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Bright Line Fever and the Fourth Amendment

Albert W. Alschuler

ARTICLES

BRIGHT LINE FEVER AND THE FOURTH AMENDMENT†*

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I. INTRODUCTION

A critical issue which appears and reappears in virtually every phase of government is how much to sacrifice justice in an individual case for the sake of administering justice by rules. Rules tend to limit the importance of subjective judgment, to promote equality, to control corruption, to simplify administration and to provide a basis for planning before and after controversies arise. Nevertheless, the limitations of language and the variety and unpredictability of human behavior make extremely difficult the articulation of general principles that will yield justice in almost every situation that they address. When the best rules that our powers can devise produce injustice often enough, we do well to abandon them even at the price of lawlessness. The appropriate blend of law and discretion cannot be determined "in the large"; the issue must be resolved "in the specific" by examining the merits and demerits of particular rules.

In these generalities, I have belabored a point that Plato made more eloquently 2500 years ago.[1] Nevertheless, the powers of the police sometimes inspire pronouncements that disregard these simple truths. For more than a decade, writing about law enforcement has been dominated by general denunciations of police discretion and general calls for governance by rules. Some of our nation's best scholars and judges—with Kenneth Culp Davis,[2] Carl McGowan,[3]

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** Professor of Law, University of Colorado; Visiting Scholar, American Bar Foundation. A.B. 1962; LL.B. 1965, Harvard University.

1. PLATO, *The Statesman*, in 2 THE DIALOGUES OF PLATO 283, 322-25 (Jowett trans. 1937).
2. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

Anthony G. Amsterdam,[4] John Kaplan[5] and James Vorenberg[6] among them—have proclaimed the need for rules and guidelines to channel police discretion. These writers often have suggested that the police should draft the necessary guidelines themselves. Some of them have argued that courts should interpret the due process clauses of the fifth and fourteenth amendments to require the police to create internal regulations. Some have proposed that the police view the rulemaking procedures of federal administrative agencies as their guideline for writing guidelines.

Almost all of us accept the basic principle that these writers have expressed. Apart from some members of the Conference on Critical Legal Studies, hardly anyone regards the ideal of the rule of law as controversial. When rules can limit the play of atomistic, idiosyncratic choice without yielding significant injustice, of course they should be adopted. But what should the rules be? Might the complexities that have inhibited current lawmakers from confining police discretion inhibit new lawmakers as well? If guidelines were specific enough to serve their purposes, might they fail to anticipate important public needs in a significant number of situations? Or, more probably, might the guidelines consist of pabulum-like generalities which fail to offer real guidance?[7] These issues—the critical issues—have been repeatedly neglected. For the most part, the scholars and judges have left the detail work to others. Their point has not been that they could propose workable guidelines themselves; it has been that police departments could do so once they adopted the suggested procedures. The role of the judges and scholars has been merely to advocate more law.[8]

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3. McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972).

4. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 414-29 (1974).

5. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1050-55 (1974).

6. Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651 (1976).

7. *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (1980).

8. Of course, the proponents of law enforcement guidelines have recognized in the abstract a need to blend law and discretion. Some, in fact, have offered sensitive discussions of the issue. None has gone very far, however, towards demonstrating the feasibility of a regime of detailed guidelines. In the end, for example, Professor Davis observed:

> The principal reason for inadequacy of administrative rules is inability of administrators to see all around a subject sufficiently to risk generalizations in rules . . . . The way out of this common impasse is for administrators to recognize that rules need not be in the form of generalizations. When an administrator knows the answer to a hypothetical case, he should issue a rule, stating the case, his position, and his reasons, without a

There is only one way to determine whether the closer control of police discretion through rulemaking is feasible; and if the advocates of guidelines tried their hands at drafting useful guidelines, they might find recent judicial experience instructive. In adjudication under the fourth amendment, the United States Supreme Court has expressed concern about the lack of legal guidance afforded police officers. Moreover, the Court has articulated a series of "bright line rules" to begin to remedy this defect. In each of the four cases that this article will consider, the Court has indicated that prophylactic rules—rules that the Court has recognized are likely to yield injustice in particular situations—should be substituted for the generalities of the fourth amendment.

In *Dunaway v. New York*,[9] the Supreme Court declared, "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[10] In *Robinson v. United States*,[11] the Court said: "[O]ur . . . 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 . . . ."[12] In *Michigan v. Summers*,[13] the Court observed that its ruling would not require an officer "to evaluate either the quantum of proof justifying the detention or the extent of the intrusion to be imposed by the seizure."[14] This

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generalization. When further hypothetical cases can be added, they should be. As this kind of rule-making interacts with decisions in particular cases, generalizations will usually emerge in due course.

K. DAVIS, *supra* note 2, at 220 (emphasis and footnote omitted).

It is difficult to imagine that a police administrator would (or should) promulgate a "rule" limited to situations in which a husband appears to have assaulted his wife by throwing a vase at her, in which the husband has one prior arrest for assault but no convictions, in which the immediate provocation for the husband's action appears to have been the wife's shouted statement that he should get a job, in which the wife's only apparent injury is a slightly bruised forehead, in which the husband appears highly intoxicated but expresses remorse for his conduct, in which the wife wishes to have the husband removed from the premises but does not wish to have him prosecuted, and in which the wife claims that the vase thrown by the husband had special sentimental value. Each of the circumstances of this case would seem to have some bearing on whether to arrest the husband, and the case is not one of unusual complexity.

9. 442 U.S. 200 (1979).

10. *Id.* at 213-14.

11. 414 U.S. 218 (1973).

12. *Id.* at 235.

13. 452 U.S. 692 (1981).

14. *Id.* at 705 n.19.

unequivocality was essential, the Court said, for "if police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.' "[15] Similarly, in *New York v. Belton*,[16] the Court said that "in order to establish the workable rule this category of cases requires," it would endorse a proposition that it regarded as "generally even if not inevitably" appropriate.[17]

The scholar whose writings are most clearly associated with the Supreme Court's recent emphasis on bright line rules is Professor Wayne R. LaFave, America's foremost authority on the fourth amendment. In his 1982 Mellon Lectures at the University of Pittsburgh,[18] Professor LaFave objected to the bright line rule that the Supreme Court had articulated in *Belton*, and described in greater detail the circumstances in which he considered prophylactic fourth amendment rules appropriate. At the same time, he reiterated the need for these prophylactic rules in a variety of situations. Professor LaFave's central argument for unyielding fourth amendment rules appears in a passage which the Supreme Court quoted with approval in *Belton*:

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."
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> [The security that the fourth amendment was designed to protect] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.[19]

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15. *Id.* (quoting Dunaway v. New York, 442 U.S. 200, 219-20 (White, J., concurring)).

16. 453 U.S. 454 (1981).

17. *Id.* at 460.

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

19. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141-42 *(quoted in Belton*, 453 U.S. at 458). As Professor LaFave has recognized, the argument that he has advanced for unyielding fourth amendment rules also has been made by other distinguished scholars. *See, e.g.*, E. GRISWOLD, SEARCH AND

The thesis of this article is that a bright line approach to interpretation of the fourth amendment is "generally even if not inevitably" misconceived. As I have indicated, I have no quarrel with the principle that doing justice in an individual case may be less important than providing a clear and workable rule. Nevertheless, I believe that the search for bright line fourth amendment rules typically leads to a disregard of values more substantial than those depicted in the writings of LaFave—"hair-splitting distinctions," "subtle nuances," "finespun new doctrines," "recondite matters," and "the heady stuff upon which the facile minds of lawyers and judges eagerly feed."[20] Not only do categorical fourth amendment rules often lead to substantial injustice; in addition, their artificiality commonly makes them difficult, not easy, to apply.

Bright line fourth amendment rules may fail in their mission of simplifying the administration of justice for essentially three reasons. First, the effort to draft even a partial code of fourth amendment law may yield an unmanageable multiplicity of rules—more bright lines than the human eye can keep in view. Second, the task of marking the boundary of even a bright line rule usually is not mechanical; and when the rule is artificial, delimiting its boundary becomes a matter of guesswork. Third, the articulation of bright line rules to govern some situations inevitably raises the question whether other bright line rules will be developed for other situations. Artificiality begets artificiality, and especially when categorical rules are developed by courts rather than legislatures, it becomes difficult to tell where the process will end.

Ultimately, for all of these reasons, categorical rules may muddy more than they clarify. Rather than choose between the competing evils of injustice in individual cases and imprecision in governing principles, courts may give us both.

II. PROPHYLAXIS IN PERSPECTIVE

I said at the outset that the virtues and vices of prophylactic rules must be examined "in the specific." Nevertheless, before turning to the "specific" bright line principles that the Supreme Court's

SEIZURE: A DILEMMA OF THE SUPREME COURT 47, 48 (1975); Amsterdam, *supra* note 4, at 375; Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 365 (1973).

