: THE DEFINITION OF ROLE AND RELATIONSHIP

I begin with the point of view of the officer. His claim is that the law ought to recognize the difficulty and uncertainty of his job by giving the greatest possible range to the exercise of his expert judgment as to when a stop or search or arrest ought to be made, and as to what ought to be done next. To the extent that the courts require that these judgments ultimately be judicial ones, or judicially reviewable, his claim shifts slightly, to an insistence that if the courts are to decide these matters they should promulgate clear and specific rules that the police can reasonably follow. Only if there are such rules can any punitive or deterrent sanction—such as the exclusionary rule as it is now understood—be sensible or fair. Attempts to frame such rules, however, have foundered on several stubborn realities: the complexity of the factual experiences with which they are concerned; the discovery that rules employing clear and general categories, or making highly specific directions, will sacrifice legitimate concerns either of the criminal justice system or of individuals; and the great diversity of attitude on substantive questions among the members of the Supreme Court, making the necessary agreement difficult. The result has been an uncertain and confusing body of cases and principles which fail to provide the sort of guidance the police understandably demand. What is worse, from their point of view, these uncertain directions are enforced by a unitary deterrent sanction—exclusion of evidence—without any regard to the degree to which an officer knew or should have known that what he was doing was wrong.\(^5\) It is not surprising that

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5 There is some movement away from this conception of the exclusionary rule. See the dissent of Chief Justice Burger in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415–19 (1971), in which one of the bases for attacking the exclusionary rule is its failure to make “rationally graded responses” to misconduct. In Michigan v. Tucker, 94 S. Ct. 2357 (1974), the Court faced a case in which an interrogation had taken place before the Miranda case was decided: the trial afterward. In holding that the statement obtained should not be excluded for failure to give the warnings, the Court took the view that Miranda applied to the case, under the holding of Johnson v. New Jersey, 384 U.S. 719 (1966), but that the exclusionary rule should not apply to the violation because it could not be said that the officer’s failure to give the warnings was either willful or negligent. In these circumstances, the deterrent
the police, and those who readily identify with them, feel unfairly treated.

The Court has not been much more successful in talking about the other major participant in the transaction, the citizen who complains of his treatment by the police. At one time property law was apparently conceived of as drawing a bright line around the individual, defining in relatively clear and certain terms a zone of autonomy and privacy. If there was no trespass, there was no search and the Fourth Amendment did not apply. On the other hand, no search whatever was permitted except for items in which the state or another had a superior property interest, such as stolen goods or contraband. Understandably enough, the Court has not found the first formulation sufficiently protective of individual privacy, especially in an era of sophisticated electronic devices. And the second formulation is excessively restrictive of legitimate state interests in searching for and seizing evidence. But attempts to produce a body of "privacy" law to supplement or supplant the use of property concepts have not been successful. There is one strain in the opinions which reduces Fourth Amendment adjudication to a process of identifying and balancing the competing "interests" of the citizen and the state. But this is bound to be an empty or mislead-

rationale of exclusion cannot sensibly apply. While this can be regarded as a manufactured holding—Justices Brennan and Marshall concurred on the ground that Miranda should not be applied to this interrogation, and Mr. Justice Stewart said that the opinions really held the same thing—it does suggest that the application of the exclusionary rule ought to be in some respect dependent upon the degree of fault of the officer, which seems, after all, only sensible and fair. The Court's reference to "willfulness or negligence" does not adequately address, however, the problem of how fault should be measured. In order not to encourage ignorance of relevant cases by law enforcement personnel, the appropriate standard should be this: If a reasonable person, fully acquainted with the Supreme Court and relevant lower federal court cases, should reasonably have known the conduct was forbidden, the exclusionary rule should properly apply, otherwise not. For a different test of "reasonableness" in a civil action, see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972).

7 Gouled v. United States, 255 U.S. 298 (1921).
ing exercise unless there is some agreement on what "interests" are important and why, and some agreed way of reconciling them when they conflict. The beguiling metaphor of calculation implicit in such terminology is, after all, a metaphor and not the definition of rationality itself. It can only work if we have some prior language to define what is to be subjected to that process. This approach has the danger of becoming a sort of universal solvent, operating as a technique for resolving all constitutional questions without much regard for the choices authoritatively expressed in the language of that document itself.

A somewhat similar movement from apparent clarity to a recognition of complexity has occurred in the administration of "probable cause" and "reasonable search" limitations. Once it was said that the police could in no way interfere with an individual's liberty or privacy without "probable cause" and a judicial warrant where practicable (at least in search cases). In the key cases of Terry v. Ohio,\textsuperscript{11} and Camara v. Municipal Court,\textsuperscript{12} the Supreme Court has broken down that formulation, and it is now plain that some detentions and some searches can be carried on with less than probable cause; and even that judicial warrants for searches, and perhaps detentions, may in some cases issue on less than probable cause.\textsuperscript{13} We may be on the threshold of a Fourth Amendment jurisprudence in which the only question is whether the Supreme Court believes a police practice to be "reasonable." No one can know what meaning will be given such a term, just as no one can know what "privacy" will be made to mean.

A citizen who prided himself on living under the protection of a set of specific constitutional guarantees—or an officer who wanted clear direction and a recognition of the importance of his enterprise—could understandably be confused and worried by what he can see and anticipate. Not only are the rules generally unclear; there is a fundamental uncertainty both as to how the basic values of the Fourth Amendment should be expressed—in terms of property, privacy, "protected interests," or some other way—and how the authority to interfere with those values should be defined.

\textsuperscript{11} 392 U.S. 1 (1968).
\textsuperscript{12} 387 U.S. 523 (1967).
\textsuperscript{13} See the suggestion made in dictum in Davis v. Mississippi, 394 U.S. 721, 727 (1969).
B. THE STRUCTURE AND DEVELOPMENT OF FOURTH AMENDMENT DISCOURSE

At the beginning there was the language of the Fourth Amendment itself. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Two things are apparent from the language. First, it is incomplete; such key terms as "search," "seizure," and "probable cause" can be given meaning only through historical context or innovation. Second, the relationship between the two clauses is unclear.14

I take up the second point first. One possible reading is that the primary prohibition is against "unreasonable searches and seizures" under standards of reasonableness to be evolved by the Court; and that the "probable cause" and other specific requirements of the second clause are taken as constitutional definitions of reasonableness only in that class of cases where warrants happen to be obtained. The difficulty with such a reading is that under it an officer would never be required to obtain a warrant, and it would make the protections of the warrant clause pointless if they could be evaded at the officer's will.15 To give meaning to the warrant clause

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14 The form of the Amendment actually adopted by the House of Representatives in 1789 was somewhat different. The two clauses were connected by having the central language read "shall not be violated by warrants issuing without probable cause." (Emphasis added). But the version received and ratified by the Senate, and adopted by the states, was the version we now have, the change having been made by the reporting committee. Lasson, History and Development of the Fourth Amendment to the United States Constitution 101 (1937). It cannot be the "intention of the framers" in any specific sense, then, that we seek to advance in analyzing and giving meaning to this language, but our own interest in the coherence and intelligibility of the fundamental instrument of our government. That this was not meant to be language of great precision seems plain from the looseness with which "fundamental rights" were talked about both in the political arguments of the time and in such particular constitutional provisions as the Ninth and Tenth Amendments.

15 On the reading suggested in the text, one incentive to obtain a warrant might still remain, that of reducing exposure to criminal and civil liability. This was in fact one of the primary functions of the warrant procedure when it first evolved. See 2 Hale, History of the Pleas of the Crown chs. 10-13 (1736). Can it be that the original intention was to leave the officer free to choose which sort of search or seizure to carry out, subject to the requirements of the warrant
it seems necessary that, in some cases at least, a warrant be required, but there are no criteria in the language of the Amendment for defining the scope and degree of the requirement. This suggests another reading. Assume that the heart of the Amendment lies in the warrant clause rather than the "reasonableness" clause and requires that a warrant be obtained for any search or seizure, unless for good reason excused, and, wherever a warrant is so excused, that the same standards of probable cause and specificity, so far as possible, be applied. That is, under this reading "reasonableness" would be defined by the criteria of the warrant clause—probable cause, specificity, and the implicit warrant requirement—which are presumed to apply to every search. When the direct application of the clause is excused, as where an emergency excuses the warrant requirement, its criteria still operate as standards or guides for the evaluation of searches. Although there has been some argument both as to its historical basis and as to its wisdom, it is pretty much this reading the Court adopted when, upon the passage of far-reaching federal criminal laws—especially prohibition laws—it began to work out a meaning for the Fourth Amendment.¹⁶

1. What is a search? In Olmstead v. United States,¹⁷ the Court seemed to define a "search" for the purposes of the Fourth Amendment as a "trespass" and accordingly held that wiretapping involved no violation of Fourth Amendment rights. But it never said how a trespass was to be defined. Is this to be a matter of state property law, federal common law, or some combination of the two? The question of the role of state property law in defining the interests protected by the Fourth Amendment was evaded in two cases that seemed to raise it, Chapman v. United States,¹⁸ involving a landlord's right to enter a tenant's premises, and Stoner v. California,¹⁹ involving a hotel clerk's power to consent to a police search of a rented hotel room. Neither case presented the issue squarely and each was decided without any intimation by the Court as to the power of the state to authorize such searches.

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¹⁷ 277 U.S. 438 (1928).
through declarations of property law, or as to the standards by which such declarations would be examined.

When Olmstead was abandoned in the series of cases culminating in Katz v. United States—20—which held that the Fourth Amendment "protected people, not places" and used a language of "privacy" instead of (or in addition to) a language of property to define the sort of intrusion regulated by it—whatever clarity the law had had was gone. Who is to determine what is a "privacy" interest for the purposes of the Fourth Amendment, and under what criteria? To what extent, if any, is this to be at least initially a question of state law? 21 If there is to be a federal law of privacy, what shall be its bases, its terms, and its contours?

Particularly difficult, under either a "property" or a "privacy" language, is the analysis of those cases where an individual shares premises, belongings, or communications with another private person—a landlord, a hotel clerk, a roommate, a spouse, a hiking companion, a neighbor—who then consents to a search. Under what circumstances has that other person such a power over whatever is "private" that he can authoritatively consent to its search and seizure by the police? What relevance has state law of property, contract, and agency in determining the terms of the "sharing" and the nature of authority granted? Is the situation different when the person with whom the "sharing" takes place is not a private person but a police agent pretending to be a private person? This question shades into the use of secret agents and spies. Is it an invasion of privacy subject to Fourth Amendment regulation when a secret agent is planted in one's business office, one's church, or one's law firm? When the meterman, the auto mechanic, or the garbage collector are paid to report on one's activities?

2. What is an arrest? What is a seizure? A perhaps more surprising omission has been the Court's failure over the years to tell us what was an "arrest" of the sort requiring probable cause, and what should be done with detentions short of such an arrest: were these to be permitted freely, subject to no Fourth Amendment regulation; prohibited entirely, unless probable cause existed; or subjected to intermediate regulation, and if so under what authority? In

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21 For a case continuing to give independent Fourth Amendment protection to the ownership of property, see Alderman v. United States, 394 U.S. 165 (1969).
Henry v. United States,\textsuperscript{22} the Court seemed to assume that any interference with liberty was an "arrest" requiring probable cause. In Rios v. United States,\textsuperscript{23} the Court backed away from this view and held that when an "arrest" occurred, and by implication whether one did, were to be regarded as matters of "fact." But it gave the trier of fact no criteria by which to approach, let alone resolve, the question.

This uncertainty was in part resolved by Terry v. Ohio, which held that some interferences with liberty—in this case a frisk for weapons and the detention necessary to complete that frisk—would be regarded as "seizures" distinct from "arrests," and therefore not requiring "probable cause." But Terry also held that these interferences were subject to Fourth Amendment regulation under its first clause, prohibiting "unreasonable searches and seizures." The idea was that of the universe of "seizures" some were "arrests," regulated by the probable cause requirement; others were "less than arrests," regulated by the first clause. This analysis does not work so well, as a practical or linguistic matter, with respect to "searches." What kind of search is less than a search? And it raises considerable question both as to the place of the warrant requirement and its commands of probability and specificity. In what searches and seizures will probable cause and the warrant not be required, and under what criteria of reasonableness will they be regulated? Terry suggests that at least in "frisk" cases both the specificity requirement (limiting the frisk to an external pat-down of the sort that would reveal a weapon) and a depreciated version of the probable cause requirement (requiring "articulable suspicion" that the person is armed) should apply. But this does not tell us what to do with other cases. And its result, inconsistent with the earlier reading of the relationship between the two clauses, is that an officer alone can do what a judge could not, under the probable cause language, authorize him to do.

3. How is "probable cause" to be measured? There is an enormous body of law giving a complicated and somewhat uncertain content to the "probable cause" language,\textsuperscript{24} varying especially in the methods by which the requisite probability is to be measured.

\textsuperscript{22} 361 U.S. 98 (1959).
\textsuperscript{23} 364 U.S. 253 (1960).
and established. Virtually all these cases, however, agree on one thing. Probable cause permitting a search or arrest requires good basis for believing it probable or likely that the particular search contemplated will produce the items legitimately sought, or that the particular person arrested has in fact committed a crime for which arrest is permissible. In making and reviewing determinations of probable cause a court functions as a sort of trier of fact, asking a particular question about a particular case: does the evidence properly before it support the conclusion of probability to the requisite degree? This is the general approach used even in Terry v. Ohio to determine whether the particular facts of the case justified the frisk engaged in there.

In Camara v. Municipal Court a different conception of the "probable cause" judgment was employed for the first time, with consequences that can hardly be measured. On first reading, that case may seem to add to the protections of the Fourth Amendment. It overruled Frank v. Maryland and held that an administrative inspection of a residence in order to determine whether it complied with housing code requirements was a "search" subject to the warrant requirement of the Fourth Amendment. The Court rejected the argument that the Fourth Amendment did not apply because it was a "civil" search carried out as part of an administrative scheme and not meant to further a criminal prosecution. But in requiring a warrant the Court created added difficulty. In the normal case there will be no specific reason to believe that a particular house is substandard. Indeed, the purpose of such schemes is to inspect whole neighborhoods or even cities to uncover dangers of which even the occupants may be unaware. The Court had to choose between invalidating these obviously valuable inspections or interpreting "probable cause," for the first time, to require evidence not of some degree of probability with respect to the particular invasion, but of the reasonableness of the scheme as a whole. The latter was the view adopted by the Court. In Camara, the standard for the issuance of the warrant is not the probability test articulated in the warrant clause, but a general "reasonableness" standard.