20. These phrases appear in LaFave, *supra* note 19, at 141, 143, 162.

fourth amendment decisions have articulated, I think it worthwhile to set the stage by offering four general observations.

A. The Fourth Amendment as an Ex Post *Demand for Perfection or as an* Ex Ante *Rule of Reason?*

The proponents of bright line rules commonly claim that without them police officers would be subjected to *post hoc* demands for perfection. As they describe today's judicial administration of the fourth amendment, appellate judges with the advantage of years of legal training and experience, the use of extensive law libraries, the benefit of collegial deliberation, and the assistance of capable law clerks, review at their leisure the propriety of a police officer's actions. The judges commonly divide upon the issue—sometimes by a vote of five to four. Then the judges write opinions analyzing a multiplicity of factual and legal concerns at length and in detail. The officer whose actions prompted this activity may have had only a moment to analyze the factual and legal issues presented in a tense and fast-breaking situation. Nevertheless, his actions may be held unconstitutional simply because he took a position ultimately adopted by four judges rather than five.

We have known since the days of *The Mikado* that a police officer's lot is not a happy one, but it is desirable to place the issue in perspective. Just as the fourth amendment proscribes unreasonable searches and seizures in general terms, the law of torts subjects all of us to a demand of reasonableness in everything we do. When a person departs from the standard of care that a reasonable person would observe and when injury results from this departure, the law is likely to subject the negligent actor to consequences more unpleasant in personal terms than the exclusion of the fruit of his labor from evidence in a criminal case. Tort law provides no exemption for split-second decisions (not even for decisions made at fifty-five miles per hour), and it applies when a violation of duty is so unclear that opposing parties take the issue to litigation with the expectation of almost-certain victory apparent on both sides.

Of course, the amorphous character of the law of negligence is not one of its virtues, and from time to time courts have attempted to render this body of law more precise by specifying in detail certain duties or rules of conduct. The history of the effort has not been encouraging. The classic illustration is the "stop and look" rule for railroad crossings that the Supreme Court articulated in an

opinion by Justice Holmes in 1927[21]—and that the Court abandoned in an opinion by Justice Cardozo in 1934.[22] The failure of judicial attempts to articulate bright line rules for the resolution of tort disputes may point a lesson for fourth amendment litigation as well.

Despite its imprecision, most of us do not complain that the law of negligence subjects us to impossible demands and the fourth amendment's rule of reason no more demands the impossible of law enforcement officers than tort law demands the unattainable of the rest of us. Both bodies of law, at least when properly administered, take account of the circumstances in which a challenged decision was made. If, in light of both general standards of decency and the available legal guidance, a police officer did as well as could be expected in making a necessarily hasty decision to search or arrest, the search or arrest cannot fairly be condemned as unreasonable.

Of course, courts may divide sharply on the weight to be given various circumstances including an officer's need for immediate action. A court's close division certainly does not establish that any member of the court ignored the difficulty of the officer's situation or that any member viewed the officer's conduct only from a *post hoc* perspective. Similarly, judges may recognize the need for speedy, unreflective action in the field although their own opinions adhere to an established judicial tradition and offer more than instinctive, one-sentence responses to the totality of the circumstances. A detailed opinion may be designed merely to demonstrate to others the unreasonableness of a particular intuitive response. It is odd to argue, as Justice White did in a dissenting opinion in *Stone v. Powell*,[23] that the fourth amendment commonly forbids searches and seizures when an "officer is acting as a reasonable officer would and should act in similar circumstances."[24] When an officer acts reasonably, it would torture the English language to condemn his action as an unreasonable search.[25]

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21. Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

22. Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934). The conventional wisdom imparted to first-year law students is that Justice Cardozo clearly won this debate on the scope of the rule of law in tort ligitation.

23. 428 U.S. 465 (1976).

24. *Id.* at 539-40 (White, J., dissenting).

25. This statement requires some qualification in situations in which, although the officer acts reasonably, he relies on a determination by some other authority that has not acted reasonably—for example, a superior officer, a police legal advisor, a magistrate, a legislature or even the United States Supreme Court. Thus, a police officer may act reasonably when he relies on a

To be sure, courts occasionally have seemed to demand the same complex, multifaceted analyses on the part of officers in the field that they have offered in their own opinions.[26] Although they uniformly have recognized that factual circumstances must be judged *ex ante*,[27] some courts may not have applied an *ex ante* perspective to issues of law. They may have asked what an ideal response to the factual circumstances would have been, not simply whether an officer acted reasonably.[28] Judicial decisions that fit this pattern may justly be criticized. Nevertheless, the unhappy lot of law enforcement officers does not require the articulation of bright line rules. On the contrary, to require that officers master and apply a multiplicity of artificial rules may demand more than they should be expected to provide. A rule of reason that takes an officer's unhappy lot as its starting point may be fairer, not only from the perspective of the sound administration of public justice, but also from the perspective of the officer himself.[29]

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magistrate's determination of probable cause, but if the magistrate acted unreasonably in finding probable cause, the officer's search remains unreasonable. Similarly, a police officer who, in the period just prior to Chimel v. California, 395 U.S. 752 (1969), thoroughly searched a room or house in which a suspect had been arrested, probably would have acted reasonably under the applicable Supreme Court precedents; but if the Court had acted unreasonably in authorizing this sort of wide-ranging search incident to arrest, the search would violate the fourth amendment. In short, although in most situations the fourth amendment establishes only a rule of reason, this rule of reason ought to extend to all governmental agencies and officers. *But see* Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975).

26. Professor LaFave has cited Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), and United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974), as illustrations. LaFave, *supra* note 18, at 321-22.

27. *See, e.g., infra* notes 48-102 and accompanying text (discussing the traditional judicial definition of "probable cause"); Hill v. California, 401 U.S. 797 (1971).

28. One reason for this failure to apply an *ex ante* perspective consistently may be the courts' sense that they are not judging the past so much as establishing rules for the future. They may ask, not whether the officer whose conduct is at issue acted reasonably, but how another officer should act tomorrow if the same circumstances were to be duplicated. The judicial development of fourth amendment law merges two tasks that sometimes might profitably be separated, judging the past and guiding the future. In that respect, this body of law differs from tort law; a jury's finding of negligence guides future conduct in only a vague, assimilative sense. Nevertheless, antediluvian though it probably seems to say so, the principal function of courts, even in fourth amendment cases, is to judge the past. Basically, judges should guide the future only insofar as guidance emerges from their efforts to do justice in the cases before them. When other means of guiding the future become necessary (and of course they often do), it is ordinarily the province of other governmental bodies to supply them.

29. The sense that fourth amendment doctrine currently subjects police officers to *post hoc* demands for perfection has prompted, not only the development of bright line rules, but also proposals to limit the exclusion of evidence under the fourth amendment to situations in which a police officer has acted without a "reasonable good faith belief" in the lawfulness of his conduct. Once it is recognized that in most situations the fourth amendment establishes only a rule of

B. Prophylactic Rules or Presumptive Rules?

Prophylactic rules should be distinguished from rules that are

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reason to be applied from an *ex ante* perspective, the arguments for creating a "reasonable good faith" exception to the exclusionary rule ring hollow.

As Professor Phillip E. Johnson has observed, the principle that has led some observers to favor a "reasonable good faith" exception is sound: the reasonableness of a police officer's actions should be judged, not on the basis of hindsight, but on the basis of the circumstances that confronted the officer and the knowledge that he could fairly have been expected to possess. As Professor Johnson also has noted, however, the adoption of a "reasonable good faith" exception is unnecessary to implement this principle. Under a proper interpretation, the fourth amendment itself reflects the *ex ante* perspective that the proponents of a "reasonable good faith" exception consider appropriate. Address by Phillip E. Johnson to the Workshop on Teaching Criminal Justice of the Association of American Law Schools, in Chicago (Oct. 15, 1983).

Professor Johnson's analysis does not imply that the adoption of a "reasonable good faith" exception to the exclusionary rule would be inconsequential, yielding only the same outcomes that an appropriate reading of the fourth amendment itself would produce. To the contrary, the overlay of one "reasonableness" standard upon another would be likely to yield mind-boggling confusion.

Were a "reasonable good faith" exception to the exclusionary rule established, courts undoubtedly would be reluctant to find subjective bad faith on the part of police officers (both because this bad faith usually would not exist and because doubtful cases probably would be resolved in favor of the officers). To a large extent, "good faith" therefore would drop from the test; the critical issue would be posed by the modifier "reasonable." Reasonableness, however, always has been the central fourth amendment inquiry—the amendment proscribes only "unreasonable" searches and seizures. In many cases, a "reasonable good faith" exception would seem to ask whether an officer reasonably believed in the reasonableness of his action. This strange query would seem to invite slippage. "Reasonable good faith" apparently would become a way of saying: "The officer acted improperly, but it's close enough for government work."

Moreover, a "reasonable good faith" exception would seem to focus attention on the judgments and actions of the police officers who conduct searches and seizures rather than on the judgments of other officials who authorize these searches and seizures. *See supra* note 25. The effect sometimes might be to leave departures from current fourth amendment requirements without redress while blocking the development of more sensible requirements. For example, in light of the confused state of the law governing the warrantless searches of automobiles and of containers within them (*see infra* notes 174-202 and accompanying text), it would be difficult ever to conclude that an officer who had conducted a warrantless search of a container inside an automobile on the basis of probable cause had done so without "reasonable good faith." Moreover, the "reasonable good faith" of the officer would resolve the only outcome-controlling issue in the case, saving the courts from any need to reassess the "reasonableness" of their past rulings.

In fact, the creation of a "reasonable good faith" exception probably would reflect a desire to escape the unfortunate complexity of the Supreme Court's fourth amendment decisions. Whenever "the law" becomes complex, the impulse is strong to establish principles of "equity" and start over. After encumbering the fourth amendment's basic rule of reason with an accretion of complex subordinate rules, the Court therefore may seek to establish a fresh test of reasonableness by creating an exception to the principal mechanism for implementing existing law. The difficulty is that a "reasonable good faith" exception would truly not offer a fresh start. Instead, it would enshrine past rulings as its baseline for judging both "reasonableness" and "good faith."

The past application of a "reasonable good faith" standard might well have altered the outcome of every criminal case in which the Supreme Court has found a fourth amendment violation since its decision in Mapp v. Ohio, 367 U.S. 643 (1961). Cases typically reach the Court because

thought to provide a just resolution of every case within their terms and that courts are prepared to modify when, in unanticipated circumstances, they work unjustly. Judges sometimes can give police officers substantial guidance through the development of this second, less-bedazzling sort of rule. Consider, for example, the situation in which a citizen complains to an officer that he has been assaulted by a person whom he knows and whom he identifies. The citizen may be a stranger to the officer, and the officer may know nothing about his credibility. Does this citizen's statement—without more—give the officer probable cause to arrest the accused wrongdoer?

This issue recurs frequently, and it is appropriate for courts to resolve it in general terms. Many courts have. One court has said, for example,

> A "citizen-informant" is a citizen who purports to be the victim of or to have been the witness to a crime who is motivated by good citizenship

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they present doubtful issues, and a "reasonable good faith" standard suggests that the very doubtfulness of the issues should preclude exclusion of the evidence seized.

For example, the federal agents whose conduct was at issue in Katz v. United States, 389 U.S. 347 (1967), certainly acted in "reasonable good faith" when they attached electronic surveillance equipment to the outside of a telephone booth that they expected the defendant to use. Similarly, the officers whose conduct was at issue in Chimel v. California, 395 U.S. 752 (1969), acted in "reasonable good faith" when, as an incident of a lawful arrest, they searched the entire house of the person whom they had arrested. Moreover, in light of prior judicial rulings, the officers whose conduct was at issue in Payton v. New York, 445 U.S. 573 (1980), acted in "reasonable good faith" when they entered a private residence without a warrant to effect a felony arrest.

Rather than invite the semantic confusion of a "reasonable good faith" standard, courts ought to emphasize that the fourth amendment mandates evaluation of an officer's actions only from an *ex ante* perspective. At the same time, courts should recognize that the reasonableness of the officer's conduct is not always the determinative issue; sometimes, for example, the reasonableness of the courts' own past decisions may be critical. *See supra* note 25.

Some commentators have suggested that the exclusionary rule should be applicable only to the unreasonable actions of police officers because it has not been demonstrated that the misconduct of other officials "is a pervasive problem akin to police lawlessness." P. Johnson, New Approaches to Enforcing the Fourth Amendment 8-10 (Sept. 1978) (unpublished working paper). These suggestions apparently reflect a demeaning, stereotypical view of law enforcement officers (at least in comparison to other occupational groups). To apply this stereotype as justification for modifying the exclusionary rule while proclaiming that the modification reflects sympathy for America's beleaguered police officers is ironic. If magistrates, judges and legislators in fact act lawlessly much less often than police officers, application of the exclusionary rule to their actions would not be at all harmful; this application merely would not lead to the exclusion of evidence very often. Any remedial principle that is considered appropriate for police officers (be it the traditional exclusionary rule or some new version) ought to apply equally to other public officials who may authorize searches and seizures. One need not judge the relative frequency of misconduct by the members of various groups to conclude that the same deterrent and remedial principles should apply to the same misconduct.

> and acts openly in aid of law enforcement . . . . It is reasonable for police officers to act upon the reports of such an observer of criminal activity.[30]

Another court has framed the rule somewhat differently:

> A citizen eye-witness who, with no motive but public service, and without expectation of payment, identifies himself and volunteers information to the police has inherent credibility. Therefore the usual requirement of showing prior reliability does not apply in these circumstances.[31]

The judicially created rule concerning "citizen-informants" provides useful general guidance to police officers. Nevertheless, the person who appears at the Hill Street Precinct Station tomorrow may be named Wolf Crier, and this citizen-informant may begin by admitting that he often has made scurrilous and unsupported charges against television personality Dinah Shore. The informant may claim, however, that his days of fabrication are over. He also may report that only an hour ago Justice Harry Blackmun, wearing a judicial robe, dark glasses, a false beard and a grey fedora, assaulted him with a blackjack in an alley. The informant may note that his identification of Justice Blackmun was confirmed when one of the seven dwarfs who accompanied the miscreant addressed him as "Harry." Although an officer who arrested Justice Blackmun on the basis of this information could argue that the arrest was authorized by the "citizen-informant" rule as formulated by respected appellate courts, the arrest of Justice Blackmun certainly would have been unreasonable. Police officers are not automatons. They can recognize the need for departures from generally appropriate doctrines in exceptional circumstances. At the same time, the somewhat tentative character of most judicial rules does not deprive these rules of their ability to provide significant guidance to law enforcement officers.

Sometimes, in fact, courts have failed to generalize when generalization would have been appropriate. As I have emphasized, the development of judicial rules is desirable when the rules will yield just results in a substantial majority of cases and when they can be modified in the occasional cases in which they work unfairly. For example, like the question of the credibility to be afforded "citizen-informants," the credibility of "first-time police informants" poses a

30. People v. Schulle, 51 Cal. App. 3d 809, 814, 124 Cal. Rptr. 585, 588 (1975).
31. People v. Saars, 196 Colo. 294, 299, 584 P.2d 622, 626 (1978).

recurring fourth amendment issue, yet the Supreme Court has failed to resolve this issue in a way that offers clear guidance to police officers and magistrates. The issue typically arises in cases in which police officers have offered leniency or some other benefit to a person under arrest on the condition that he provide useful information—for example, that he reveal the identity of the person who sold him the drugs that the officers have found in his possession. Is information provided by a "first-time police informant" sufficiently credible in itself to supply probable cause for an arrest or search? Prior to 1971, the Supreme Court had given a clear negative answer to this question. The word of a police informant could be trusted if the police had used this informant in the past and if his information consistently had proven accurate, but officers were expected to confirm the statements of a first-time police informant through independent investigation before searching or arresting a person whom he had identified.[32]

In 1971, the Court apparently changed its position. In *United States v. Harris*,[33] a first-time informant told a federal tax investigator that he often had purchased bootleg whiskey from Roosevelt Harris.[34] The affidavit filed by the investigator to support his application for a search warrant recited circumstances other than the informant's tip that might have contributed to a finding of probable cause. The principal opinion in *Harris*, authored by Chief Justice Burger, discussed each of these circumstances in detail. At the end of his opinion, the Chief Justice considered the informant's statement. He wrote:

> Here the warrant's affidavit recited extrajudicial statements of a declarant . . . that . . . he had many times and recently purchased "illicit whiskey." These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code . . . .
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> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support finding of probable cause to search . . . . Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the

32. *See* Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).
33. 403 U.S. 573 (1971).
34. *Id.* at 575.

> informant's admission that over a long period and currently he had been buying illicit liquor on a certain premise, itself and without more, implicated that property and furnished probable cause to search.[35]

The portion of Chief Justice Burger's opinion that contained this language was joined by only three other Justices, but lower courts commonly have failed to consider that fact and have read the Chief Justice's language as controlling.[36] Moreover, Justice Stewart, who attached significant although not necessarily determinative weight to the informant's supposed admission against penal interest, supplied the Court's fifth vote for a finding of probable cause.[37]

The Chief Justice's opinion went beyond the necessities of the case to declare that the first-time informant's statement alone would have established probable cause, but the opinion's reasoning on this issue seemed strained. If admissions of crime sometimes "carry their own indicia of credibility," the reason is that people ordinarily lack a motive for falsification when they make statements adverse to their interests. Police informants, however, usually run a greater risk of prosecution when they withhold "admissions against penal interest" than when they make them. In the context of the police informant system, admissions of crime often do not carry their own "indicia of credibility" but quite the reverse.