27 The Court said: "[P]robable 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
This case led to a suggestion in the majority opinion in \textit{Davis v. Mississippi}\textsuperscript{28} that warrants might issue to compel the production of fingerprints—and perhaps voice exemplars, attendance at lineups, and other material such as blood samples, hair clippings, and the like—all on less than probable cause. This intimation was quickly taken up by the drafters of Proposed Rule of Criminal Procedure 41.1,\textsuperscript{20} which would permit judicial “orders” (not warrants) for some items on less than probable cause, although this seems plainly inconsistent with the express language of the Constitution. Finally, in \textit{Almeida-Sanchez v. United States},\textsuperscript{30} a concurring opinion—necessary to the existence of a majority disapproval of discretionary stops and searches by “roving border patrol” officers on less than probable cause—held that warrants may properly issue, on the authority of \textit{Camara}, authorizing border patrol officers to stop whomsoever they wished in large zones near international borders, upon a showing that this practice is reasonably necessary to the curtailment of illegal entry by aliens, and without requiring that the particular stop be justified by particular facts presenting particular probabilities. Here the Court has legitimized a practice not enormously different from the writs of assistance—authorizing officers to search where they wished for smuggled goods—against which the Fourth Amendment was specifically directed.\textsuperscript{31} The con-

\textsuperscript{28} 394 U.S. 721, 727 (1969).

\textsuperscript{20} 52 F.R.D. 409, 462 (1971). Colorado has adopted a rule permitting a court order for fingerprinting on less than probable cause. \textit{Colo. R. Crim. P. 41.1}.

\textsuperscript{30} 413 U.S. 266, 275 (1973).

\textsuperscript{31} One possibly significant difference is that the search authorized by \textit{Almeida-Sanchez} is that of a car, not of a house. The use of the word “house” in the
stitutional definition of reasonableness expressed in the details of the warrant clause was abandoned here, and the Fourth Amendment was read as though it prohibited "unreasonable searches and seizures" without more.

The point of these remarks has not been to claim that *Terry* and *Camara* are diabolical cases—indeed it is difficult to see how they could properly have been decided differently on their facts—but to trace the impact they have had on the probable cause and warrant protections of the Fourth Amendment, removing some classes of search and seizure from those protections altogether and, at least in some cases, changing the fundamental nature of the probable cause inquiry. The question remains whether these cases could have been justified in ways less destructive of Fourth Amendment traditions.

One possible starting point is the fact that both *Terry* and *Camara* involved not searches for evidence or fruits of crime, but intrusions made for quite other purposes: to protect the life of the officer and to discover hazardous conditions in the house. Would it be a sensible reading of the Fourth Amendment to hold that searches carried out for such protective purposes as these are to be regulated under the "reasonableness" standard of the first clause rather than the probability and specificity criteria of the second? Presumably those criteria would continue to be relevant to any evaluation of reasonableness, but not determinative as they are in criminal searches. The ultimate question would be whether there is a plain social need for the intrusion, and whether the search engaged in was narrowly tailored to its purposes. This seems to have been the conception of reasonableness employed in the cases. In *Terry* the frisk was limited to one that would uncover weapons that might present a danger, and was valid only because the officer could substantiate his suspicion that this particular person might be armed. *Camara* required that the inspection be on an area-wide or other systematic basis, thus removing the dangers of discrimination which seem to

Amendment itself may support a greater protection for homes than vehicles. See the discussion of *Chambers v. Maroney* and *Vale v. Louisiana* in the text infra, at notes 39-41. The search here would be greatly limited in scope by the fact that its object is a person; intrusions into the glove compartment, a suitcase, or a bag would presumably be invalid under any view expressed in the opinions.
be part of what the Fourth Amendment opposes. Even more important, under *Camara* the householder is apparently entitled to have the inspection take place at a reasonably convenient time, which means that he has the opportunity to minimize the intrusion enormously, by removing containers that he does not wish seen, by suspending activities he does not wish observed, and so on.\(^{32}\)

If the suggested double standard were adopted, there would be the danger that the opportunity to carry on protective searches, regulated by the "reasonableness" clause, would be abused by officers in fact seeking evidence of crime where the standards of the warrant clause are not met. One way to limit that possibility would be to hold the "plain view" rule inapplicable to such intrusions, and prohibit the use in a criminal proceeding of any item found in such a search. This construction would permit, subject to the suggested use limitation, inspection of premises where fires had occurred (to discover the causes); compulsory medical tests and treatments when there was a danger of epidemic; the inspection of luggage and the person as a condition upon the right to fly; the stopping of automobiles for license and registration checks; and so on. But the proposed warrants for compulsory revelation of evidence to assist criminal investigations would be invalid, as would "detentions" for investigation.\(^{33}\)

The proposed distinction between two kinds of search—civil and criminal—is meant to provide a way of making sense of the relationship between the clauses and to reconcile the legitimate demands of the community and the citizen sensibly and fairly. For shorthand purposes, one might put it this way: "criminal" searches, subject to the criteria of the warrant clause, should be regulated by

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\(^{32}\) 387 U.S. at 539-40. Professor LaFave has suggested that criminal sanctions might still be imposed for an initial refusal, if it is ultimately found that the scheme is reasonable. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Supreme Court Review 1, 37. That of course need not, and in light of the values expressed in *Camara* should not, be permissible.

\(^{33}\) The search for aliens illegally in the country would be a closer question. No such search should be permitted for purposes of prosecuting the aliens for crime, but I suppose deportation might be regarded as a civil sanction—akin to an order to repair defective wiring uncovered during a housing inspection—though it seems to me far closer to a criminal proceeding than that. In any event, under the proposed analysis, nothing uncovered during a search for aliens could be used in a criminal proceeding.
a "principle of particular justification," requiring a showing that the probabilities on the facts of the individual case support the specific search; "civil searches," regulated by the reasonableness clause, should be subject to a "principle of general justification," requiring both a showing that the intrusion is supported by an overriding state interest in protecting people from serious harm, and that the intrusion has been tailored as narrowly as possible consistent with that end.

To the extent that the proposed reading makes sense of the relationship between the clauses, it can be said to have the support of the language of the Amendment. But can this reading be supported by reference to its purposes and history? This is a difficult matter explored at some length below. But I would here point to the conception of the Fourth Amendment that would justify an affirmative response. The Amendment at its heart is not directed simply against intrusions into privacy or property but against the official oppression and harassment of individuals and classes by intrusions of a certain double character: using the power of the state first to compel an entry or detention by force of arms or law; then to punish, through criminal sanctions or forfeiture, the person whose world has been so violated. In this sense (among others) the Fourth Amendment and the Fifth Amendment have closely related purposes. They are primarily meant as ways of regulating the ways in which the state may proceed criminally or punitively against its citizens, not as a limitation upon civil obligations rationally imposed upon them. The paradigm injury with which the Amendment is concerned is not the search or seizure alone, but the use of that power as a part of the criminal process. This view of the Amendment supports both the proposed distinction between civil and criminal searches and the abolition of the plain view rule as a way of minimizing the impact of the civil search. This reading is of course not free from difficulty, and I shall deal with some potential objections later.

4. When is a warrant required? The reading the Court has given the Fourth Amendment through most of its history has assumed the primacy of the warrant clause. One natural corollary has been that a search is valid only if made pursuant to a proper warrant, unless an emergency or "exigency" exists which excuses that require-
ment.\textsuperscript{34} But in working out the implications of this formulation the Court has met two problems of extreme difficulty.

The first is how the "exigent circumstances" which excuse a warrant are to be defined. In some opinions it seems implied that the

\textsuperscript{34}One's view of what circumstances should excuse the warrant requirement will depend in large part on one's assessment of the purpose and efficacy of the warrant mechanism itself, and on this point there has been some rather deep, though incompletely articulated, difference of opinion.

The classic statement is Justice Jackson's: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1948).

The rejoinder, implicit in some of the opinions discussed below, admits the value of judicial review of police decisions, but sees little to be gained in having that review come before, rather than after, the intrusion. This view is supported by doubts that the "independent magistrate" is in fact likely to be "independent" at all. The major lines of justification are: First, one effect of the warrant procedure is to freeze the story of the officer or his informant at a point well ahead of the arrest or search. Thus even if it be true that the only substantial judicial review takes place after the intrusion, that process will be far more accurate if based on facts asserted before the intrusion, and not on a version possibly revised in the light of later discoveries. Second, it is by no means realistic to assume that magistrates are never "independent" and, to the extent that they are so, certain impermissible intrusions will be prevented. Third, to the extent that a magistrate is committed to the police view of the criminal process in general and of the case before him in particular, he still has an important function to perform: to advance the ultimate success of the intrusion and the admissibility of the evidence obtained, he will take pains to ensure that probable cause is adequately stated and that the other requirements of the warrant clause are met. Even deep-seated partisanship—if not coupled with an attitude of lawlessness—does not make the process of prior magistral review a pointless one. Finally—an argument that had great appeal to Justice Frankfurter—to require an officer to have a judicial warrant, however improperly granted, is to remain at least that symbolic step away from a police state, for the officer acts not on his authority but that of a court.

With respect to arrests the Court has never required a warrant (though it has occasionally spoken of a "preference" for such a warrant). No persuasive reason has been given for the distinction between an arrest and a search—indeed, if there is to be a distinction one might think it should go the other way—and it may rest on no stronger ground than the apparent historical circumstance that a warrant has generally not been required by the states or at common law for arrests for felonies and certain misdemeanors. The notion may be that in an arrest situation there is almost always a danger that the defendant may leave the jurisdiction while a warrant is obtained, but that would not make sense in every case. For example, when the officers leave the federal building to arrest someone where there has been probable cause for days or weeks, one could sensibly require that they obtain a warrant. At least one lower court has held that when an arrest is to take place inside a residence, which will necessarily involve an intrusion into a house, a warrant
categories of exigency are closed—the warrant is excused where the search is incident to an arrest, of a movable vehicle, or pursuant to consent—while others suggest that new categories can be added, perhaps indefinitely. In *Warden v. Hayden*, for example, it was held that an entry by police in "hot pursuit" of a fleeing suspect whom they had probable cause to arrest was valid, notwithstanding the failure to obtain a warrant. In *Schmerber v. California*—the blood test case—it was said that a warrant could be excused where there was danger that evidence would be lost or destroyed. The danger is, of course, that the exception will eat up the rule. Is there not always a danger that what one is searching for may be moved or destroyed?

Attempts to employ sharp categories have not, however, been wholly successful. *Carroll v. United States* established the proposition that the search of a car on the highway could be carried out without a warrant if there were probable cause, for the obvious reason that the car might be driven away while a warrant was applied for. But in *Chambers v. Maroney* this principle was applied to permit the warrantless search of a car that had been impounded by the police, for the search of which there was obviously plenty of opportunity to get a warrant. Is the rule then to be an "exigency" rule, requiring a showing that the vehicle or other item to be searched is in fact in some danger of being moved? Or a "car" rule, simply permitting warrantless searches of cars, and if so, on what grounds?

The major argument in support of *Chambers* is that where a car is involved there will be an actual exigency in such a large percentage of the cases that the Court will not stop to inquire whether one exists in a particular case. But this raises a large question about Fourth Amendment adjudication. Is it proper for the

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35 See, e.g., the plurality opinion of Mr. Justice Stewart in *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).


38 267 U.S. 132 (1925).


40 In *Coolidge v. New Hampshire*, 403 U.S. 443, 461–62 (1971), Mr. Justice Stewart said: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *But see* *Cady v. Dombrowksi*, 413 U.S. 433 (1973).
Court to operate, for the sake of clarity and efficiency, by such
categorical rules, or is the Court not obliged rather to determine
and judge the constitutionally relevant interests at stake in the par-
ticular case? This question will recur in the analysis of *United States
v. Robinson*, which presents it in a particularly stark form.\(^4\)

The second problem in the administration of the “exigency” ex-
ception to the warrant requirement arises with respect to searches
incident to arrest, with which *Robinson* itself is concerned. If the
arrest creates an exigency excusing the warrant, how far does the
exigency go and why? In *United States v. Rabinowitz*\(^2\) the Court
permitted an exhaustive search of the defendant’s office incident to
an arrest for possessing and selling stamps with a forged overprint.

\(^4\) Vale v. Louisiana, 399 U.S. 30 (1970), suggests that the use of such categories
may be used in favor of the citizen as well as the officer, in this case to prevent
the warrantless search of a “house” even where an analysis of the exigencies would
support it. Here the Court held invalid the search of a drug dealer’s house, follow-
ing his arrest outside it for a sale of drugs evidently obtained from the house even
though there were present family members who might have destroyed the drugs
while a warrant was obtained. It may be that the use of the word “house” in the
Amendment supports the greater protection afforded the residence, or perhaps
there is a notion that the use of the car is properly subject to greater regulation,
owing to its danger, and hence that the privacy interest in it is less. In practical
terms, I think the Court is interested in ensuring that at least one place retains
important protections, even if public necessity supports interference with others.

There was some difference of view among the Justices as to whether on the facts
of the case a warrant could have been obtained for the search of the house prior to
the officer’s initial appearance—the officer in fact had a warrant to arrest the sus-
ppect in connection with bail proceedings and some of the Justices seemed to think
they could have obtained a search warrant as well. The case may, therefore, be
limited to situations in which an opportunity to obtain a search warrant exists; or,
more likely and more properly, it may stand for the proposition that the likely de-
struction of evidence alone is not enough to permit entry to a house without a
warrant.

The “categorical rule” can be as dangerous a form for constitutional lawmaking
when it runs in favor of the suspect as when—as will be the case in *Robinson*—it
runs in favor of the officer. The prime example is *Miranda*, which in its most
extreme form would exclude statements if the warnings were defectively given,
even where it was shown that the suspect knew all of his rights anyway. See the
discussion of this aspect of *Miranda* in *White, The Legal Imagination* 611–14
(1973). Attention has been given to the problems of categorical rules in the so-called
irrebuttable presumption cases, beginning with *Bell v. Burson*, 402 U.S. 535 (1971),
What distinguishes the rules requiring probable cause, specificity, and a warrant—
and perhaps also the rule giving special protection to the “house”—from the
*Miranda* rules and the legislative categories in the irrebuttable presumption cases,
is the fact that these categories are established in the Constitution itself.

\(^2\) 339 U.S. 56 (1950). The fluctuating history of the permissible scope of such
searches is presented in some detail in this case.
In his famous dissent, Justice Frankfurter argued that the power to search without a warrant ought to go no further than the reasons for which it exists, namely, to search for evidence the defendant might try to grab and destroy, and for weapons he might use against the officers. "To say that a search must be reasonable is to require some criterion of reason," said Justice Frankfurter, and he found these criteria in the traditional requirements that probable cause exist and that a warrant be obtained, except to the degree that the warrant is excused for the reasons stated. In *Chimel v. California,*\(^4^3\) the Court repudiated *Rabinowitz* and adopted Justice Frankfurter's reasoning: a warrant is not required for a search of the arrestee's person or the area in which he might grab to obtain a weapon or destroy evidence, but for any search beyond that area both probable cause and a warrant are required.