Chief Justice Burger declared: "That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct."[38] This remarkable analysis accomplished a remarkable feat—it rendered the Supreme Court's apparently new position on the weight to be accorded the statements of first-time informants nominally consistent with the Court's prior decisions on the issue. Although the earlier decisions had insisted that courts needed a specific reason to credit an informant's statements before concluding that the statements established probable cause, they had not specifically considered the

35. *Id.* at 583-84.

36. *E.g.*, United States v. Tucker, 526 F.2d 279 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976); United States v. LaFond, 482 F. Supp. 1379 (E.D. Wis. 1980); People v. Neusom, 76 Cal. App. 3d 534, 143 Cal. Rptr. 27 (1977).

37. Justice Stewart joined a part of Chief Justice Burger's opinion that mentioned both the informant's admission against interest and the general background of the suspect. *See* 403 U.S. at 577-80, 585.

38. 403 U.S. at 583-84. The fact that the informant apparently reduced rather than enhanced the risk of his own prosecution would have prevented his statement from being treated as a declaration against penal interest under the Federal Rules of Evidence. 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 489 (1980).

possibility that an "admission against penal interest" would satisfy this requirement.

Of course, a first-time police informant usually does admit his criminal conduct when he implicates other people. Accordingly, the apparent effect of the *Harris* decision was to justify a finding of probable cause in almost every situation in which law enforcement officers act on an informant's tip. When the informant is a "good guy" not involved in criminal activity, the citizen-informant rule usually will apply; when the informant is a "bad guy" who has participated in crime himself, the almost inevitable "admission against interest" will establish the informant's credibility.[39] In this situation, the process of filing an affidavit for a search warrant is likely to become merely a trap for an unwary police officer who fails to allege all of the relevant circumstances, including his informant's "admissions against interest," in sufficient detail to justify a judicial finding of probable cause.[40]

Chief Justice Burger did not discuss the credibility of first-time informants in general terms in *Harris*. Instead, amidst a lengthy discussion of the facts, he offered some apparently technical "law-

39. This wonderful "Catch 22" was illustrated by the opinion of the Colorado Supreme Court in People v. Trontell, 188 Colo. 253, 533 P.2d 1124 (1975). The police had not used the informant in *Trontell* previously; his reliability therefore had not been demonstrated by past success. The state nevertheless contended that the citizen-informant rule applied. It noted that the informant was an eyewitness to the crime and that he had been identified by name in the affidavit for a search warrant. The only difficulty was that the informant also had been a participant in the crime, and the Colorado Supreme Court concluded that the citizen-informant rule was not intended for this situation. The court nevertheless upheld the legality of the search on a different ground; by admitting his participation in the crime, the informant had made a declaration against his penal interest and thereby had established his reliability. The court enthusiastically applied *Harris* although the police had struck an explicit bargain with the informant, promising him lenient treatment in exchange for his information.

40. The Supreme Court's recent decision in Illinois v. Gates, 103 S. Ct. 2317 (1983), seems likely to put an end to demands for ever-greater detail in affidavits for search warrants. The Court overruled the *Aguillar-Spinelli* doctrine which, as applied by many lower courts, had made the drafting of these affidavits a technical exercise with standard forms and phrases reminiscent of common law pleading. *See, e.g.*, People v. Peschong, 181 Colo. 29, 506 P.2d 1232 (1973).

Gates's overruling of *Aguilar-Spinelli* may not have been as significant a development as some of *Gates*'s critics suggest; the combination of *Harris*'s ruling on "admissions against penal interest" and the "citizen informant" rule had emptied the so-called "reliability prong" of *Aguilar-Spinelli* of any coherent content a dozen years before *Gates*. Moreover, the "basis of knowledge" prong of *Aguilar-Spinelli* had always seemed unsound. If, to take an extreme example, an anonymous tipster called the police on 364 successive occasions and on each occasion accurately forecast a specific crime, one would not need to know the basis of this person's knowledge to conclude that his similar forecast on the 365th occasion deserved to be credited. For additional discussion of *Gates*, see *infra* note 98 and accompanying text.

yer's talk" about admissions against penal and proprietary interest. Moreover, shortly after declaring that "admissions of crime . . . carry their own indicia of credibility—sufficient at least to support finding of probable cause to search," the Chief Justice seemed to contradict himself by writing: "Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another."[41]

The question of the first-time informant's credibility arises daily in the administration of criminal justice, and both police officers and magistrates are entitled to an authoritative judicial resolution of this issue—a resolution that would not depend on efforts to pierce the veil of artificial legal analysis but that might be qualified in cases that depart from the usual pattern. Although I doubt that even tentative and presumptive judicial rules can substantially refine the fourth amendment's rule of reason, some fourth amendment issues do recur often enough to lend themselves to generalization; and whenever fair generalization is possible, courts have a duty to provide it.

C. Courts or Legislatures as the Source of Prophylactic Rules?

The judicial development of prophylactic rules raises a significant issue of institutional competency. The essence of the legislative function is generalization; the essence of the judicial function is resolution of the case at hand. I do not contend (although others have[42]) that the articulation of prophylactic rules in constitutional adjudication is inherently inappropriate. On some occasions, detailed factual inquiry may not be worth even the time and energy of the courts themselves.[43] Nevertheless, when the Supreme Court ap-

41. *Harris*, 403 U.S. at 584. Especially in view of the fact that first-time police informants do not always make "admissions against penal interest," it is not surprising that sophisticated second-year and third-year law students commonly study the *Harris* opinion without recognizing the Supreme Court's apparent change of position on an important fourth amendment issue.

42. *See* J. WHITE, THE LEGAL IMAGINATION 612-13 (1973).

43. For example, a later portion of this article notes the proposal of Justice Powell for hearings on whether "ambiguous containers" like laundry bags and cardboard boxes have been kept in such a way as to support reasonable expectations of privacy. *See infra* note 191 and accompanying text. Justice Powell observed:

> Relevant to such an inquiry should be the size, shape, material, and condition of the exterior, the context within which it is discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing or binding the container, that indicates a desire to prevent the contents from being displayed upon simple mischance.

Robbins v. California, 453 U.S. 420, 434 n.3 (1981) (Powell, J., concurring). Even if Justice Pow-

peared to offer prophylactic protection to the rights of criminal suspects in *Miranda v. Arizona*,[44] critics complained that the Court had converted the Bill of Rights into a code of criminal procedure.[45] These critics certainly were correct that, wherever the far-from-bright line boundary between the legislative and judicial functions should be drawn, courts should have less freedom than legislatures to develop artificial rules that deliberately sacrifice justice in individual cases for the sake of administrative simplicity. I mention this issue of institutional responsibility only to note that I will not pursue it in any depth in this article. As indicated, my argument will be that "bright line" fourth amendment rules usually fail on their own terms regardless of the authority that promulgates them.

D. Rules That Restrict or Rules That Expand Police Authority?

Bright line fourth amendment rules come in two forms. The first declares that a search or seizure will be held unconstitutional although it might be judged reasonable if viewed in isolation. The theory underlying this first type of rule is that a seemingly reasonable search or seizure is part of a broader category of police action that usually is unfair. A bright line rule condemning the entire class of behavior is necessary to provide appropriate guidance. The second form of bright line rule upholds police actions that might be held unconstitutional if judged solely on their facts. It rests on the theory that these seemingly unreasonable police actions are part of a broader class of police behavior that merits categorical approval. This second form of bright line rule plainly does not confine police discretion but expands it beyond the limits that a regime of case-by-case adjudication would establish.

It may not be entirely coincidental that most of the Supreme Court's current bright line rules tell police officers, "Yes, you may search," rather than, "No, you may not." The sole exception is a doctrine that might be characterized as a pseudo-bright line rule—a rule whose categorical clarity is more a wish than a reality. This rule antedates the significant changes in the Court's composition that occurred during the Nixon presidency. Although recently reaf-

ell's approach were sound in theory, I doubt that the hearings that he proposed would be worth the cost. A prophylactic rule affording constiutional protection to all closed, opaque containers might well be worthwhile.

44. 384 U.S. 436 (1966).

45. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

firmed by the Supreme Court,[46] its status has even more recently been called into question.[47] This rule proclaims that the constitutional term "probable cause" establishes a "single familiar standard" for lawful searches and arrests in an extraordinary variety of situations. Because the concept of probable cause lies at the heart of the fourth amendment and because the meaning of this concept is relevant to several of the cases discussed in this article, it is appropriate to begin an examination of the Supreme Court's bright line decisions with the Court's interpretation of "probable cause."