Mr. Justice White, speaking also for Justice Black, would have used a different rule in *Chimel*. The police should be free, incident to an arrest, to carry out a search of the whole premises—even beyond the "grabbing area"—without a warrant, but only insofar as they have probable cause. The argument is the same as that supporting his opinion in *Chambers*. It will so often be the case in such circumstances that there is a warrant-excusing exigency that we ought to permit such searches on a blanket basis. This is not to permit a search "without criterion of reason" for the police are subject to the restrictions imposed by the probable cause and specificity requirements, which determine the direction and intensity of the permissible search. The categorical rule argued for by Justice White would excuse, as to the search beyond the person, only the warrant requirement, not the substantive criteria of that clause.

What *Rabinowitz* or *Chimel* leave wholly open is the question whether the search within the "grabbing area"—which everyone agrees requires no warrant—is limited by a probable cause requirement, as even Mr. Justice White would limit the search beyond it. Or is the authority to search an arrested defendant an "automatic" or "per se" authority, not controlled even by the probable cause standard of the Fourth Amendment?

This is the question addressed by *United States v. Robinson.*

II. UNITED STATES v. ROBINSON

"I just searched him. I didn’t think about what I was looking for. I just searched him."44

A. THE FACTS

On 19 April 1968, Officer Jenks of the District of Columbia police department made what he called a “routine spot check”45 of Robinson’s automobile. He asked for and examined Robinson’s registration and his license, which proved to be a temporary operator’s permit. He also examined Robinson’s draft card, apparently having requested it.46 He noticed that the operator’s permit gave a birth date of “1938,” and the draft card one of “1927.” He made notes of the cards and permitted Robinson to drive away. A later check of license records showed that one Willie Robinson, Jr., born in 1927 had had his license revoked; and that a temporary permit had subsequently been issued to one Willie Robinson, born in 1938. The pictures on the revoked license and the application for the temporary license were both of the man Jenks had stopped.47

Four days later, while on duty, Jenks saw Robinson driving the same car, stopped him and asked to see his license and registration. Upon being shown the same cards as before, he placed Robinson under arrest (a) for driving while his license was revoked and (b) for obtaining a license by misrepresentation. These offenses carry substantial penalties, including the possibility of imprisonment. The arrest was what the Supreme Court called a “full custody arrest,” by which they mean that the decision had been made to take the defendant to the station for booking. It is significant for the pur-
poses of this case that under District of Columbia law the offenses were automatically bailable, that is, the defendant had the right to be released, after booking, if he could post bond. It is not clear from the record whether Jenks had been looking for Robinson, or whether he just happened to see him. The court of appeals proceeded on the assumption, however, that Jenks's purpose was to make an arrest for the license offenses described and not for some other, improper, purpose, such as searching him or his car for drugs. All the opinions agree that Jenks had probable cause to make the arrest for the reasons stated.

The dispute is as to the propriety of the subsequent search. Jenks engaged in what his departmental regulations call a "full field type search," in which the officer examines the contents of all the pockets, removing every item, even one "that he believes is not a weapon." According to Sergeant Donaldson, a police training instructor: "Basically it is a thorough search of the individual. We would expect that in a field search that the officer completely search the individual and inspect areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes." Of the search carried out in this case, Jenks said, "I just searched him. I didn't think about what I was looking for. I just searched him." He found in Robinson's jacket pocket a crumpled-up cigarette packet, which seemed to have some objects other than cigarettes inside it. Jenks opened the packet and found fourteen gelatin capsules of heroin, for the possession of which Robinson was ultimately convicted. The question was whether the capsules were properly admitted at trial, or whether they should have been excluded as the fruit of a search improper under the standards of the Fourth Amendment.

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48 Id. at 1102-03.
49 Id. at 1088 n.3. The court of appeals did not deal with the defendant's allegations of improper motive because they found the search improper on other grounds. The Supreme Court said: "We think it is sufficient for purposes of our decision that respondent was lawfully arrested for an offense, and that Jenks' placing him in custody following that arrest was not a departure from established police department practice. . . . We leave for another day questions which would arise on facts different from these." 414 U.S. at 221 n.1. The implications of this rather Delphic statement are discussed in the text infra, at notes 81-82.
50 414 U.S. at 221-22 n.2.
51 471 F.2d at 1089 n.9; 414 U.S. at 251.
52 One of the factual peculiarities of the case is the assertion made and not disputed that for this offense Jenks was "required" by his departmental regulations (a)
Having been arrested in April 1968, the defendant was held in jail, unable to post bond, until his trial in August 1969, when he was convicted. His appeal resulted first in a reversal by a panel of the court; then, after rehearing en banc, in a remand for factual clarification—the original record was somewhat obscure on the facts surrounding the search—in June 1971. The trial court held a factual hearing pursuant to the remand order, and the case was reheard en banc in October 1972. The court of appeals held the search invalid since there was no claim that it had as its object evidence of the crime for which Robinson was arrested, and since it exceeded the sort of "frisk"—defined in Terry v. Ohio—which was adequate to protect the officer against the use of weapons. The Supreme Court granted certiorari, and, after argument, affirmed the conviction in December 1973. I stress these details because one of the important structural facts the Court must face is the staggering ex-

to make what they call a "summary arrest" and what the Supreme Court calls a "full custody arrest" and (b) to carry out the "full field search" referred to above. The source of the arrest requirement is Metropolitan Police Department General Order No. 3, Series 1959, which reads in part:

"The use of Traffic Violation Notices is a courtesy of long standing and shall be employed whenever possible, consistent with the overall safety of the public. Only in the more serious or aggravated types of traffic violations, those which indicate a serious disregard for the safety of others, or those in which the officer has reasonable grounds to believe that the individuals concerned will, in all probability, ignore the Traffic Violation Notices, should it be necessary to make summary arrest. These include, but are not confined to: . . . Operating After Suspension or Revocation of Operator's Permit. . . . In these types of cases and in the interest of public safety, it is not appropriate to permit the offending motorists to continue on to their destinations and summary arrests should be made." 471 F.2d at 1097 n.23.

The source of the requirement that pursuant to a custodial arrest the officer make a "full field search," as described above, seems to be the instruction of training officers such as Sergeant Donaldson. But it is never made clear what sort of "requirements" these are: are they mandatory rules, for deviations from which officers are punished in some way, perhaps by the imposition of sanctions, perhaps by receiving poor performance reports? Or are they suggestions or guidelines, subject to exception when good judgment requires it? These questions are never answered. As the Court decides the case they are ultimately unimportant, for in a companion case it upheld a similar search where there were no such requirements. Gustafson v. Florida, 414 U.S. 260 (1973). At least one commentator, however, has suggested that the existence of such rules, and the degree of compliance with them, should be of the greatest importance, for such rules tend to prevent what this commentator regards as a central concern of the Fourth Amendment, discriminatory or arbitrary use of police power. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416-39 (1974).

53 471 F.2d at 1099-1100.
penditure of time, money, and energy on the defendant's side as well as the prosecution's, and by the Court as well as by the parties, that a case such as this entails.

B. THE COURT'S OPINION

Mr. Justice Rehnquist, writing for the majority, spoke at first as though this were a simple case that could be disposed of by reference to a well-established rule. "The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case." The question that has troubled the Court in the past, how far beyond the person such a search may go, was not at issue. The limitations of *Terry v. Ohio* do not apply where a "full custody arrest" has occurred. He pointed to many cases, state and federal, which establish in general terms the right to search the person of one who is arrested, a principle that has been stated over and over again.

Beneath the surface, however, as the Court recognized, there are substantial complications. The numerous judicial reiterations of the right to search (a) are cast in extremely general terms, without express consideration of the question before the Court in this case, i.e., whether that right is absolute or in some way conditional or restricted; and (b) are usually accompanied by a statement of the reasons supporting the search, i.e., the need to discover any weapons the person arrested might use against the officer and any evidence of the crime which he might try to destroy. Implicit in these justifications may well be principles of limitation. The first point is important. It is usual that a legal rule is not absolute but qualified or presumptive—virtually always admitting the possibility of an exception or qualification upon another version of the facts—and to convert a statement of a general principle into a statement of an absolute rule of unconditional authority would do intellectual violence to well-established conventions of legal thought and argument. The second point is also important. What makes it possible

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54 414 U.S. at 224.

to claim that the system of rules and the confusing pattern of adjudication built around them which together we call the law is ultimately grounded in rationality is that the process is at its heart a purposive and expressive one, in which the application of general rules is to be shaped by the reasons that support them and in which particular decisions rest not upon the rote application of general propositions but are justified by reference to the purposes of the rules as they apply in the particular case. In Robinson’s case—unlike many others, in which the general rule would properly apply—it was conceded by the Government that there was no possible evidence of the crime which the defendant might have tried to destroy, so that basis for the search falls away. With respect to the protection of the officer, the court of appeals found that the factual record supported the conclusion that a Terry “frisk” was adequate to uncover virtually any weapons the defendant might seek to employ. The seizure of the cigarette packet, and its opening, exceeded the limits of such a frisk and were accordingly found improper by the court of appeals.

The Supreme Court speaks to these objections in a critically important paragraph:

[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to Weeks, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication. A police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular case.

56 471 F.2d at 1094 n.17.
57 414 U.S. at 235. Mr. Justice Powell put much the same point more bluntly in his concurrence: “I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.” Id. at 237.
arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

This statement means that the Court will simply not listen to the claim that a particular search incident to an arrest was not in fact supported by the reasons that underlie the practice generally. To this extent the Court would allow an interference with interests protected by the Fourth Amendment without requiring that the interference be justified in the usual ways. When the Court authorized the search for weapons and the seizure of the packet without requiring any showing of a basis to suspect that the defendant might be armed, the Court dispensed with the principle—a version of which was employed even in Terry—that a search be based upon probabilities reasonably assessed with respect to the facts of the particular case. This is what I have called the principle of particular justification, normally applied in criminal searches. When the Court validated the opening and examination of the packet it departed from tradition even more markedly. It was unlikely that the packet could contain any evidence of the crime, and any weapons it might contain could apparently be rendered harmless by simply retaining the packet, unexamined, until the defendant was released. To permit the opening and examination of the packet in these circumstances is inconsistent with the basic principle underlying all the cases in the Fourth Amendment field, including Camara, that each intrusion must be justified in some way by reasoned reference to the legitimate interests of the state. This is what I have called the principle of general justification. When the Court departed from this principle and validated the search as a matter simply of "authority," it employed a concept wholly new to Fourth Amendment law.

This is not necessarily to say that the case is wrong. There is great force in the Court's position that after-the-fact adjudication of the risks and necessities presented by each situation in which a search is carried out incident to arrest is impracticable in the highest
degree. We have no videotape of the event. On what basis can these factual judgments be made? And, in any event, great latitude must be given to the officer's judgment of what his safety requires. The process of arrest can be extremely dangerous, and the claim of the officer that he is entitled to take whatever steps seem reasonable to him to protect himself is understandable and urgent. Indeed, any limiting rule is likely to have little effect in practice upon conduct genuinely thought necessary to self-protection. Moreover, the rule of Robinson is limited to cases in which there is probable cause to make a custodial arrest, which is normally a vastly greater imposition than any search and which will usually be followed, in any case in which the suspect is jailed, by an inventory search of an extremely thorough kind. In addition, the blanket authority seems to provide a simple rule that the police and lower courts can follow, and, to this extent, to introduce a measure of order into what is otherwise a confusing sea of adjudication. It promises, too, to conserve social resources that are now being poured in huge quantities into the process of determining the propriety of what, upon any practical view, are really quite minor shifts in the degree of an intrusion. In the present case, for example, where nearly everyone agrees that it was all right for the officer to pat the outside of the pocket with the cigarette packet, years have been consumed in litigation of the question whether the additional intrusion involved in the seizure and opening of the packet was permissible.

Faced with these tensions, how should argument over their resolution proceed? With an ambiguity of attitude that has become traditional in such cases, the Court suggested history as a starting place and claimed to find widespread, indeed practically universal, support for its position in the statements of state and federal courts and the views of commentators. But, typically, the Court ultimately conceded that the question had not been authoritatively settled in a plain holding and regarded itself as free to decide the matter either way in light of Fourth Amendment principles and practical realities. Examination of the historical background is difficult and highly problematic, especially for one who is not a professional historian—and there is a serious uncertainty among lawyers about what to do with what history uncovers—yet some attempt should be made, for the authority of the Court and of its judgment begins in large measure with the connections it can draw with its own past.
C. THE HISTORY

The precise question before the Court, whether the scope of searches incident to arrest shall be established in a blanket way under a general rule of authority, has never been expressly decided by the Supreme Court. What Mr. Justice Rehnquist pointed to was a vast number of general statements to the effect that there is a "right to search incident to arrest," and the absence of any Supreme Court cases specifically holding that such searches are to be limited by their justifications. The first question is how this indeterminate past ought to be read. The major difficulties with the material upon which the Court relies are (a) that the statements of the "rule" permitting a search incident to arrest are so brief and general that they cannot be said to address the question whether it should be an absolute rule or limited by its purposes; and (b) that they normally include a statement of the justifications for the rule, seemingly implying limitations on its scope. For example, in *Weeks v. United States*,68 the Court said in dictum:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice, 8th ed., § 60; Dillon v. O'Brien and Davis, 16 Cox C.C. 245.

The statement that the right has been "uniformly maintained" is, I believe, to be taken as a statement of the uniformity with which the general rule has been accepted, not as a statement that the generally stated right is without limit or qualification. Limits, for example, seem both stated and implied in the following language in the work by Bishop relied on by the Court in the quoted passage:69

*[T]he right of search for this purpose [of finding weapons to prevent escape] does not exist of course in every case; as, for example, where the arrest is for mere disorderly drunkenness, and it is submitted to, and there is no ground to fear an

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68 232 U.S. 383, 392 (1914).
69 1 Bishop, Criminal Procedure § 210 (3d ed. 1880). (Emphasis added.)
attempt at escape. In like manner, in cases of larceny, and others in which there is a probability of finding evidence of guilt on the prisoner's person, he may be searched for them.

In addition, at least some of the judicial statements relied on by the Court seem to be directed not to the question whether a search is valid irrespective of the existence of justifying reasons but to a different question. Is a search of the person of the defendant, otherwise valid, to be held invalid because no warrant has been obtained? That there is such an exception to the warrant requirement is of course plainly established by the cases.\(^6\)

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

But to convert that statement of an exception to the warrant requirement into a rule of unqualified authority would strain the apparent purpose of the language, especially where it suggests the reasons which support, and presumably define, the power of search.

The Agnello language just quoted suggests a line of connection with another pair of cases of considerable historical importance, Rabinowitz and Chimel, already discussed. For Agnello suggests that the search of the person incident to arrest and the search of whatever portion of his premises may be searched without a warrant are to be regarded in the same light and are to be justified in the same way.\(^61\) While neither Rabinowitz nor Chimel deals with the proper scope of the search of the person, it seems to be assumed on all sides in the opinions that any search beyond the person is to be limited by probable cause.\(^62\) Mr. Justice White's dissent in Chimel makes plain that he is arguing for no stronger rule as to the zone beyond the person, though both he and the majority do suggest, somewhat ambiguously, that a different rule might apply to the

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\(^6\) Agnello v. United States, 269 U.S. 20, 30 (1925).

\(^61\) The implications of this passage seem to me inconsistent with the statement in the Court's opinion that the search of the person and the search of the area within his control have "been treated quite differently." 414 U.S. at 224.

\(^62\) Justice Minton's opinion in Rabinowitz is sufficiently opaque to suggest a possible qualification of this statement.
search of the person himself. But no authority is advanced to support this view, and the other cases, such as Agnello, seem to consider the search of the person and whatever other search is permitted in the same light. And, as the Court in Robinson recognized, a dictum in Peters v. New York plainly suggests some limitations on the power to search the person:

[T]he incident search was obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." Preston v. United States, 376 U.S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects.

But I think one should hesitate to place too much weight on these apparent assumptions, whichever way they cut, since in none of the cases is there an express and distinct consideration of the Robinson question. As Mr. Justice Rehnquist ultimately concluded, the question has not been authoritatively addressed by the Supreme Court, and there is conflicting evidence as to the Court's assumptions on the matter.

There is another branch of history to which the Court might properly look in attempting to resolve what its own cases have left open. What have in fact been the practices and understandings upon which the lower courts and police have operated, from the making of the Constitution on? For if a plain understanding permitting such searches on an automatic and unreviewable basis could be established, that would tend to support—though not conclusively—the majority's reading of the earlier Supreme Court statements. Here I can only refer to the findings of others. There is very little evidence to go on. In an essay attacking the views of Justice Frankfurter expressed in Rabinowitz, and later adopted by the Court in Chimel, Professor Telford Taylor has claimed that the Fourth Amendment was directed at the abuses of the warrant practice, that "none of the parties was at all concerned about warrantless searches

63 395 U.S. at 763, 773, 780–81.
64 392 U.S. 40, 67 (1968). Justice Harlan in his concurrence agreed with this statement only as a "factual observation," evidently refusing to accept it as a doctrine of limitation. 392 U.S. at 77.
incident to arrest," and, as a historical matter, that "[t]here is little reason to doubt the search of an arrestee's person and premises is as old as the institution of arrest itself." But if there is little reason to doubt, there is little reason to assert. We simply do not know much about eighteenth-century practice. In the nineteenth century we are little better off. The numerous state court opinions cited by the Supreme Court are cast in much the same general way as the Supreme Court opinions and are similarly accompanied by reasons which may be meant to suggest limitations. For example, the Court quotes an extensive passage from the early New Hampshire case of Closson v. Morrison which concluded:

We think the officer arresting a man for crime, not only may, but frequently should, make such searches and seizures; that in many cases they might be reasonable and proper, and courts would hold him harmless for so doing, when he acts in good faith, and from a regard to his own or the public safety, or the security of his prisoner.

And there is at least some evidence that the practice of searches was not wholly uniform. In Illinois, for example, it was said that "An officer has no right to search a prisoner unless he has a warrant authorizing him to make the search."

There is another difficulty, not mentioned in Robinson, in making sense of what evidence there is. Many of the statements of the right to search the arrestee seem to assume that he is to be placed in jail, which provides a whole new set of justifications for a search: to prevent the introduction of weapons and contraband to the jail, and to protect the police (by making an inventory of the defendant's possessions) against charges of theft, neglect, and the like. These factors are not present in the Robinson case—although they would be in a large number of arrest cases—because under District of Columbia law Robinson had a right to be released on payment

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66 47 N.H. 482, 485 (1867). The next sentence in the New Hampshire opinion makes the qualification express: "It must, we think, in a case like this, be a question of fact for the jury, whether the taking of the property from the prisoner were bona fide, for any purpose indicated above as reasonable and proper; and, of course, justifiable, or whether it were mala fide, unreasonable, and for an improper and unjustifiable purpose."

67 Moore, A Practical Treatise on Criminal Law § 148 (1876).
of a bond, without being incarcerated. Finally, as Mr. Justice Marshall made clear in his dissent, the majority relied on its view of past understandings without adequately dealing with the large number of contemporary cases which have held full searches impermissible incident to an arrest for a traffic violation, unless there were special circumstances supporting such intrusions.

The conclusion I come to about the history is different only in emphasis from that reached by the Court. It seems plain that the Supreme Court has never explicitly addressed the question presented by Robinson and there seems to have been no widespread and explicit understanding on the point. What we do have is, on the one hand, nearly unanimous general statements of the right to search incident to arrest and the absence of any Supreme Court holdings expressly limiting that right; on the other, statements of justification seeming to imply limitation, and a general understanding, running very deeply through the Fourth Amendment cases, that intrusions must be justified in some rational way by reference to those interests of the state they are meant to serve. How the tension between the requirement of justification and the general statements of authority to search should be resolved is a question the Court in Robinson properly regarded as left open by the earlier cases.

D. THE MERITS

I begin with a reminder of three important factual peculiarities of this case. (1) It is assumed that there existed no evidence of crime

68 Although the police plainly have a legitimate interest both in preventing the introduction of contraband and weapons into the jail and in protecting themselves against claims as custodians of items held, the right to search the defendant and his possessions should be limited to steps necessary to secure these ends. It may be, as Judge Leventhal has put it, "that a less extreme intrusion on privacy [marks] the limits of reasonableness, as by giving him an opportunity, like that accorded someone given a bathhouse locker for temporary use, to 'check' his belongings in a sealed envelope, perhaps upon executing a waiver releasing the office of any responsibility." United States v. Mills, 472 F.2d 1231, 1239 n.11 (D.C. Cir. 1972). United States v. Edwards, 94 S. Ct. 1234 (1974), may by implication have decided the question the other way. But that case does involve a search (for paint chips on an imprisoned defendant's clothes) for which there was probable cause, and can thus be distinguished from cases in which a search is engaged in solely for inventory purposes.

69 See cases cited 414 U.S. at 244–47, and 471 F.2d at 1103–05.
for which Jenks could have been searching.1 The arrest was a "full custody" arrest, after which the defendant was to be taken to the station and booked; but (3) incarceration could legally follow only if the defendant did not make bail. In these circumstances and in the light of the Fourth Amendment tradition described above, are the frisk, the seizure of the cigarette packet, and the opening of the packet to be regarded as permissible?

1. Terry v. Ohio: variations on a theme. One possibility is to regard the case as governed by Terry v. Ohio. If an officer can point to particular facts leading him to believe that the arrestee may be armed, he may carry on a "frisk" of the sort described in Terry to discover any weapons the arrestee might use. Where, as in Robinson, there is no claim that the search can be justified as a search for evidence, no search beyond such a frisk should be permitted incident to arrest. This analysis would limit the intrusion by the justifications that support it as determined with respect to the facts of the particular case.

70 What ought to be the scope when there is evidence for which the officer could have been looking? For such searches fall not within the "civil search" category I have suggested above, and, insofar as they are based upon probable cause, their fruits may be used against the defendant. What is unclear is what "probable cause" will mean in the search for evidence, a difficulty only obliquely adverted to in Warden v. Hayden, 387 U.S. 294 (1967), which for the first time held that "mere evidence" may be seized. The difficulty is this. In searches for contraband and fruits of crime, the only question is the probability that the searched-for items will be at the place where the search is to take place. With a search for evidence, there should be a new question as well, which is whether the evidence as to the existence of which there is the requisite probable cause is sufficiently probative to support the search. That is, in the first case the defendant has no right to the items in question and there is a plain right in the state to have them, if they can properly be found and seized. Evidence, however, may range from the critical piece of evidence likely to prove guilt—the bloody shirt, the fingerprint—to items of the most marginal importance to the trial of the case: cumulative evidence to show that the defendant was in Miami on the critical date, for example, or that he is in the stamp-collecting business, points which the defense might happily concede. At one stage of the present case, for example, it was urged that the search could have been validated on evidentiary grounds on the theory that the defendant might have been carrying the notice of permit revocation normally sent out by the motor vehicle department. 471 F.2d at 1094 n.17. This, it was argued, would be probative to demonstrate willfulness. What sort of interest in the evidence, beyond its marginal admissibility, need the government demonstrate in order to justify a search? If the argument made by the government were to suffice, the claim made in Warden v. Hayden that searches for evidence are "no more intrusive" than searches for contraband or stolen goods is a hollow one indeed. The require-
As the Court points out, however, there are substantial differences between the facts of *Terry* and the facts of custodial arrest cases that might make one hesitate to apply the *Terry* rule simpliciter. As a matter of psychology, the person subjected to arrest is probably more likely to use a weapon, if he has one, than is one who is simply being talked to by the police, as in *Terry*. He presumably has more to lose from what the police seek to do to him and more determined resistance on his part is, as a general matter, more likely. The physical circumstances of a custodial arrest are also significantly different from those of a stop and frisk, especially when the officer is alone and must take the arrestee to the station in his car. Because the officer's attention must be given to other matters, it will be easier for the arrestee to employ a weapon, if he has one, without interference by the officer, and it is less likely that an attempt to reach a weapon will give rise to "articulable suspicion" permitting a *Terry* frisk. For similar reasons, smaller and more carefully hidden weapons—razor blades, small knives, and the like—may present a greater danger in the arrest than the stop and frisk situation. Handcuffing may limit the danger, but a court naturally hesitates to turn such probabilities into rules of constitutional law. And, as the Court recognized in *Terry* itself, when we deal with the steps taken by an officer to protect himself because he genuinely feels endangered, we have to face the fact that rules may have very little effect on his conduct. Finally, there are special considerations favoring a highly restricted rule in *Terry* that do not apply here. In *Terry* there is by hypothesis no probable cause to arrest, and the only criterion by which the right to frisk is regulated is the vague "articulable suspicion." The *Terry* frisk rule, therefore, creates the danger of widespread and practically unreviewable frisks of the citizenry generally, at the whim or hunch of the policeman. In *Robinson*, by contrast, we assume a valid arrest based upon probable cause, and any automatic authorization will accordingly be narrowly limited in its impact.

мент in the new Federal Rules is that the items constitute "evidence" of crime, but it is most unclear how that term will be construed. Fed. R. Crim. P. 41.

71 "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27.
In response to such considerations as these, two variations on the *Terry* rule were suggested. Mr. Justice Marshall took the view that if there were some reason to believe the arrestee was armed, a search for arms could be much more thorough than the *Terry* frisk. But no search, or no search beyond a most minimal frisk, could properly go on unless there were some proper basis for particular suspicion at its initiation. Because he would have disposed of the case on other grounds—that even if the frisk was good, the opening of the packet was an intrusion not justifiable by the demands of the situation—Mr. Justice Marshall did not indicate what degree of suspicion should be required or how it should be measured. The trouble with requiring a particular suspicion based upon articulable facts is that it requires the Court to make post hoc judgments about the degree of risk, or probability of weapons, of a sort it cannot confidently or competently make. And the officer may legitimately feel that it does not speak fairly to the hazards and uncertainties of his task. He has no clear guides. His judgment must be made fast and on the basis of incomplete information. The requirement, if followed, puts him at risk of his life whenever he cannot justify his sense of danger by pointing to reportable facts. Yet he knows and we know that his sense of danger may be both real and accurate. We have all seen people so hard or mean in appearance that they make us feel uncomfortable, perhaps to the point of crossing the street or moving our seat on the subway. We have confidence in such judgments, and act on them ourselves, yet how could we explain them in a court of law? How can we ask an officer to do so?

Apparently moved by such doubts, the court of appeals adopted

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72 There are indications in the Marshall opinion that some unjustified frisk may be appropriate, but I think he would prefer to require some particularized suspicion for any intrusion.

73 These are difficulties with the limitations of the *Terry* rule, too, of course. But, as suggested above, in a case where there is no probable cause to arrest, the Court may properly feel that restrictions on the frisk are more important, lest the entire population be subject to the uncontrolled possibility of police frisk. *Robinson,* by contrast, assumes a contemporaneous valid arrest, and the class of persons exposed to any automatic search rule is correspondingly small. There is another facet to the distinction. In a large class of cases, at least, the state interest in the intrusion, and correspondingly the professional obligation of the policeman to proceed, is greater where there is probable cause to arrest than in a *Terry* investigation. More, that is, will be lost if the officer fails to act through uncertainty as to his safety or his right to protect himself.
a somewhat different version of the Terry rule, and held that whenever a custodial arrest is made a Terry frisk may be carried out, whether or not there are particular facts giving rise to articulable suspicion that the arrestee is armed. But given the differences suggested above between the Terry situation and the custodial arrest what assurance has the Court that the frisk will be adequate to its purposes?

In holding the Terry frisk an adequate device to uncover weapons, the court of appeals relied heavily upon the fact that Sergeant Donaldson admitted on cross-examination that a "properly conducted Terry-type frisk could uncover virtually every weapon he had ever encountered in the course of in-custody searches." And the Government arms expert, who appeared on the stand with twenty-five deadly weapons secreted on his person, admitted that "virtually all of these weapons could be detected in the course of a properly conducted frisk." But as the court's footnote makes plain, there was some confusion as to what he meant by the term "frisk," and to rest a constitutional holding upon such a factual basis makes one uneasy. Suppose in the next case more knowledge or skill on the part of the expert or the prosecuting attorney leads to testimony that contradicts these admissions? And it is admitted by the court of appeals that some weapons could not be discovered by a frisk.

In a world of violence, why should the officer not be able to take whatever steps are necessary to satisfy himself that he is not in danger from a person he has arrested?

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74 471 F.2d at 1100. The court of appeals and the Supreme Court seem to accept the following definition of a frisk, quoted in Terry, 392 U.S. at 17 n.13: "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and the area about the testicles, and entire surface of the legs down to the feet." The Court was quoting Priar & Martin, Searching and Disarming Criminals, 45 J. CRIM. L.C. & P.S. 481 (1954).

75 Ibid. It is worth noting that one of the weapons the expert produced, a .22 pistol made of a small aluminum tube, was hidden in a cigarette package. Id. at 1117-18 (Wilkey, J., dissenting). But Mr. Justice Marshall cites the FBI Uniform Crime Reports for the fact that of the 112 policemen killed on duty in 1972, 108 were killed by firearms, two by knives, and one each by a bomb and an automobile. Can one infer from such statistics that a frisk is perfectly adequate? We do not know from this report anything about woundings or attempts to wound; and it is not inconceivable that a limitation announced by the Supreme Court should influence the sort of weapons that are carried. For further discussion of these questions, see 471 F.2d at 1100.
The account I have given of the views of Mr. Justice Marshall and the court of appeals shows the rule of Robinson to enjoy at least partial support from those who oppose it. In holding that the right to search is automatic, the Supreme Court has the agreement of the court of appeals. In holding that the permitted search may be more extensive than a frisk, the agreement of Mr. Justice Marshall. The Court should not be regarded, then, as taking some politically motivated turn to the right, but as responding to considerations whose legitimacy is widely conceded. This is another way of saying that this is a genuinely hard case.