III. THE "SINGLE FAMILIAR STANDARD" OF PROBABLE CAUSE: *DUNAWAY V. NEW YORK*

As a majority of the Supreme Court view the facts in *Dunaway v. New York*,[48] the defendant was involuntarily detained, placed in a squad car, driven to police headquarters, confined in an interrogation room, advised of his *Miranda* rights[49] and questioned. The state of New York did not contend that probable cause for the defendant's arrest arose until he made an incriminating statement shortly after his confinement at the station house. The state argued instead that the defendant's detention for questioning was not an arrest and that this detention without probable cause was permissible "because the police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.' "[50]

In advancing this argument, the state relied primarily on the Supreme Court's 1968 ruling in *Terry v. Ohio*.[51] *Terry* had said that when a law enforcement officer could "point to specific and articulable facts which . . . reasonably warrant [the] intrusion,"[52] he could stop and detain a suspect briefly in the absence of probable cause. Moreover, the officer could conduct a "patdown" of the suspect for weapons if he had "reason to believe that he [was] dealing with an armed and dangerous individual."[53] The Court recognized that the

46. Dunaway v. New York, 442 U.S. 200 (1979). *See infra* notes 48-113 and accompanying text.

47. *See* Illinois v. Gates, 103 S. Ct. 2317 (1983); *infra* note 98 and accompanying text.

48. 442 U.S. 200 (1979).

49. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

50. *Dunaway*, 442 U.S. at 207.

51. 392 U.S. 1 (1968).

52. *Id.* at 21.

53. *Id.* at 27.

"stop" upheld in *Terry* was a seizure governed by fourth amendment standards and that the officer's "frisk" of the suspect was a search. It concluded, however, that both of these actions should "be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures" rather than by the standard of probable cause.

In *Dunaway*, the Supreme Court described the stop-and-frisk issue presented in *Terry* as *sui generis*,[54] added that the rule of that case was "an exception to the general rule requiring probable cause,"[55] and observed that the Court had been "careful to maintain [this exception's] narrow scope."[56] The Supreme Court held the detention in *Dunaway* unconstitutional and said:

> The familiar threshold standard of probable cause for Fourth Amendment seizures . . . provides the relative simplicity and clarity necessary to the implementation of a workable rule . . . .
>
> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in "the often competitive enterprise of ferreting out crime." . . . A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront . . . . For all but [a few] narrowly defined intrusions, the requisite "balancing" . . . is embodied in the principle that seizures are "reasonable" only if supported by probable cause.[57]

Under the Supreme Court's view of the facts (a view disputed by the dissenting Justices), the Court's condemnation of the detention in *Dunaway* seemed sound.[58] Indeed, *Dunaway* might have been decided under the fifth amendment's privilege against self-incrimination rather than the fourth amendment's prohibition of unreasonable seizures, for the notion of an involuntary detention for the purpose of obtaining a voluntary confession would be likely to

54. *Dunaway*, 442 U.S. at 209.

55. *Id.* at 210.

56. *Id.*

57. *Id.* at 213-14.

58. Justice Rehnquist, joined by Chief Justice Burger, contended that the defendant in *Dunaway* had not been detained but that he had agreed voluntarily to accompany the officers. *Id.* at 221-27 (Rehnquist, J., dissenting).

find favor only in the writings of George Orwell, Lewis Carroll or overzealous New York prosecutors.[59] Moreover, the detention in *Dunaway* was so little different from a "technical arrest" that the state's argument that it should be judged by an entirely different standard seemed strained.

At the same time, the Supreme Court's view of the probable cause requirement as a bright line principle seemed inappropriate. The concept of probable cause can be interpreted sensibly only as an embodiment of the "multifactor balancing test" that the Court rejected in *Dunaway*. Rather than permit departures from the probable cause requirement in exceptional circumstances, courts should read this requirement to accommodate the needs of law enforcement and the protection of individual privacy in every situation governed by the fourth amendment.

What was the "single familiar standard" to which the Supreme Court referred in *Dunaway*? Apparently this standard was so familiar that the Court sensed no need to define it. In other cases, however, the Court had held that probable cause to arrest exists when the "facts and circumstances known to the officer warrant a prudent man in believing that [an] offense has been committed" and that the person to be arrested committed it.[60] Similarly, lower courts have said that probable cause to search exists "when circumstances known to a police officer are such as to warrant a person of reasonable caution in the belief that [the] search would reveal incriminating evidence."[61] One plausible construction of this language would be that a person could not lawfully be arrested unless his guilt appeared more probable than not, and a search could not lawfully be undertaken unless it appeared more probable than not that this search would be successful. Although this interpretation of the Supreme Court's language is not inevitable, some courts have defined the probable cause standard in exactly this way.[62] Moreover, unless the Court's language implies a "more probable than not"

59. Justice White also may have intimated approval of the concept. *See* Terry v. Ohio, 392 U.S. 1, 34-35 (1968) (White, J., concurring).

60. Henry v. United States, 361 U.S. 98, 102 (1959). *See* Stacey v. Emery, 97 U.S. 642, 645 (1878); Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Draper v. United States, 358 U.S. 307, 313 (1959); Beck v. Ohio, 379 U.S. 89, 91 (1964).

61. *E.g.*, United States v. McEachin, 670 F.2d 1139, 1142 (D.C. Cir. 1981).

62. *E.g.*, State v. Sheppard, 35 Or. App. 69, 72-73, 581 P.2d 549, 551 (1978) ("more likely than not"); People v. Montoya, 114 Cal. App. 3d 556, 562, 170 Cal. Rptr. 624, 626 (1981) ("more evidence than 'equal' evidence").

standard, it does not establish a "bright line" or easily understood principle at all. At the very least, the Court's language suggests that some uniform degree of persuasion is essential to a finding of probable cause in every situation in which this finding is required.

A unitary view of the probable cause requirement leads, however, to incongruous results. On some occasions, a greater than fifty percent probability that a search will be successful may not be sufficient to justify it. A classic illustration arises when police officers rely upon highly generalized statistical evidence to establish probable cause for a search or arrest. In a well-worn hypothetical case,[63] social scientists whose research methods are beyond challenge have reported that between the hours of 7:00 p.m. and 11:00 p.m. on any given evening a majority of black males between the ages of sixteen and twenty-five on the streets of a particular neighborhood carry concealed weapons—a criminal offense. A police officer claims probable cause for a search or arrest simply because he knew the survey results and because, in addition, he knew that the person whom he searched or arrested was a twenty-year-old black male on the streets of this neighborhood at 10:00 p.m.. Surely one's inclination in this situation is to insist that evidence cannot establish probable cause unless it differentiates the person searched or arrested from other members of a broad demographic group. Moreover, one is likely to be especially suspicious of racial and gender-based classifications of the sort employed in this case. On some occasions, a standard of "more probable than not" apparently demands too little.

In other situations, however, a search may be reasonable although the probability of its success is much less than fifty percent. Imagine that an informant whose past statements have been consistently reliable has reported that a bomb is set to explode in one of the rented lockers in a major New York airport. The only difficulty is that the informant does not know which locker contains the bomb, and 150 lockers have been rented. The opening of each locker would invade the privacy of a distinct individual and almost certainly would constitute a separate search. Moreover, the chance that the bomb would be found in any one locker would be no better than

63. Although I did not invent this case, I do not know who did. Justice Brennan seemed to advert to it in his dissenting opinion in United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.2 (1976) (Brennan, J., dissenting). *See also* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 775.

one in 150. Could a smaller than one percent chance amount to probable cause for a search? In this situation, of course it could.

One reason for permitting the search of 150 or more rented lockers when one locker apparently contains a bomb would be that this action might prevent imminent public harm; the police would not simply be seeking evidence to prosecute someone for a past offense such as a bombing that occurred last month. Plainly, the concept of probable cause should be sufficiently flexible to recognize this critical difference in circumstances.[64] At the same time, most criminal law enforcement is designed to prevent future public harm at least in part, and a case-by-case assessment of the potential severity of the harm that a search might prevent seems almost unavoidable. If an informant had told the police, not that a bomb was located in one of the lockers, but that a small-time drug dealer had stored an ounce or two of marijuana there, the potential gain to law enforcement almost certainly would not warrant invading the privacy of many innocent people. If, however, the police knew that the Mafia's largest heroin shipment of the decade was inside one of those lockers, the case for permitting the search would be substantially stronger. Allowing this heroin to reach the streets might not be as harmful as permitting a bomb to explode, but some would dispute the point. The differences among these various cases do not seem subtle, finespun, hair-splitting or recondite. It is difficult to understand how the cases can yield to a "single familiar standard."