2. The Robinson rule of automatic authority to search. As Mr. Justice Marshall suggested, there are two distinct questions presented by Robinson: Is a full search of an arrestee's person for weapons automatically permissible, notwithstanding the apparent inconsistency of such a rule with the principle of particular justification? If such a search is automatically permissible—under what I have called the principle of general justification—is the Court right in validating the additional intrusion entailed in the opening and examination of the packet, and if so on what grounds? It may be that every interest of the officer could have been protected if he had simply retained the packet, without opening it, and returned it to Robinson when he was released. Since the Court made no inquiry into this factual question, it seems to permit this intrusion without requiring that it be justified in any fashion, even by reference to the needs of the situation stated in the most general way.

a) Opening the packet: a rule of lawlessness? Assuming for the moment that the automatic search is permissible as a reasonable response to the dangers typically present in arrest situations, can the opening of the packet be justified? By hypothesis there was no evidence to discover. And the officer could presumably have protected himself against the use of any weapon it might have contained by simply retaining it until the suspect was released. It is on these grounds that Mr. Justice Marshall dissents, and his concern seems well founded. An emergency situation, and the legitimate claims of the officer to protect himself, may justify a shift from the requirement of particular justification to a rule based upon general or categorical probabilities and necessities. But to permit the opening of the packet seems to abandon the very idea that the intrusion need be justified at all, that the government has an obligation to explain its intrusive behavior by reference to its legitimate interests and
concerns. This would disregard not only the standards of both halves of the Fourth Amendment but perhaps the most fundamental notion of legality, that the government is bound to justify its intrusions by rational reference to its legitimate concerns.\textsuperscript{77}

Imagine a situation in which an arrested person is being searched. He asks the officer, "Why are you searching me? Why are you taking away from me the things that I am carrying?" The officer may answer, "Because I am taking you to the station and I want to be sure that there is no weapon you may use against me." That response may or may not be sufficient under the standards of the Fourth Amendment but it is an exercise in reasoned justification. Contrast: "Why are you opening that packet—or wallet, or envelope—and examining what is in it?" The officer responds, in a paraphrase of Officer Jenks's words: "I'm just searching. I don't think about what I'm searching for. I'm just searching."

A rule permitting a search on the latter basis says, for the first time, that the citizen whose rights are invaded is not entitled to insist that the invasion be limited by either a particular or a general justification. Instead of being regarded as a person, whose interests clash with those of the police, the suspect is here told that in some important way he belongs to the police and not to himself. Earlier I suggested that the task of the Court under the Fourth Amendment could be said to find a way to talk about an irreconcilable clash of interests that did justice to the claims on both sides, to find a language in which the opposing sides could both talk, expressing their claims and defining their disagreement. The idea is not that either or both sides would be compelled to accept as right a decision reached, but that both should recognize that they have an opportunity to put their cases as rational people and have them heard. In \textit{Robinson}, the Court talked about the officer and citizen in radi-

\textsuperscript{77} In this sense, among others, the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment can be seen as intimately related, even if the particular criteria of the former were not thought to be "incorporated" in the latter. The interference by a police officer with a citizen's security and freedom—a search and seizure—is a deprivation of liberty or property to which the Due Process Clause should apply by its express terms. Even on the state of the law antedating \textit{Wolf v. Colorado}, 338 U.S. 25 (1949), and \textit{Mapp v. Ohio}, 367 U.S. 643 (1961), a state would presumably not have been permitted to authorize searches and seizures without rational reference to its legitimate concerns. To the extent that \textit{Robinson} establishes such an authority, it can be said to be inconsistent not only with the Fourth Amendment but with the most fundamental conceptions of the Due Process Clause and the principle that the police are rationally answerable to the law.
cally different ways, not as opposing litigants with equal standing, but of one as an agent who simply has power to use as he wills, and of the other as one who is simply subject to it. If a citizen asked how this part of Robinson defined his place in a public world he would find that he is given no right to insist that the officer explain or justify what he does; his role is simply to submit. What is more, since the power to which he is subject need not be justified or explained, there is no rational way to determine its scope. If the officer may look in the packet, may he open an envelope and read a letter? May he open a briefcase and read the files? Why not search the entire car, the home, the office? If the grant of authority is not based upon reasons, it cannot be limited by them either. The impact is one not of clarification but incoherence, for clarity is a function of intelligibility. And the effects run deep. However Robinson may be limited by future cases, it stands as a permanent rhetorical resource, a case that can be called upon in the widest range of cases by anyone who wishes to argue that the police should have one blanket power or another as a matter simply of "authority." If I read Robinson accurately in this way, it introduces into our constitutional law a principle of moral and intellectual brutality—a rule of authority rather than rationality—that is inconsistent with every aspect of our legal tradition.

Can the case be read any other way? As I understand the opinion of Mr. Justice Rehnquist it cannot. Indeed, it seems to be a primary purpose of this opinion to establish a radically new way of talking about the relationship between the suspect and the officer described above—and to that extent the case should be repudiated. But it may be that even this aspect of the holding of the case can be explained and supported in another way, with a far less disastrous impact on our tradition than seems to be implied in the majority opinion. In the first place, it is physically possible for the packet to have contained a weapon which might have been used against the officer. This distinguishes this search from the examination of documents, the reading of letters, or any intrusions beyond the area in which the suspect could reach, and may impose some limit on the rule of authority the case establishes. Second, the alarmist view of this case I have expressed above depends upon an assumption of fact: that the officer could have as easily protected himself by retaining the packet as by examining it. It may be that this was not true, or not felt to be true by the officer. We do not know whether
his uniform had an empty pocket that could easily be reached, for example. Third, it could be maintained that the intrusion actually occurring here was no greater than that we have assumed would be permissible, namely, retaining the packet until the release of the suspect. That is, the very retention of the item without examination is itself a substantial Fourth Amendment intrusion and perhaps there should be no constitutional significance in the difference between retention and examination. For example, if it were one's wallet that were in question, and if it contained no contraband or weapon, one might well prefer that it be searched and returned, instead of retained. It may be thought that the suspect should be able to choose which alternative is "more" intrusive, but it is perhaps not realistic to require, in every case and without regard to the peculiarities of the facts, that an arresting officer give such options to the people he is taking into custody. In sum, I think it would conflict with the attitude expressed by the Court, but not unduly strain its holding, to say that Robinson should authorize no search (a) that could not be said to be directed at weapons or evidence of the crime for which the arrest takes place; and (b) that was found to be more intrusive than an alternative in every respect equally protective and so perceived by the officer. A difficulty would remain. Suppose the search is within the permissible ambit, what response should be made to a defendant's offer to prove that the intrusion was in fact not motivated by an honest fear of weapons or belief in the existence of evidence? I propose below that a "good faith" limit should be adopted as the basis for relief in a civil action. But even without that limit, the narrowing construction proposed above would make this part of Robinson more nearly consistent with the principle of general justification, and many of its most troublesome or dangerous implications would be sharply curtailed. The proper result would then have been either a remand for determination of the factual question suggested, or a holding for the government on the grounds that the defendant had failed to carry his burden on the point.

b) Can the automatic right to search be justified? Should the

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78 There is some support for such reasoning. Chambers v. Maroney, 399 U.S. 42 (1970), upheld the warrantless search of a car that had been taken to the police station after an arrest, on the cumulative grounds that under Carroll v. United States, 267 U.S. 132 (1925), the warrantless search of the car on the highway, at the time of arrest, would have been valid and that the Court could not say that it was a greater intrusion to take the car to the station and search it there.
search incident to arrest be regulated under the traditional standards governing searches that are part of the criminal process—requiring a specific showing of probability on the basis of the particular facts—or should it properly be regulated under what I have called the principle of general justification, requiring only a showing of a legitimate governmental interest and a sufficient categorical or statistical probability to support the intrusion? The pressures are plain. On the one hand, the claim by the officer that he be free to do what he thinks necessary for his self-protection is an urgent and comprehensible one, and post hoc review of the particular risks and probabilities seems unworkable and even unfair. On the other hand, a truly automatic rule of authority to search would have enormous practical and theoretical consequences. A thorough search could be made of any person subjected to custodial arrest, including a wide range of traffic offenders, without any showing of any rationally based suspicion. An automatic rule would expose to an arbitrary and unreviewable exercise of police power every person who violates a substantial traffic rule, which is in practice virtually everyone. To the extent that not all of us are in fact arrested and searched when we make a left turn without signaling or when we go through a stoplight, the evil of the rule will shift from the breadth and multiplicity of the incursions on Fourth Amendment interests it authorizes to their discriminatory character. What is more, under Robinson's rule of nonreviewability it seems plain that searches may be carried out when there is in fact no sense of danger, no felt concern that the suspect may be armed, and to permit such searches seems to entail all the evils apparently implicit in the authority to open the packet. It defines the arrested person as an object of unregulated power, not entitled to insist that the asserted justification for a search be actually present in the particular facts or motives proceeded upon. This aspect of Robinson does more than legitimate demands of the police for security and their claims of expertise; it removes their conduct from regulation by law. Or so it seems. The case may not, however, go as far as it seems to go.

(1) What limits does Robinson suggest upon the authority it establishes? Suppose that you are seen by an officer going through a stop sign without coming to a complete stop. Does Robinson mean that a policeman may stop you; search you and your pockets for weapons; examine the contents of your wallet; rifle through
your briefcase; force you to remove your clothes; and probe your body cavities—all without making any particular claim of suspicion or probability? Presumably not all of those, but why not? Where and how is the line to be drawn? To ask that question is to invite examination of the opinion itself to see what criteria of limitation its reasoning may suggest.

(a) The most obvious limitation apparently suggested by Robinson itself is implied in the fact that here both the arrest and the search engaged in are said to be "required" by police regulations. It may accordingly be thought that Robinson promises a Fourth Amendment jurisprudence rather different from any so far suggested. At least where the police have sought to regulate themselves, the Court will not analyze the interests at stake in a particular case but will examine the pertinent regulation under a standard of reasonableness in light of the interests generally involved in the situation to which the regulation speaks. This system—while totally different from what we have had—would have some real merits. It would bring to bear what expertise the police can demonstrate in the form of a capacity to make and justify reasonable rules. And, assuming there is a mechanism for ensuring that what the rules "require" is in some sense really required of the police, it might substantially reduce the degree of discrimination in the exercise of police power, which, although surely not the major target of the Fourth Amendment, is a real evil that a sound Fourth Amendment law should curtail. Indeed one commentator has come out strongly for some such view of the Fourth Amendment. 79 But no such limitations, and no such theory of Fourth Amendment adjudication, can be grounded on Robinson, for in a companion case, Gustafson v. Florida, 80 the Court upheld a similar arrest and search where there was no regulation requiring that the arrest or search be made.

(b) Perhaps a more promising line is that suggested in some of the lower court opinions and at least referred to—though with what degree of approval it is hard to know—in the majority opinion. Arrests and searches under Robinson may possibly be held invalid if it can be shown that they are "pretextual" or "sham," that is, if the real motive of the officer in making the arrest and search was to find evidence of other crimes or to harass the suspect. 81 There

81 What the Court said, in disposing of the question in the present case is this: "We think it is sufficient for purposes of our decision that respondent was lawfully
are, however, several difficulties with any attempt to make this approach meaningful. First, the cases establishing the invalidity of pretextual searches are all lower court cases. The principle has never received solid Supreme Court articulation, and it is not clear, to me at least, that a majority of the Court would support it. I can imagine some Justices holding that if the police have the authority to make a particular intrusion, the arrest and search should not be invalidated simply because they made it for one reason rather than another. A more substantial difficulty is that it is most unclear what it means and how it would be administered, especially after the kind of lawmaking engaged in in Robinson itself. The citizen, after all, will almost never have direct and independent evidence of what the officer's motive was, and the officer will in almost all cases be able to claim that at worst his motives were mixed. To the extent that improper motive can be shown circumstantially, by evidence that there were no facts giving rise to articulable suspicion that the person was armed, or that other people similarly situated had not been similarly searched, the Court would be operating on premises inconsistent with those of Robinson and Gustafson themselves. For if no reason need support the searches of the person and of his belongings, it is tautological that they cannot be invalidated on the grounds that no reasons for them can be shown. A full-fledged "pretext" rule would require a showing of regularity or particular justification of exactly the kind Robinson says is no part of the constitutional inquiry. I think the pretext limitation will shrink to cover, if anything, only the case in which there is direct evidence of motive, as where a fellow officer reports that the searching officer told him that he was "going to get that guy the first chance I could."\(^8\)

(c) A limitation may be implicit in the Court's repeated reference to the fact that this was what the Court called a "full custody arrested for an offense, and that Jenks' placing him in custody following that arrest was not a departure from established police department practice. . . . We leave for another day questions which would arise on facts different from these." 414 U.S. at 221 n.1.

\(^8\) Perhaps pretext could be made out in one other class of cases on the basis of circumstantial evidence, i.e., where it could be shown that the officer habitually treated one race or sex differently from another. But that would be extremely difficult to prove and would not provide a serious limit on the power to search.
arrest," that is, an arrest to be followed by booking. Is a search of the Robinson kind to be possible only in a booking situation? The trouble is that even if such a requirement is established it is easily evaded. An officer can stop, arrest, and search on the claim that this is to be a full custody arrest. Then, if he finds nothing of an independently incriminating nature, he may presumably "change his mind" without objection from the arrestee, and let him go.

(d) A more promising suggestion is made by Mr. Justice Stewart in his concurrence in Gustafson, where he says that there may be some offenses for which a full custody arrest, whether or not authorized by state law, is not constitutionally permissible.83 (The standards for such a rule might be similar to those of the District of Columbia Code: a full custody arrest is appropriate only where the defendant has demonstrated a serious disregard for the safety of others or where there is good reason to believe that he would not respond to a summons.)84 This is an important and, so far as I am aware, a novel suggestion, which ought to receive serious consideration entirely apart from Robinson. For it should apply as well—and with even greater force, because the intrusion involved is so much greater—to the decision made at the next stage of the process, whether to hold the person arrested in jail, or permit him to go free on bail or on his own recognizance. This is a difficult field in which to make standards, and the Supreme Court has quite understandably left it virtually alone. Its importance is plain in Robinson's own case: the sixteen months in jail awaiting trial is by any measure a more serious imposition than the search he underwent. If this view were adopted, one result of Robinson might be some reduction in the litigation of cases raising the proper scope of a search incident to arrest but an increase in cases litigating the propriety of the arrest and detention decisions. Judicial attention to these questions is long overdue, but I think that they are properly considered independent of the rule of Robinson itself.85

(e) The Court does suggest a limit when it says that the search

83 414 U.S. at 266-67.
84 471 F.2d at 1097 n.23.
85 There is one other possible implication of the "full custodial arrest" language: it may provide the groundwork for a new way of addressing probable cause to arrest itself. It would be possible to have a scheme in which "probable cause" is required for a "full custodial arrest"—at which a Robinson search could go on—and permit detentions less than arrest on less than probable cause, where presumably only less severe intrusions would be appropriate—Terry frisks, Davis examinations, and perhaps interrogations, subject to whatever is left of the Miranda rule. This would permit both searches and "arrests"—at least in the tort sense—on less
in Robinson, “partook of none of the extreme or patently abusive characteristics which were held to violate the due process clause of the Fourteenth Amendment in Rochin v. California.” This would presumably invalidate a skin search or cavity probe incident to a traffic arrest, but beyond that how is the “extremity” or “abusiveness” of the search to be measured? If by reference to the legitimate concerns of the officer carrying on the search, the Court will be operating on premises inconsistent with those that establish the authority to search.