As the concept of probable cause is usually defined, the seriousness of the harm that the police seek to prevent or of the offense that they wish to investigate does not seem to enter the constitutional calculus. Probable cause exists when facts and circumstances warrant a prudent person's belief that an offense has been or is being committed. Apparently, it does not matter what offense it is. Dissenting in *Brinegar v. United States*,[65] Justice Jackson challenged the appropriateness of this view and voiced sentiments that appeal strongly to a basic sense of decency. He hypothesized a situation in

64. An anonymous tip ordinarily cannot supply probable cause for a search until it has been verified in significant part by independent investigation. Nevertheless, when an anonymous caller reported that a named student was carrying a firearm on the premises of a public school, the Illinois Supreme Court concluded that probable cause had been established. People v. Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968). Although the *Boykin* ruling afforded a troublesome power to faceless accusers, the ruling was probably sensible in light of the risks of police inaction when a very serious harm is threatened.

65. 338 U.S. 160 (1949).

which the police had thrown a roadblock around a neighborhood and searched every outgoing car in an effort to prevent the escape of a kidnapper who was still holding his victim. Justice Jackson said that he would strive to sustain this action but added that he would not "strain to sustain such a . . . universal search to salvage a few bottles of bourbon and catch a bootlegger."[66]

So far as I am aware, Justice Jackson has been the only member of the Supreme Court ever to declare that the seriousness of the threatened harm might be an important consideration in judging the reasonableness of a search. On at least one occasion, however, the Court itself has acted on the same principle. In *United States v. United States District Court*,[67] the Supreme Court held that in the absence of judicial authorization the President and other members of the Executive Branch have no inherent power to engage in electronic surveillance to guard against violent overthrow of the government. The Court suggested that the customary warrant procedure would not prove unduly burdensome in this context and observed:

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many [other] types of crime . . . . Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crimes.[68]

One can read this language to say that although the fourth amendment's warrant requirement is not subject to a "domestic security" exception, there is a "domestic security" exception to the requirement that warrants may issue only upon probable cause. If probable cause were a "single familiar standard," the establishment of a separate standard for "domestic security" cases obviously would violate the Constitution. If, however, the term "probable cause" permits judges to consider the distinct dangers posed by differing crimes, the Supreme Court's recognition that domestic secur-

66. *Id.* at 183 (Jackson, J., dissenting).

67. 407 U.S. 297 (1972).

68. *Id.* at 322.

ity cases may not present the same fourth amendment issues as gambling cases would seem appropriate.

Even if one recognizes the appropriateness of a "sliding scale" of probable cause, one can sensibly dispute the merits of the Court's suggestion that electronic surveillance in domestic security cases is significantly different from electronic surveillance in other cases. Although the violent overthrow of the government is obviously a more serious evil than the shipment of dice across a state line, the threat of this evil in most domestic security cases is remote. Moreover, the Supreme Court recognized in *United States District Court* that surveillance in national security cases is likely to pose a special danger to constitutionally protected speech.[69] One therefore might view the opinion in *United States District Court* as an illustration of the perils inherent in an open-ended concept of probable cause. This concept would indeed allow judges to subordinate the protection of privacy to their transient pet phobias. To entrust the security of persons, houses, papers and effects to mere judges is terrifying; all of us would prefer a government of laws.

Nevertheless, the pretense that probable cause is a "single familiar standard" did not prevent the Supreme Court from writing the opinion that it wrote in *United States District Court*. A riddle attributed to Abraham Lincoln asks, "How many legs would a lamb have if you called the tail a leg?" Lincoln's answer was that calling the tail a leg does not make it one.[70] Similarly, the Supreme Court's insistence that probable cause is a "single familiar standard" cannot make the essentially undefined constitutional language a unitary, bright line concept. Proclaiming that "the term 'probable cause' rings a bell of certainty," as Justice Douglas did in a dissenting opinion in *Terry v. Ohio*,[71] is unlikely to lead any judge to condemn as unreasonable a search that the judge considers reasonable. Justice Douglas's bell of certainty may not ring in the judge's ears; he may march to the tinkle of a different glockenspiel.

The seriousness of the evil that a search or seizure might prevent is probably a less important determinant of the quantum of evidence necessary to justify it than the extent to which this search or seizure would intrude upon privacy, liberty or property. In

69. *Id.* at 313-14.

70. 1 C. SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 570 (1939).

71. 392 U.S. 1, 37 (1968) (Douglas, J., dissenting).

Terry,[72] the Supreme Court recognized that a "stop" could be reasonable although the available evidence would not justify an "arrest." In other words, relatively minor governmental intrusions can be justified by less persuasive evidence than would be required for more substantial intrusions. Rather than accommodate the competing interests within the probable cause framework, however, the Court insisted that probable cause was not always the constitutionally required standard. The Court apparently sought to preserve the "bright line" character of the probable cause concept by creating a two-tiered fourth amendment—probable cause for some intrusions, reasonable suspicion for others.

Of course, the fourth amendment mentions probable cause only to say that no warrants shall issue without it. The *Terry* opinion explained:

> If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . . But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[73]

The fact that the police officer in *Terry* could not have obtained a warrant without risking both the commission of a robbery and the escape of the robbers plainly justified his failure to obtain a warrant. Nevertheless, the officer's inability to obtain a warrant had no bearing on the quantum of evidence necessary to justify his detention of the defendant. The Supreme Court's analysis seems to indicate that actions not subject to the warrant clause should be tested only by "the Fourth Amendment's general proscription [of] unreasonable searches and seizures." Prior to *Terry*, however, the Supreme Court had said that the evidentiary standard for a warrantless search or seizure could be no less stringent than that necessary to justify a

72. *Id.* at 26-27.
73. *Id.* at 20.

search or seizure with a warrant.[74]

A departure from this pre-*Terry* view would have represented a radical reinterpretation of the fourth amendment, and it is doubtful that the Supreme Court intended this reinterpretation. Consider, for example, the Supreme Court's ruling that a police officer need not have a warrant to make a felony arrest in a public place even if he has ample opportunity to obtain one.[75] Does it follow from this ruling and from the Supreme Court's analysis in *Terry* that a felony arrest in a public place should be tested only by a standard of reasonableness and that such an arrest may be made without probable cause? It was incongruous for the Court to indicate in *Terry* that a police officer needed a great deal of evidence when he had time to obtain a warrant and a smaller amount of evidence when he did not. A better ruling would have been that the quantum of evidence necessary to justify a search or seizure is unaffected by an officer's ability to obtain a warrant but that probable cause is an inherently flexible concept that demands less evidence for some intrusions than for others.

This point becomes critical when exigent circumstances are lacking and when courts attempt to control less intrusive police actions through the warrant procedure. The defendant in *Davis v. Mississippi*[76] was one of twenty-four black youths whom law enforcement officers had rounded up for interrogation and fingerprinting following a rape. Although the defendant's arrest was plainly invalid, the Supreme Court indicated in dictum that a state might devise a constitutional procedure for detaining a suspect to obtain his fingerprints when, in the Court's words, "there is no probable cause in the traditional sense."[77] The Court added, however, "[T]he general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context."[78]

The fourth amendment says expressly that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation."[79] Endorsing use of the warrant procedure when probable cause is lacking would be inconsistent with this command. Of course, a

74. Wong Sun v. United States, 371 U.S. 471, 479 (1963).
75. United States v. Watson, 423 U.S. 411 (1976).
76. 394 U.S. at 721 (1969).
77. *Id.* at 727.
78. *Id.* at 728.
79. U.S. CONST. amend. IV.

court could authorize the brief detention of a suspect when the evidence would not justify his arrest and could require the issuance of a warrant as a prerequiste to this detention. The court could render this procedure consistent with the Constitution, however, only by recognizing the flexibility of the probable cause concept. Rather than speak of probable cause to believe, the court might speak of probable cause to do. It might recognize that probable cause to do one thing (for example, to stop a suspect or to detain him for fingerprinting) may differ from probable cause to do something else (for example, to arrest the suspect and charge him with a crime). Under this view, probable cause would mean "good reason," no more and no less. Unlike the two-tiered view of the fourth amendment advanced in *Terry* and *Dunaway*, this interpretation of the amendment would not force a court to abandon use of the warrant procedure whenever it permitted a police action on the basis of less persuasive evidence than would be required for an arrest.

In a case decided only a year before *Terry*, the Supreme Court endorsed the flexible reading of the probable cause requirement that *Terry* and *Dunaway* disclaimed. In *Camara v. Municipal Court*,[80] the Court upheld the constitutionality of administrative housing inspections despite the absence of articulable reasons for suspecting building code violations within particular dwellings. At the same time, the Court ruled that homeowners are entitled to demand search warrants before allowing these inspections. The *Camara* opinion explained:

> Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails . . . .
>
> Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.[81]

In very broad terms, courts might develop a "test" of probable cause analogous to the formula that Judge Learned Hand once proposed as a definition of negligence.[82] This test would ask whether

80. 387 U.S. 523 (1967).

81. *Id.* at 536-37, 538.

82. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). I am grateful to Professor Alan Meisel for suggesting that the "Hand formula" might be profitably applied to the determination of probable cause.

the evil that a search or seizure might prevent, multiplied by the strength of the evidence justifying the intrusion, would be greater than or less than the impairment of privacy or property that the search or seizure would entail. As Judge Hand recognized with respect to his negligence formula, this test would call for the balancing of values both unmeasurable and incommensurate.[83] Moreover, even this rather blurry formula would fail to capture all of the circumstances that might become relevant: for example, whether some less restrictive alternative could accomplish the government's objective, whether the timing of the proposed search or seizure was appropriate, and whether the evidence supporting the search or seizure differentiated the target of the government's action from other members of a broad demographic group or was instead of a highly generalized statistical character.[84]

Although no comprehensive history of the probable cause requirement has yet been written,[85] the origins of this requirement are apparently as old as Bracton's mid-thirteenth century treatise *On the Laws and Customs of England*. Bracton declared that a person could be proclaimed an outlaw on the basis of "presumptive cause" and that this proclamation would be valid although it later developed that no crime had been committed.[86] By the time of Sir Mathew Hale's treatise in the seventeenth century, the concept of "probable cause" had become a test of the legality of searches and arrests in a number of situations.[87] Apparently the single, familiar standard of *Dunaway v. New York* was not yet familiar, however. Hale spoke consistently of "probable cause to suspect" rather than "probable cause to believe," and his illustrations revealed that probable cause was not always an extremely demanding concept. For example, if one member of a gang of robbers had been identified and if a second person later were found traveling in his company, these facts alone would justify an arrest of the known robber's traveling companion.[88]

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83. *See* Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (L. Hand, J.); Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949) (L. Hand, J.).

84. *See infra* note 138 and accompanying text; *see also supra* note 63 and accompanying text.

85. A useful preliminary sketch is Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155 (1982).

86. 2 H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 356 (S. Thorne trans. 1968).

87. 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 98-104 (London 1778).

88. *Id.* at 81.

Other sources confirmed that very little evidence could establish probable cause in the pre-revolutionary period. Several authorities declared that, so long as an offense had been committed, the common opinion of the public that a particular person had committed it would justify his arrest.[89] "Generally keeping company with persons of scandalous reputation" also could be sufficient,[90] as could remaining silent in the face of an accusation of serious crime.[91]

In the period just before the American Revolution, in both England and America, oppressive governmental searches led defenders of the rights of English subjects to insist upon the importance of the probable cause requirement. The grievance of these forebearers of the Revolution, however, was the asserted power of executive officers to search and seize simply upon unsupported suspicion. The issue was whether any evidentiary basis would be required to authorize searches and seizures, not what quantum of evidence would be necessary. No materials of which I am aware suggest that the pre-Revolutionary concept of probable cause was a unitary standard rather than a flexible requirement of case-by-case justification.[92]

The pre-Revolutionary concept of probable cause seemed to embody the same judgment that the Supreme Court expressed in 1931: "There is no formula for the determination of reasonableness.

89. *Conductor Generalis, or Office, Duty and Authority of Justices of the Peace* (written about 1749) *(quoted in* Weber, *supra* note 85, at 158); M. DALTON, THE COUNTREY JUSTICE 277 (1622); 2 W. HAWKINS, PLEAS OF THE CROWN 118 (8th ed. 1824) (n.p., n.d., written in 1716); 1 R. BURN, JUSTICE OF THE PEACE 292 (30th ed. 1869). *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 599-600 (3d ed. 1922).

90. 2 W. HAWKINS, *supra* note 89, at 118.

91. *Id.* For an illustration of how a little evidence might prompt an eighteenth-century magistrate to order an arrest, see Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 90 (1983) (describing the arrest of Charles Cane in 1756).

92. In Wilkes v. Wood, 19 How. St. Tr. 1153 (1763), Lord Chief Justice Pratt declared that the "discretionary power" of law enforcement officers to act *"wherever their suspicions may chance to fall"* was "totally subversive of the liberty of the suspect." *Id.* at 1167 (emphasis added). Wilkes wrote in 1762, "To take any man into custody . . . *without having some seeming foundation at least*, on which to justify such a step, is inconsistent with wisdom and sound policy." J. WILKES, THE LIFE AND POLITICAL WRITINGS OF JOHN WILKES 372 (1773) (emphasis added). The Virginia Declaration of Rights, adopted on June 12, 1776, proclaimed that "general warrants, whereby any officer or messenger may be commanded to search suspected places *without evidence of a fact committed* . . . are grievous and oppressive, and ought not to be granted." The Constitution of Virginia in 7 F. THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3814 (1909) (emphasis added). The historic battle was between those who insisted on the common law requirement that a search or seizure be justified on its facts and those who claimed that a general warrant could obviate the need for case-by-case justification.

Each case is to be decided on its own facts and circumstances."[93] Indeed, the Supreme Court reiterated this traditional view as recently as three weeks before the decision in *Dunaway*. The Court said in *Bell v. Wolfish*,[94] "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need to search against the invasion of personal rights that the search entails."[95] Moreover, several years after *Dunaway*, the Supreme Court apparently returned to this view in *Illinois v. Gates*.[96] Without mentioning *Dunaway* and its "single familiar standard," the Court declared, "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[97] It added, "There are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another."[98]

Professor Anthony G. Amsterdam once referred to "the monstrous abyss of a graduated fourth amendment . . . splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general ooziness."[99] He also observed that a sliding scale would "produce more slide than scale"[100] and that it would convert the fourth amendment into an "immense Rorschach blot."[101] These wonderful phrases make a significant point. Nevertheless, at the same time that Professor Amsterdam insisted that levels of justification under the fourth amendment must be confined to a small and manageable number of categories, he failed to indi-

93. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). Remarkably, Justice Brennan, the author of the *Dunaway* opinion, has cited this language with approval when the Supreme Court has announced bright line rules that he does not like. New York v. Belton, 453 U.S. 454, 464 n.1 (1981) (Brennan, J., dissenting). *See also* United States v. Robinson, 414 U.S. 218, 238 (1973) (Marshall, J., joined by Douglas and Brennan, JJ., dissenting).

94. 441 U.S. 520 (1979).

95. *Id.* at 559.

96. 103 S. Ct. 2317 (1983).

97. *Id.* at 2328.

98. *Id.* at 2332 n.11. *Gates* may have moved a bit too far from the bright line approach of *Dunaway*. The Court's opinion insisted repeatedly on an examination of the totality of the circumstances and did not seem to recognize the utility of subordinate, presumptive rules for the resolution of recurring fourth amendment issues. *See supra* notes 30-41 and accompanying text. On the whole, however, the Supreme Court's apparent recovery from a bad case of bright line fever seems a cause for rejoicing.

99. Amsterdam, *supra* note 4, at 415.

100. *Id.* at 394.

101. *Id.* at 393.

cate what the nonwoolly content of any one of these categories might be.

Moreover, Professor Amsterdam's captivating imagery may exaggerate the extent to which a regime of case-by-case adjudication would leave law enforcement officers sliding without scale into the monstrous abyss. As this article had indicated, courts sometimes can give law enforcement officers significant guidance within a framework of case-by-case adjudication by establishing subordinate, presumptive rules for the resolution of recurring fourth amendment issues. Although the effort to develop a grand, unitary definition of probable cause may be hopeless, generalization about the credibility of "citizen informants" and of "first-time police informants" is probably feasible. In addition, every ruling in a system of case-by-case adjudication becomes part of a dialogue between judges and law enforcement officers. This dialogue can—and has in fact—established standards that may not be subject to precise verbalization. All of us can recognize that the roundup of twenty-four suspects in *Davis v. Mississippi*[102] lacked probable cause, yet none of us may be able to define the critical constitutional term or articulate with precision the standard that we have employed. The reason for our common understanding is not that the roundup would have been indefensible if its costs and benefits had been judged afresh; this highly intrusive police action did enable law enforcement officers to apprehend the perpetrator of a brutal crime. Nevertheless, a long course of adjudication under the fourth amendment had given expression to a set of values, and this course of adjudication had effectively settled the probable cause issue in *Davis* before it arose. Our traditional regime of case-by-case adjudication plainly does communicate. It is wrong to imagine that communication always must take the form of bright line rules.

IV. SEARCHES INCIDENT TO DETENTIONS: *UNITED STATES V. ROBINSON*

In *United States v. Robinson*,[103] a motorist was arrested for operating a motor vehicle after the revocation of his operator's permit. It was undisputed that the arrest was valid, that the arresting officer properly made a custodial arrest rather than issue a traffic citation, and that the officer lawfully subjected the motorist to a *Terry*-type

102. 394 U.S. 721 (1969).
103. 414 U.S. 218 (1973).

frisk before transporting him to the station house. The arresting officer, however, went beyond a frisk of the motorist for weapons. He reached inside the motorist's pocket, removed a crumpled cigarette package, opened this package and discovered unlawful drugs. The issue was whether this search of the motorist's person could be justified as an incident of his arrest.