There would seem then to be no workable limits suggested in the opinion upon the blanket authority of the officer to search in any way he wishes the person and effects of anyone he subjects to a custodial arrest for any crime. Is there any way in which the claim of the officer to be able to take reasonable steps to protect himself and the rights of the individual against arbitrary or unjustified searches can be more fully and fairly reconciled?

(2) A proposal: the protective search as a civil search, subject to the principle of general justification and to suspension of the plain view rule. Here is my suggestion. The officer should have an automatic authority to make a full arms search incident to an arrest, even though this authority is inconsistent with the principle of particular justification, but nothing found in such a search should be admissible in a criminal trial of the person arrested. The premise is that the officer’s safety requires this much. Post hoc regulation by assessing specific probabilities is simply not workable, partly because there will often be unresolvable conflicts in testimony, partly because some very important facts—the attitude or appearance of the defendant—simply cannot be tested later. Moreover, deterrent rules are not likely to work where there is genuine fear. If there is one place a hunch ought to be able to function it is in a search for arms incident to arrest. As a matter of Fourth Amendment theory, such an authority could be justified on the grounds that the search in question is a civil, not a criminal, search, and should properly be regulated by what has been called the principle of general, not particular, justification. That is, the protective search for weapons can

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86 Need it be observed that the reference to the Fourteenth Amendment here is part of the general practice of a majority of the Court to refuse to speak approvingly of Mapp v. Ohio?
be regarded not as part of the criminal process—like a search for evidence—but as the sort of imposition, occasioned by plain public necessity, that is involved in housing code inspections, inoculation requirements, mandatory health examinations, entries to put out a fire, searches of air travelers, and the like, to be regulated under the “reasonable search” standard of the first clause of the Fourth Amendment, rather than by the criteria of the warrant clause.

The difficulty is that this rule, like the Robinson rule, exposes every arrestee to the unregulated and arbitrary power of the officer to search him, for any reason or no reason, whether or not he is in fact in fear of danger and searching for weapons. I have suggested that regulation through post hoc adjudication of the reasonableness of the fear or suspicion on the particular facts, implemented by a deterrent exclusionary rule, is not likely to be effective. Is there then any other way in which to regulate such searches, to attempt to ensure that the power to search for weapons be employed only for the reasons for which it is established? This is the aim of the second half of my proposal: nothing found during a search for weapons could be introduced in a criminal proceeding against the arrested person. This would involve a suspension of what is sometimes called the “plain view” rule, permitting the seizure of any seizable object found during a legitimate search, and this has its costs. But it would provide a way, however imperfect, to regulate the otherwise uncontrolled power established by Robinson. To regulate civil searches under the reasonableness standard of the first clause, subject to suspension of the plain view rule, would seem to provide a sensible and practical way to validate both civil searches and criminal searches without permitting the civil power to be used for criminal purposes, against the language and purpose of the Amendment. This analysis would give real force to both clauses, yet distinguish between them; and I believe it would make a rational and fair accommodation of the genuinely competing interests present in the arrest situation. But is there any authority for such a proposal?

While the Supreme Court has never suggested the use of such a limiting principle, several commentators have argued that the power established in Terry v. Ohio should be so regulated, and it is commonly thought that Peters v. New York,\(^7\) a companion case to

\(^7\)392 U.S. 40 (1968). In this case a burglary suspect was forcibly stopped in a hallway, and subjected to a pat-down. The officer retrieved from his pocket
Terry, was decided as it was in order to avoid addressing the question. In Camara and its companion cases the question neither arose nor was adverted to. Judge Aldrich has recently suggested that such a principle be applied in searches of air travelers, and Professor Amsterdam has recently added his voice to those who support it with respect to Terry frisks. One certainly cannot claim that there is solid Supreme Court authority for such a principle, but at the very least it seems true that the Court is free to adopt it without substantial interference with the Fourth Amendment tradition. Indeed, as I have tried to argue, this principle might be the best way to give real force to the most important strains in that tradition. And this does seem a rather obvious way to reconcile the urgent and legitimate demands of the officer that he be able to take what steps he thinks necessary to protect himself from harm, with the very real fear that this power will be abused.

Objections are possible along several lines. First, it may be thought insufficiently protective. The officer still has the power to carry out whatever search he wishes; the fact that what the search turns up will be of no value except to the officer’s safety may not in fact remove all incentives to carry on more extensive searches. He may search out of curiosity, or a desire to harass, or to find some item—contraband or stolen goods which he could, under existing law, retain for destruction or return to the proper owner even if the search were illegal. It is of course true that the removal of criminal evidence incentives will not perfectly regulate and con-


89 United States v. Skipwith, 482 F.2d 1272, 1280–81 (5th Cir. 1973) (Aldrich, J., concurring).

90 Amsterdam, supra note 52, at 427.
trol the search, but I think it is plain that it will help do so. And
the objection stated above goes far beyond my particular sugges-
tion. It exposes the insufficiency of exclusion as a technique of regu-
lation in any case. But to point to a partial insufficiency of a device
of regulation is not to say that the device is bad as far as it goes. The
question is rather how one proposal compares with others, or with
no regulation at all.

This brings me to a second line of objection. To prohibit the
use of evidence seen and seized during what is by hypothesis a
perfectly legal and valid search imposes a large social cost—the ex-
clusion of evidence for a most conjectural gain, the deterrence of
improperly motivated searches. What is more, it seems to make
the primary thrust of the Fourth Amendment the exclusion of evi-
dence, while in fact the major purpose is not that but to limit the
number and degree of intrusions, and the exclusionary rule is just
one remedial device to secure that goal. I would respond in the
following way:

(a) To call the search valid and legal by hypothesis is to state
conclusions in the form of premises. It is our question—an answer
to which should not be assumed—whether such searches are to be
valid notwithstanding noncompliance with the criteria of the war-
rant clause, and if so under what conditions? The presumption
should be against the validity of any search that does not comport
with the criteria of the warrant clause, which states the basic Fourth
Amendment standards. When a claim is made that an overriding
social concern should validate searches even though they do not
meet those standards, the appropriate attitude, it would seem to
me, is to limit the constitutionally dubious intrusion in every sen-
sible way.

(b) The nonapplication of the plain view rule would be such a
limitation. First, it would have some tendency, however imperfect,
to eliminate searches carried out for reasons other than proper ones
by making such searches fruitless, while a direct prohibition of
searches based on improper motives would be hard to enforce be-
cause of factual uncertainties. More important, it seems to me
wrong to regard the exclusionary rule as merely one remedy among
other remedies devised to enforce the Fourth Amendment, and
wrong to talk as if the only important question were whether an
"intrusion" was permitted, not what could be done after the in-
trusion occurred. Fourth Amendment privacy ought not to be re-
An option that is preserved intact or, by definition, utterly gone. It is a way of regulating a relationship between a citizen and his government. As I suggested in the introductory section, I think it can properly be said that the kind of "intrusion" against which the Fourth Amendment was primarily addressed was not a single but a double one: first, the forced entry and rummaging through one's effects; second, the seizure of one's possessions and their use against one, in a forfeiture or criminal proceeding. This is one sense, as the Court in Boyd v. United States91 said, in which the Fourth and Fifth Amendments "run almost into each other." To put it in dramatic terms: in one case, the right of the citizen to exclude officials is overridden because of some pressing necessity of the sort everyone can understand, to put out fires, stop airplane bombings, halt the spread of disease, and the like, but the officers may do only what the necessity authorizes. In the other, entry is gained under the claim of necessity but then what is found in the course of the "valid search" is used to convict or punish. Imagine it this way: each one of us has his field of property and privacy, secure against official intrusion; the necessities of public

91 116 U.S. 616, 630 (1886). Justice Black's concurrence in Mapp v. Ohio—necessary to a firm majority on the constitutional question involved—was expressly based on the view that the exclusionary rule was not merely a remedy devised to enforce a constitutional prohibition but emerged from the "close interrelationship" between the Fourth and Fifth Amendments. 367 U.S. at 662. The best exposition of the interrelationship between the principles limiting search and seizure and the principle that a person cannot be compelled to incriminate himself is still the Boyd case, together with its English forebear Entick v. Carrington, 19 How. St. Trials 1030 (1765). For development of the argument that the Fourth Amendment was primarily directed against searches for evidence to be used in criminal prosecutions and forfeitures, see the opinion of Justice Frankfurter in Frank v. Maryland, 359 U.S. 360 (1959). The contrary view—rejecting the distinction between civil and criminal searches—is developed in Comment, State Health Inspections and "Unreasonable Search": The Frank Exclusion of Civil Searches, 44 Minn. L. Rev. 513 (1960); Barrett, note 34 supra, at 70-74; LaFave, note 32 supra at 4-5, 36-38. The major point of these articles is not to claim that the criteria of the warrant clause should apply to such searches but to suggest that they should be subject to some substantial constitutional regulation. My proposal is meant to provide a theoretical basis for such regulation—the first clause of the Amendment—distinct from that for the regulation of criminal searches, and subject, for the reasons suggested, to different criteria.

I should also say that I think that the general view of the Fourth Amendment pressed here—that its most basic concern for both the intrusion and the later use of what is seized in a criminal or forfeiture proceeding—is the correct one. But agreement on that point is not essential to the proposed suspension of the "plain view" rule in civil searches, which is also supported—adequately I believe—by the need for some device to regulate such searches.
safety require that some invasions upon that field occur on the basis of general probabilities, and speaking as a group of ideal citizens, we agree that such intrusions should be permitted for those reasons and we submit to that civil obligation. But to allow the police to use what they discover in such searches in a criminal case against the ideally acquiescing citizen involves an unfair shift of role. It is as if one had lent one's car to the police to drive an injured person to the hospital and were later charged with possession of the marijuana seen on the seat by the officer, or with failure to have a proper inspection sticker. As a matter of ordinary expectation, the claim of an emergency implies a simplicity and consistency of relation, a fidelity to premises, which is betrayed by a conversion to a criminal proceeding.

To say, as some have, that the proposed distinction between civil and criminal searches cuts the wrong way—to provide greater protection to the criminal than the honest citizen\(^9\)—seems to me to misunderstand the special force of the Fourth Amendment and its connection with the Fifth Amendment and the rest of the Bill of Rights. It is of course true that the Amendment protects against "invasions" but it also protects against what can be done after the invasion has occurred. In *Marron v. United States*, it was held that the plain view rule should not apply to searches under warrant.\(^9\) Until *Warden v. Hayden*, the categories of items that were subject to seizure even pursuant to a legal search were carefully limited.\(^9\) When an intrusion occurs, a Fourth Amendment interest has been invaded; when the fruits of the invasion are used against one in a criminal proceeding, another "invasion"—to which the Fourth and Fifth Amendments have been thought to speak—occurs. Still another way to put it is this: when the search or seizure for purposes of the criminal law takes place, the criminal process has begun. And it has always been accepted that the citizen in that situation has special safeguards against the power the state proposes to use against him. It is not that the Amendments protect criminals more than honest people, but that they are meant primarily to regulate the criminal process, not the rational imposition of obligations of citizenship.

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\(^9\) This is the thrust of Barrett, note 34 supra.

\(^9\) 275 U.S. 192 (1927).

\(^9\) Gouled v. United States, 255 U.S. 298 (1921). *But see* People v. Chiagles, 237 N.Y. 193 (1923), in which Judge Cardozo holds that such limits under New York law do not apply to searches incident to arrest.
There is another obvious difficulty with my proposal. While the removal of criminal evidence incentives will tend to regulate searches incident to arrest and to keep them within proper bounds, it will not do so with perfect efficiency, and the question remains what, if anything, is to be done about those cases where it fails to do so? What additional limits upon the power to search should be judicially imposed? What shall be done about opening and reading letters; examination of the contents of wallets and billfolds; body cavity searches; opening crumpled cigarette packages? Shall there be any limit at all, or is the adjustment of incentives achieved by abolition of the plain view rule itself to be regarded as an adequate regulation? (We are speaking here necessarily of limits imposed in a civil, or perhaps criminal, proceeding against the officer, since any evidence obtained will by hypothesis be excluded in any event.) I would suggest that if in a civil proceeding brought by an arrestee to redress what he regards as an improper search, he can satisfy the trier of fact that an intrusion took place which was not honestly intended as a protective search, he should be entitled to recover damages for a violation of his constitutional rights. The burden should be on the plaintiff, and great latitude should be afforded the officer's judgment, as no doubt it would be. But the reading of documents, the examination of pictures, and searches beyond the area into which the suspect could reach, would be plainly bad. In Robinson itself, the plaintiff should recover if he can demonstrate that the officer knowingly failed to employ a less intrusive and costless alternative to examination of the packet. On the facts he might or might not be able to do that, and it is perhaps wrong to claim on what we know of the case that one result or another is required.

I do not claim that this proposal will work with machinelike

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06 One could do worse for a starting point than the statement of the Supreme Court of New Hampshire in Closson v. Morrison, 47 N.H. 482 (1867), whose general statement of the right to search incident to arrest was relied on by the Court in Robinson. In a sentence not quoted in Robinson, the New Hampshire court said: "It must, we think, in a case like this, be a question of fact for the jury, whether the taking of the property from the prisoner were bona fide, for any purpose indicated above as reasonable and proper, and, of course, justifiable, or whether it were mala fide, unreasonable, and for an improper and unjustifiable purpose." Id. at 485. While the standard is framed in terms of good faith or honest purpose, no doubt the relative reasonableness or unreasonableness of a claimed belief would properly be considered relevant by any trier of fact asked to determine motive. No legislation is necessary to permit such civil relief in the federal courts. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), on remand, 456 F.2d 1339 (2d Cir. 1972).
efficiency to permit all searches that ought to occur and to prevent all searches that ought not to occur. But no proposal is likely to do that. It does seem to me that this resolution speaks to the officer in a way that does justice to the dangers and complexities of his job, respects his claims to expertise, and provides him with a rule he can follow, that he may carry on a search reasonably and honestly calculated to produce weapons. To the arrested citizen it speaks with a very different voice from Robinson. It does require that he be subjected to intrusions of a kind the general or categorical necessity for which should be plain enough. Yet it protects him, so far as the law can do so, against searches designed for other purposes, and against deceit and abuse, by removing the incentive for improper searches and by providing a remedy for abuse of power if it occurs. The officer is told that he must be prepared to explain what he has done in light of the purposes of the authority he has been granted, but that is no less than he should be expected to do. The citizen is told that he may recover if he can show that the authority has been exceeded, which he should be entitled to do. It is true that successful civil actions will not be numerous, since they will be inhibited by the cost of suing, the frequent unattractiveness of the plaintiff, and the probable low amount of damages. But that is true of civil suits now, against both policemen and other citizens, and perhaps ought to be true. If the intrusion is not the beginning of the criminal process, the first step in the exercise of the power of the state to try and convict, it seems appropriate that it should be regarded as an ordinary tort, subject to the usual restrictions on such actions. More than any other alternative, I think this proposal would define the officer and suspect in ways each could respect, and give maximum recognition to the legitimate claims on both sides and to the obligation of the court to subject official behavior to a rule of law.

III. DEFINING THE CITIZEN IN UNITED STATES v. MATLOCK: THE PRIVACY OF POSSESSORY AND SOCIAL RELATIONSHIPS

[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.96

A. INTRODUCTION

I have suggested that one way to regard the Court’s function under the Fourth Amendment is to say that it is to regulate the dramatic relationship between the officer and the citizen by creating a language of adjudication in which each can find a place for his most compelling claims and interests. The emphasis in *Robinson* is on an attempt to talk to the officer with the clarity he legitimately demands and with a recognition of the imperatives of a repeatedly dangerous situation that is, through the protean variety of forms it takes, simply not susceptible to regulation through clear rules. In *Matlock*, the emphasis is on the other major participant in the situation, the suspect, and the general question which the case addresses is how he is to be defined and addressed by the Court. In what language are the interests or values protected by the Fourth Amendment to be stated? What notions of security or privacy or property or autonomy are to be employed, and how are they to be given meaning? In some cases—*Matlock* included—there is a complicating second layer of questions. What shall be the treatment of arrangements made by the individual with others, parcelling out, sharing, and qualifying whatever it is that is the object of Fourth Amendment protection? Part of the definition of personal privacy is what might be called social or communal privacy, the interest people have in the security of their arrangements for sharing what they have with others. How is this aspect of privacy to be talked about by the Court?

Another way to put the general problem is to say that the language of the Fourth Amendment must presuppose another language which can provide a context by which its terms can be given meaning, a way of deciding what “their” houses, papers, and effects are, and when they have been “searched” or “seized.” Is this language simply to be that of the state law of property? As we have seen, *Olmstead* seemed to suggest so, but *Katz* plainly held that even where there is no state “property” right there can be a “privacy”

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97 But perhaps this case can be read differently. It employs a conception of trespass without making explicit reference to state definitions, and it may be that its conceptions of possession and trespass are constitutional ones. (Of course the case explicitly disregards the state law prohibiting wiretaps.) This reading of *Olmstead* would support the reading of *Matlock* suggested in the text.
interested protected by the Fourth Amendment. And surely the state power to break down the protections of the Fourth Amendment through its property laws—by creating general easements in favor of the police, defining the interest of tenants in apartments, hotels, and dormitories as subject to the authority of the manager to consent to police searches—ought to be subject to some constitutional control. On the other hand, it is plain that to a large extent one's important interests—the elements of one's legal identity—are created or defined by the state, through its property, contract, or agency law. Attempts to define "privacy" without reference to such terms have not been successful in any of the situations in which that has been attempted. It may be that privacy, like happiness, cannot be talked about directly but only through the use of other, subsidiary, languages.

Matlock involved a common but difficult form of the problem. Two people have an interest in the same premises. Over the objection of one, the ultimate defendant, the other consents to the search of the premises and evidence is found that is used against the ultimate defendant. How shall such cases be analyzed? How is the authority of the consenter to be defined, justified, and limited? Does it rest, for example, on an implied contract and if so could an express term the other way negate the authority? Or is it thought that one occupant is the "agent" of the other, empowered to consent on his behalf? Or does the authority somehow flow directly from the property or possessory interests that are shared, and if so, why? Whatever the ground of the authority, what is its scope: to permit the search of common areas; of each other's bedrooms; of the contents of desk, bureau, or briefcase?

B. THE MATLOCK CASE: FACTS AND OPINION

The defendant Matlock was validly arrested for bank robbery in the yard of a house where he lived as a paying boarder, sharing

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98 But whether there is implicit a notion that the defendant had "possession" of the telephone booth, with which purely electronic devices interfered as effectively as a trespass, is less clear. That question would be presented where there was interception of a conversation in the open, for example by a microphone that was ultrasensitive, operated from long distance, or by one that was planted in a park bench or telephone pole. The Court has not dealt with such a case.

a room with one Mrs. Graff. The house was rented by the parents of Mrs. Graff, who also lived there along with several of their other children. After the arrest, three policemen went to the door of the house and told Mrs. Graff that they were looking for money and asked for permission to search the house. Although at trial she denied it, the lower court found that she consented voluntarily to the search of the house, including the east bedroom, which she shared with Matlock. In a diaper bag in the only closet in that room the police found $4,995, whose admissibility in Matlock's subsequent trial for bank robbery is at issue here. After the search she told the policemen that she and Matlock shared the bedroom and the dresser on a regular basis, and there was testimony that both she and Matlock had said on several occasions that they were married.

The lower court excluded the money, because the evidence proffered to demonstrate Mrs. Graff's authority to consent included her statements to the police, which were hearsay and therefore inadmissible to demonstrate the truth of the facts stated, namely, that the bedroom was shared by Matlock and Mrs. Graff. The Supreme Court, through Mr. Justice White, reversed on the grounds that hearsay is not to be automatically excluded from suppression hearings, and that in any event these statements were against Mrs. Graff's penal interest—since extramarital cohabitation was a crime—and this lent them additional weight. On the basis of the evidence in the record the Court believed that the prosecution had sustained its burden of proving that Mrs. Graff had, as a matter of fact, the authority to make a valid consent to the search of the east bedroom, but remanded to permit the trial court to make its own determination of that question. Reaffirming Schneckloth v. Bustamonte, the Supreme Court held that Mrs. Graff's consent was not rendered invalid by the absence of a showing that she knew or was told that she had the right to refuse. Mr. Justice

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100 The lower court held that if a reasonable belief on the part of the officers in Mrs. Graff's authority would support the search, the statements should be admissible to demonstrate the existence of such belief, but that since the correct rule is that the consent is valid only where there is authority in fact, not where there is merely the appearance of authority, the statements should be excluded. The Supreme Court did not reach the question of "apparent authority." 415 U.S. at 177 n.14.

Douglas dissented on the grounds that a warrant should have been obtained; Justices Brennan and Marshall, on the grounds that the remand should have included investigation into the voluntariness of Mrs. Graff's consent on the theory—which had been repudiated in Schneckloth—that her consent should be considered invalid unless it were shown that she knew that she had the right to refuse.

What interests me most in this case is the simple principle which the Court adopts without much comment except to say, accurately enough, that it has been widely accepted: "[V]oluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant . . . ."102 As authority for this principle, the Court relies upon a large number of lower court cases and on the opinion by Mr. Justice Marshall in Frazier v. Cupp, involving the search of a duffel bag which the petitioner had used jointly with his cousin, Rawls, who had consented to the search: "Since Rawls was a joint user of the bag, he clearly had authority to consent to its search."103 The only explanation or analysis of the rule in Matlock appears in a footnote:104

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

These statements, which meet with nearly universal acceptance on the Court, seem to me to raise important and difficult questions which deserve extensive consideration.

What is the basis of the authority of one person who has an interest in or relationship with particular premises to consent to their search by police seeking evidence against another person who also has some interest or relationship in the premises? Is this authority rooted in the consent of the ultimate defendant, some legal relationship between them, or in considerations of policy?

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102 415 U.S. at 169.
104 415 U.S. at 171 n.7.
How are the scope of the authority, and the nature of the "interest" or "relationship" necessary to give rise to it, to be defined? What is the proper place, if any, of state law of property, contract, and agency in analyzing these questions? What role and definition, if any, should be given to a federal constitutional law of "privacy," grounded in Katz and Griswold?105

C. EXPLICATION DU TEXTE

In what follows I am interested in trying to work out what seem to be the bases and implications of the Court's rather lapidary statements quoted above. Its basic rule seems to me to be right, although I suggest one or two ways in which its implications might have led to modification of the result in Matlock. The principles and attitudes which seem to underlie and justify the rule employed here have far-reaching consequences for the ways in which the protections of the Fourth Amendment are to be defined.

1. The basis of the joint-occupant's authority: "consent" or "possession"? Upon what basis does the authority of the joint occupant rest? Is it rooted in the ultimate defendant's own consent, or does it emerge from the fact of shared possession, or can it be explained in some other way?

We can begin by putting aside two extreme cases. First, it is plain enough that if the consenter is the only person with an interest in the premises—that is, if the person against whom the search is directed is a trespasser—his authority to consent to the search is absolute. But in such a case the ultimate defendant would lack standing to object even if the search were wholly invalid.106 At the other end of the scale, it is apparently the case that if the consenter has no interest, real or apparent, in the premises, he cannot validly consent to the search under any circumstances.107

It appears that, as the Court conceives it, the authority of the

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107 It seems to be accepted, however, that if such a person carries out the search himself, without prior arrangement with the police, the evidence taken would be admissible on the grounds that there was no state action and hence no Fourth Amendment violation. I am not sure that this proposition should be so easily accepted: certainly there can be a kind of after-the-fact ratification of the trespassory conduct by the police; and there is the jurisdictionally necessary state action in the use of the evidence at trial.
joint occupant to make a valid consent to a search directed against the ultimate defendant is of a peculiar, hybrid sort. It does not rest upon the immediate or express consent of the defendant to the existence or exercise of that specific power; yet it is grounded in the voluntary action of the defendant in entering that relationship, and the conduct which gives rise to the authority in another must no doubt be free. There is no intimation in Matlock or the other joint occupancy cases that the result would be different if the parties had expressly agreed that neither could authorize the search of the premises, or if the defendant, present and objecting, formally revoked whatever authority he is held to have earlier given. The authority arises, it is said, in some conclusory and irrevocable way from the fact of joint occupancy itself. But on what proper basis can the Court—or the state—give such unintended consequences to the defendant’s conduct? If the authority to consent to a search is not grounded in the consent of the defendant, what is it grounded in and how can its scope be determined?

Perhaps comparison with another set of cases may make clear the peculiarity of the Court’s treatment of joint occupancy. When the Court says that the authority to consent depends upon “mutual use” and not a “mere property interest,” it suggests that the cases in which property interests, but not possession, are shared would be decided differently. Suppose, for example, it is asserted that a landlord who has rented a house or apartment has the authority, by virtue of state law or the nature of his relationship with the premises and the tenant, to consent to a police search of the premises; or it is argued that a hotel or motel clerk has similar powers with respect to the rooms in the building. How are these cases to be analyzed?

Presumably, of course, an authority to consent to a search could rest on the genuine consent of the ultimate defendant, if there were, for example, an agreement between him and the landlord giving the latter an irrevocable authority to search or to consent to a police search. Such an authority might in fact be bargained for, serving much the same purpose as a damage deposit, and a police search consented to pursuant to such an agreement, at least if carried on for the purposes contemplated by the parties when they established the authority, would be valid even against a contemporaneously ob-

108 Cases which suggest these questions, but propose no analysis of them, are Chapman v. United States, 365 U.S. 610 (1961), and Stoner v. California, 376 U.S. 483 (1964).
jecting tenant. But could such an authority be raised by operation of law upon the fact of tenancy, without regard to the existence of actual consent, as it apparently is in the joint occupancy case? Suppose for example that a state statute—either by direct mandate or by providing that leases shall be so construed “unless otherwise agreed”—gives the landlord the right to enter the premises at any time, or to authorize the police to do so, or that a statutory provision gives similar powers to a hotel clerk. Or consider another variant. Exercising a power established by state law, a motel keeper gives the police permission to enter a room still occupied after checkout time, when the tenant’s right to remain has expired; or a landlord does so with respect to an apartment where the rent is overdue. 109

While the landlord and hotel clerk cases have not been decided by the Court, it seems plain that there is thought to be a substantial distinction between them and the joint occupancy cases, based upon the fact that in the latter there is a sharing of possession. 110 Indeed, in stating the landlord and hotel cases I have asked whether creation of the authority to consent by state law would be valid. In Matlock the Supreme Court does not rely upon state law defining the rights and powers of co-possessors, but itself declares that the authority to consent arises from the fact of shared possession. How can this peculiar treatment of the shared possession cases be explained? The Court seems to declare that one who has chosen to share possession with another has, as a matter of constitutional law, placed this aspect of his privacy irrevocably in the hands of the joint occupant, without regard to any express or implied contractual terms between them—surely the usual term of any such agreement would be to prohibit, not authorize, consent to police searches—and without explaining why the authority to consent should not be subject, like other aspects of legal and property relations, to the power of contract. If the ultimate defendant can exclude whom he wishes, and limit by contract the landlord’s power to permit a search, as he presumably can, why can he not share premises on the express or im-


110 While the Court has not explicitly addressed the landlord or hotel clerk cases in their purest form, it is plain that they are regarded as presenting difficulties that are absent in the joint occupancy cases. In both Stoner and Chapman the searches were held invalid; the question avoided was what the impact would have been of a state law authorizing the clerk or landlord to search.
plied condition that the other person never authorize a search? One way to approach the matter would be to say that no "reasonable expectation of privacy" within the *Katz* terminology can be grounded on a contractual arrangement whose purpose is to promote, commit, or conceal a crime. But that does not really distinguish the tenant's power to limit by contract the power of the landlord, which may be exercised for such purposes too, or the sole possessor's power to exclude the universe, which he is entitled to do for any reason at all. What seems to me critical to the shared possession cases is that the paradigmatic situation of officer and citizen has been expanded to include another person who has himself a role to play, if he chooses to do so, as an interested and cooperative citizen, and it is thought important in our interest as well as his to keep him free to play that role. He may be moved by public spirit, by a desire to dissociate himself from risk, or other motives, but the Court's rule is designed to leave him free to make the choice himself. What this amounts to is a constitutional definition of the joint occupant as a citizen whose freedom to act in his own or the public interest by permitting a police search cannot—as a matter of constitutional law—be limited by contract. The defendant is entitled, on this analysis, not to the enforcement of a promise or understanding not to exercise the power, but to have the other person himself freely make that decision.

Under this view, which seems implicit in *Matlock*, the sharing of possession is the critical act that changes the relationship between the parties and creates the authority to consent in the joint occupant. Where the ultimate defendant has not chosen to share possession, he would presumably be secure from police intrusion except where either: (a) the warrant and probable cause requirements, or other usual Fourth Amendment criteria for a forcible search, are met; or (b) he has in a knowing and voluntary way consented to the establishment of an authority in another person to permit searches. This way of looking at these cases makes "possession" a term of constitutional law, used to define part of the context against which the words "search" and "seizure" can be given meaning. It would disregard the state law of property affecting the conditions of possession except insofar as such provisions of state law might be used to support a claim of consent in fact. In cases where possession is not shared, the right to authorize police entry would have to rest upon actual consent, not provisions of state law. The wrongful possessor
could of course be ejected from possession—when he fails to pay the rent or hangs on after checkout time—and no doubt state force might be employed for such a purpose. But he would retain a Fourth Amendment right against searches for other purposes and searches more extensive than those necessary for the ejection.

The use of shared possession as the critical fact in establishing the authority in a third party to consent is of course to some extent conclusory. The landlord, the remaindeman, the neighbor, may also be said to have interests in the premises and in the investigation of crime. But the possession criterion has the merit of using a well-established and reasonably clear language to define both a centrally protected Fourth Amendment interest and the conditions under which one’s power to exclude the universe is limited by being shared. This is a way of giving meaning to the word “their” in the phrase, “their house, papers, and effects” and establishing a way of talking about different kinds and degrees of sharing which will involve a minimum of interference with the accepted language of state legal systems and the expectations of private parties.

How should the Court deal with a case in which the consenting third party does not in fact share possession, or have any other actual authority to consent, but in which the police reasonably believe him to be a copossessor or otherwise to have such authority? Since the analysis I propose is not a way of assessing the reasonableness of police conduct but a way of defining legitimate expectations of privacy, a search pursuant to such a consent could not be valid unless it is the conduct of the defendant himself that has given rise to the appearance of authority. This rule would present a problem for the police only where they had sufficient probable cause to obtain a warrant and were undecided whether to proceed under the consent or to seek a warrant. In such cases the proposed rule would make them favor the warrant mechanism, which should be preferred in any event.

What is proposed here is a test both for determining when an authority to consent exists and for determining the scope of such an authority. It should go no further than the degree to which possession is shared in fact. Common areas of an apartment, for example, will normally be shared completely; bedrooms, closets, bureaus, and the like may or may not be; suitcases, briefcases, letters, files will most often not. But in each case the inquiry ought to be into the arrangements made between the occupants in fact, and their
disposition of possessory rights ought to be controlling. In Matlock, for example, the bedroom had only one closet and this was shared by Mrs. Graff and the defendant; her consent to the search of that closet should therefore be permissible. We do not know what the arrangement was with respect to the diaper bag—it may have been among the effects not jointly used—and the remand order in Matlock should accordingly have required determination of that fact.

2. What is the constitutional relevance of the joint occupant's consent? I now want to address another peculiarity of the rule that gives the joint possessor the authority to consent, without regard to the expectations of the ultimate defendant or any contractual relations between the two. To the extent that the Court makes the validity of the search depend upon the voluntariness of the consent given by the third party it creates and protects a Fourth Amendment interest of a kind it has never explicited or defined, what might be called a sort of social privacy. One can ask, after all, what constitutional interest the ultimate defendant—who has created this authority in another—can be said to have in seeing that it is exercised voluntarily rather than through deceit or duress? If we say that the ultimate defendant has exposed this segment of his privacy to invasion, of what constitutional significance is it to him that the invasion takes place through the consent of the third party or through some other route?

What seems necessarily implied in the requirement of voluntary consent is that the ultimate defendant has a right, protectable by the Fourth Amendment, to have the person in whom he has created the authority himself decide how to exercise it. The person with whom he has made the arrangement is the repository, as it were, of his privacy, and while the defendant is not protected against the free choice on the part of such a person to exercise that power against him, it seems implicit in the Court's analysis that he has a constitutionally protectable stake that that choice be free.

What this suggests is that where the joint occupant himself decides to initiate the search, by calling the police, or where—upon being informed by the police or otherwise of all relevant facts, presumably including his right to refuse—he agrees to the search at police request, the search will be valid.111 If the consent is not free

111 The distinction between searches initiated by the police and those initiated by the joint occupant is articulated and elaborated in Comment, Third-Party Consent Searches: An Alternative Analysis, 41 U. Chi. L. Rev. 121, 135–40 (1973).
and informed it should be held invalid, even if there is authority to
make such a consent. This does not tell us how "free and informed"
the choice need be, but I think that this inquiry should involve
much more than the question, obviously involved, whether the pol-
lice have engaged in uncivilized tactics or methods to secure the
consent, for more is involved here than the interest of the consenter
against unfair pressure or abuse. At stake is the ultimate defendant's
own interest in the security of the private relationships he is entitled
to establish. The Court's opinion in Matlock, which disposes of the
matter by merely saying that "voluntariness" is a matter of fact,
that no knowledge of the right to refuse need affirmatively be
shown, while correct so far as it goes, is too curt to do justice to
the problem presented. How is voluntariness to be measured? What
should be the relevance of police promises of leniency or threats of
harshness? Suppose the defendant can show that the consenter did
not know he was free to refuse, or thought he was obliged to grant
the permission requested? These are not side issues, but squarely
raise a question of major Fourth Amendment concern. What pro-
tection is to be afforded the network of private relationships that
make up our ordinary social world?

3. Connections with the secret agent cases. I should like now
to explore some connections between the joint occupancy case and
the highly problematic secret agent cases, which can be said to pre-
sent another aspect of the right to social privacy. The connections
I suggest will not make the difficulties of these cases disappear, but
I think they may uncover some important lines of concern and
perhaps suggest a way of talking about Fourth Amendment inter-
est that has even wider application.

Let us start with the case in which the secretary of an employer
reports incriminating information to the police. If there is no prior
relationship with the police, it is said that there is no state action and
hence no Fourth Amendment problem, no matter what contractual or

112 It is important to note that the decision in Schmeckloth was a "narrow one;"
bearing only on what the Government need prove as part of its case to establish
the voluntariness of consent: "[W]hile the subject's knowledge of a right to refuse
is a factor to be taken into account, the prosecution is not required to demonstrate
such knowledge as a prerequisite to establishing a voluntary consent." 412 U.S. at
249. What this amounts to is a sensible refusal to extend to this field the "warning"
requirements of Miranda. But it leaves open what the effect should be of a per-
suasive showing by the defendant of ignorance of the right to refuse. It does
not tell us what weight should be given the "factor" it declares relevant.
statutory provision the secretary may have violated in revealing the information.\footnote{As suggested above in note 107, it seems to me that in extreme cases at least a doctrine of ratification might be employed to prevent the use of evidence obtained in an illegal way.} Suppose after giving some information to the police the secretary returns, under an agreement with them, to obtain more. Here the secretary is presumably a state agent, and if he searched beyond the zone connected with his employment, that is to say beyond the zone established by his employer's consent, it would be an unreasonable search and seizure under the Fourth Amendment.\footnote{Gouled v. United States, 255 U.S. 298 (1921).} But may he continue to report what he discovers in the ordinary course of his employment? Presumably so, since he has simply exercised the power the employer has placed in his hands to communicate incriminating information to the police. In revealing the information, the Court has said, the employer "runs the risk" that it will be carried further.\footnote{The most complete elaboration of the "risk" analysis, as applied to secret agent cases, appears in United States v. White, 401 U.S. 745 (1971).} Presumably it would be irrelevant that the employee had promised him never to tell anyone what he learned, and irrelevant to say that the employer had never consented to the revelation. If these cases are decided as I suggest, can there be a Fourth Amendment violation when the police arrange with a secretarial company to have a policeman sent over the next time the defendant asks for a secretary, in order to spy on him, insofar as he can do so without making any searches beyond those normally entailed in the job? Or take the standard meterman hypothetical. If the man from the gas company may report to the police what he saw in my cellar when he checked the meter, and may arrange with them to make similar reports in the future, does it follow that the "meterman" may in fact be a police officer, planted by agreement with the gas company, to discover what he can during a routine meter-reading? Or the hotel maid. If she can report what she sees, or can be persuaded by the police so to report, can the "maid" be a policewoman who will discover what she can of my affairs when she engages in a routine cleaning of the room? (In all cases, assume that the planted official takes no action, opens no drawer or file, examines no object, that a person normally performing the function in question would not do.)
I would like to suggest that there are critical differences between the cases in which the actual employee or maid or meterman chooses to cooperate as a police agent and those in which he or she is from the beginning a plant. In the first place, the planting procedure will produce in gross a larger number of intrusions and increase the sense of general vulnerability to such exposure.\textsuperscript{116} Second, to validate domestic espionage would radically change the sort of relationship a person may have with those with whom he deals in the ordinary course of living. Instead of asking how likely it is that this independent person, this ordinary secretary or maid or meterman, may be persuaded to act for the police, he must ask how likely it is that this apparent secretary or meterman or maid is really an official in disguise. This requires him to make a judgment about others wholly different from any we normally think of ourselves as having to make, for one must not only assess the likelihood that such-and-such a person will prove loyal, but the likelihood that the person with whom one is dealing is a skilled professional dissembler, able to manufacture the usual indicia of reliability. This would uproot one's confidence to estimate risks, judge character, and protect by good social judgment one's privacy even while working in a cooperative or communal way. And this sense of sudden uncertainty is introduced into the lives not only of those engaged in crime but those in whose activities the police may be thought to have any interest, including political and social organizations.\textsuperscript{117}

One way to define what would be protected here is to call it an interest in the ordinariness of social life.\textsuperscript{118} Finally, there is another important distinction between the two classes of cases, based on the interests of the reporter. In the case where a person has decided

\textsuperscript{116} This is a factor that should have been considered in Warden v. Hayden, 387 U.S. 294 (1967), which greatly increased the sorts of items that can be the object of—and therefore the occasion for—a search. It is given weight in Justice Harlan's dissent in United States v. White, 401 U.S. 745. The major thrust of that opinion is the second point mentioned above, i.e., the effect of a rule upon the general sense of security and privacy, which Justice Harlan rightly regards as one of the important objects of Fourth Amendment concern.

\textsuperscript{117} As I suggest below, the use of such agents might well be appropriate if regulated by the warrant and probable cause criteria.

\textsuperscript{118} In his analysis of these cases, which differs somewhat from mine as to result, Professor Weinreb uses a similar terminology to explain the interest in social privacy that is at stake, Weinreb, The Generalities of the Fourth Amendment, to be published in volume 42 of the University of Chicago Law Review.
to help the police rather than the suspicious person with whom the
prior relations exist, both we as the public and he as a person have
a strong interest in having his freedom of choice protected, just as
we do with that of the joint occupant. The third person added to
the drama has claims and interests that arise independently of the
struggle between the defendant and the officer. In the "plant" case
those interests disappear. We have only the officer, whose interest
is in investigating crime in an official way, and he has no inde-
pendent interest in a freedom to choose how to exercise a power
that has come upon him in the course of his ordinary experience.

This analysis would leave untouched two classical secret agent
cases. In *Lewis v. United States*,119 the agent, pretending to be a
buyer of marijuana, telephoned the defendant at his home and ar-
ranged to buy some marijuana from him. In such a case there should
be no Fourth Amendment violation when the agent enters the house
to make a purchase, because the only ordinariness of life that would
be so protected is the expectation that an apparent criminal is what
he appears to be. More traditional ways to put the point would be
to say that no "reasonable" expectation of privacy can be grounded
on an implicit or explicit representation by a stranger that he is
indeed a criminal. To permit such deceptions will, after all, expose
to police spying only those people who express to strangers a will-
ingness to engage in criminal activity. The ordinary citizen can be
secure, so far as the law can make him secure, from such intru-
sions.120 In *Hoffa v. United States*121 the defendant did not imme-
diately reveal his criminal purposes to the secret agent, but in that
case the agent was personally known to the defendant from prior
transactions. The situation is thus analogous to that where the sec-
retary decides to give the police information, not to the one where
he is a planted spy to begin with. The people you know, that is,
may decide to report, on an occasional or systematic basis, what
you reveal to them. But with respect to relationships with others
that are not criminal in their inception, one should be entitled to

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120 It is this criterion upon which Justice Harlan would have relied to hold
the use of "bugged informers" invalid in *United States v. White*, 401 U.S. at 787.
Although Justice Harlan did not say so, it seems to me that the reasoning of that
opinion would lead to Fourth Amendment control of secret agents at least in the
situations, and to the extent, suggested in this article.

the protection of one's ordinary expectation as to their identity.\footnote{122} After that one chooses one's risks.

The interest in the ordinariness of life I suggest here is not meant to be absolute, for no Fourth Amendment interest is absolute. If the probable cause and specificity requirements of the warrant clause are met, such agents can be planted. The security this would give the citizen is that he would know that his world was what it seemed to be, unless he established relationships on criminal premises, and subject to the possibility of \((a)\) revelations by free choice and \((b)\) intrusions subject to judicial control under the standards of the Fourth Amendment. This would leave the ordinary citizen secure in his ordinary expectations of life and provide an important protection to the privacy of social relations.

IV. Conclusion

One way to regard United States v. Robinson is as a response to the wholly understandable plea from the officer for rules of conduct which recognize the critical dangers and uncertainties of searches incident to arrest and which are clear enough so that they may be followed. I have tried to show that the Robinson automatic search rule fails to achieve this result. Since the basis of the rule it establishes is unclear, so must be its scope, and instead of clarifying, it introduces a principle of confusion into the law. The price it exacts is the practical abandonment of the requirement of justification which is at the heart of the Fourth Amendment tradition. A better way to meet the legitimate requirements of the arresting officer would be to assimilate the search incident to arrest—insofar as it is a search for weapons and not evidence—to the civil search cases, where searches have been justified upon the basis of general and not particular probabilities under a standard of reasonableness rather than the criteria of the warrant clause. To limit the nature of the emergency intrusion, and to ensure that the opportunity is not abused for other reasons, I suggest that in such a case the "plain view" principle not apply. And the intrusion should not go beyond what is honestly thought necessary for self-protection, this limit to be enforced by civil action.

\footnote{122 For a somewhat similar suggestion as to result, see Kitch, Kats v. United States: The Limits of the Fourth Amendment, 1968 Supreme Court Review 133, 151-52.}
Matlock articulates another general rule, this one granting authority to a "joint occupant" to consent to the search of premises or effects jointly possessed, even over the objection of the ultimate defendant, and presumably notwithstanding any contrary agreement with him. I have tried to explain this rule, which seems to me right, by suggesting that (a) the Fourth Amendment centers its protections in property cases on the possessory interest, and (b) where the defendant chooses to share possession he establishes rights and interests in the joint occupant which are themselves constitutionally cognizable, including the interest in behaving as he will with what is his. The defendant's right is not to have total privacy or secrecy but to have the joint occupant himself exercise the choice, in an informed and voluntary way, as to what he will do with that segment of the defendant's privacy of which he is the repository. Matlock seems right in its general principle but wrong in failing to require a more precise inquiry into the scope of the possession and hence of the authority to consent to search, and in treating the voluntariness of the consent as if it were a simple matter of fact, without establishing workable criteria for its establishment or refutation.

This analysis suggests a line of connection with the secret agent cases, with respect to which I suggest a limitation on the use of such agents to cases in which (a) a private citizen makes the choice to function as an agent in a preexisting relationship, or (b) the relationship is criminal from its inception, or (c) the warrant, probable cause, and specificity requirements are met. Such a limitation would permit the use of agents but leave the ordinary citizen secure in his ordinary expectations of life; it would protect in this context, as Matlock should in the joint possession case, both the ultimate defendant's interest in the privacy of his social relations and the consenting person's right to do with his own what he will.