Four years before *Robinson*, the Supreme Court had reviewed the doctrine of searches incident to arrest in *Chimel v. California*.[104] It had recognized that these searches serve two distinct purposes:

> [I]t is reasonable for [an] arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape . . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.[105]

Noting that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible"[106] and that "the burden is on those seeking [an] exemption [from the warrant requirement] to show the need for it,"[107] the Court held in *Chimel* that a search incident to arrest could not extend beyond an arrestee's person and "the area from within which he might gain possession of a weapon or destructible evidence."[108]

In *Robinson*, there was no suggestion that the challenged search could have prevented the concealment or destruction of evidence of the offense for which the defendant had been arrested.[109] The defendant contended, in addition, that the arresting officer's frisk had eliminated the possibility that the defendant might use a weapon to resist arrest or effect an escape. Although it is far from clear that the Supreme Court relied on a self-protective rationale when it upheld the search in *Robinson*, the Court did discuss this issue. The Court's earlier opinion in *Terry* had said that a frisk for weapons could adequately protect the safety of an officer who had stopped and detained a suspect, but the majority in *Robinson* concluded that *Terry* was inapposite. "It is scarcely open to doubt," the majority said, "that the danger to an officer is far greater in the case of the ex-

104. 395 U.S. 752 (1969).
105. *Id.* at 763.
106. *Id.* at 762 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).
107. *Id.* at 762 (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)).
108. *Id.* at 763.
109. *See Robinson*, 414 U.S. at 252 (Marshall, J., dissenting).

tended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop."[110]

One hesitates to doubt something that the Supreme Court has said is scarcely open to doubt; but when a suspect has been frisked and his knives, clubs and guns have been removed, transporting him to the station house does not seem to pose a notable danger of assault with a knife, club or gun. Perhaps the Court was concerned about smaller weapons that might be missed in a patdown search—such weapons as razor blades and safety pins. Even the dissenting Justices in *Robinson* seemed to acknowledge that these weapons posed a salient danger.[111] Few traffic offenders seem likely to be armed with concealed safety pins or razor blades, however; and it is difficult to visualize an offender withdrawing a safety pin and announcing to an officer, "Don't move. I've got you covered." To be sure, an arrestee who took an officer by surprise might inflict a serious injury with a razor blade or other small weapon—but probably not a serious enough injury to prevent the wounded officer from shooting the arrestee in his tracks as he fled. For a person under arrest to attack an armed officer with a safety pin or razor blade would be madness, and I am not persuaded that law enforcement officers need worry a great deal about the danger. Moreover, when an officer does remain apprehensive after a careful frisk, he can handcuff an arrestee and lock him in the sealed rear seat of a patrol car. In *Robinson*, the government conceded that the arresting officer had not been searching for weapons and that the officer had not in fact been motivated by a sense of imminent danger.[112]

A self-protective rationale for the search in *Robinson* therefore would have been strained; and, as I read the Supreme Court's opinion, it did not assert any self-protective justification for the search in that case. Instead, the Court relied both on the dubious proposition that a full search of the person had been a recognized incident of custodial arrest throughout our legal history[113] and on the perceived

110. *Id.* at 234-35 (majority opinion).

111. *Id.* at 254 (Marshall, J., dissenting).

112. *Id.* at 236 n.7 (majority opinion).

113. *Id.* at 224. The Court advanced this contention although the dissenting Justices quoted the following language from an 1853 English case:

need for bright line standards. Apparently, from the Court's perspective, even treating traffic arrests as a class would have drawn too fine a line. The *Robinson* opinion observed:

> [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. . . . 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. . . . 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.[114]

Although the dissenting Justices argued that "[t]he majority's attempt to avoid case-by-case adjudication . . . is doomed to fail as a matter of practical application,"[115] I believe that *Robinson* did establish an easily administered rule. Nevertheless, *Robinson* went beyond the appropriate judicial practice of affording law enforcement officers the benefit of the doubt in matters of self-protection and permitted these officers to engage in undisguised fishing expeditions and even in gratuitous harrassment.[116]

Five years before *Robinson*, in *Terry v. Ohio*,[117] the Supreme Court had considered a police action that, judged on its facts, seemed clearly reasonable. A single officer had stopped and frisked three suspects who had given strong indication that they were about to commit an armed robbery. This officer's carefully timed intervention and limited searches had illustrated the ability of capable law enforcement officers to provide appropriate, measured re-

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> With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that a general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case.

Leigh v. Cole, 6 Cox C. C. 329, 332 (Oxford Cir. 1853) *(quoted in Robinson*, 414 U.S. at 247 n.2 (Marshall, J., dissenting)).

114. *Robinson*, 414 U.S. at 235 (majority opinion).

115. *Id.* at 248 (Marshall, J., dissenting).

116. *See* White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 185-216.

117. 392 U.S. 1 (1968).

sponses even in difficult, fast-breaking situations. At the time of the *Terry* decision, however, abuse of the power to stop and frisk was, with good reason, a significant grievance of many inner-city residents and civil rights groups.[118] The Supreme Court might have written an opinion in *Terry* declaring it categorically unreasonable to stop and frisk in the absence of probable cause for arrest. Had the Court written this bright line opinion in an effort to provide guidance for law enforcement officers, and had the Court therefore condemned the police action in *Terry*, the general reaction probably would have been one of outrage; and the outrage would have been justified. Nevertheless, treating all stops as a class would have been analogous to treating all searches incident to arrest as a class—exactly what the Supreme Court later did in *Robinson*. The language of Chief Justice Warren's opinion in *Terry* may offer an appropriate counterpoint both to the decision in *Robinson* and to the perceived need for bright line standards that informed the *Robinson* ruling.

> The exclusionary rule . . . cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusion upon constitutional protections. . . . No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.[119]

V. DETENTIONS INCIDENT TO SEARCHES: *MICHIGAN V. SUMMERS*

Because the Justices of the Supreme Court have contracted bright line fever and seem not to care very much about the facts of individual cases, it is difficult to tell from the Court's opinion what happened in *Michigan v. Summers*.[120] The text of this opinion devoted only three sentences to its description of the facts:

> As Detroit police officers were about to execute a warrant to search a house for narcotics, they encountered respondent descending the front steps. They requested his assistance in gaining entry and detained him while they searched the premises. After finding narcotics in the basement and ascertaining that respondent owned the house, the police arrested him, searched his person, and found in his coat pocket an

118. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967).

119. *Terry*, 392 U.S. at 13-15.

120. 452 U.S. 692 (1981).

envelope containing 8.5 grams of heroin.[121]

Neither the Court's opinion nor that of the three dissenting Justices indicated what had led to the initial finding of probable cause for the narcotics search. Both opinions apparently assumed that although the police had good reason to believe that narcotics would be found inside the house, they had not received any advance indication of whose drugs they might be.[122] The Court's statement of facts indicated that the police failed to discover that the defendant owned the house until after they had detained him and searched the premises.[123] Nevertheless, a footnote to the Court's opinion reported that the police knew at the time of the initial detention that the defendant resided in the house.[124] Another footnote revealed that the police detained seven occupants of the house in addition to the defendant while they conducted their search.[125]

The majority and dissenting opinions agreed that the determinative issue in *Summers* was the propriety of the initial seizure of the defendant and his detention while the police conducted their search. Moreover, both opinions agreed that this seizure and detention were not supported by probable cause. Although the record in *Summers* did not reveal the length of the defendant's detention, the dissent noted that narcotics searches commonly continue for hours.[126] The detention in *Summers* therefore seemed more intrusive than the streetcorner stop-and-frisk that *Terry* had permitted without probable cause. At the same time, this detention seemed less intrusive than the station house detention that *Dunaway* had condemned because the probable cause standard had not been satisfied. Neither *Terry* nor *Dunaway* seemed to control the resolution of the issue before the Court.

The majority noted that "some seizures admittedly covered by the Fourth Amendment . . . may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity."[127] It concluded that the detention in *Summers*, like the stop in *Terry*, was one of these seizures. The majority de-

121. *Id.* at 693.

122. This assumption was, however, inaccurate. *See infra* note 149 and accompanying text.

123. Again, the Court's view of the facts may have been inaccurate. *See infra* note 148 and accompanying text.

124. *Summers*, 452 U.S. at 695 n.4.

125. *Id.* at 693 n.1.

126. *Id.* at 711 (Stewart, J., dissenting).

127. *Id.* at 699.

parted from the pattern of the *Terry* opinion, however, by articulating a bright line rule that, it insisted, would not require a police officer "to evaluate either the quantum of proof justifying the detention or the extent of the intrusion to be imposed by the seizure."[128] "[W]e hold," the majority said, "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[129] The dissenting Justices argued for a different categorical rule. They maintained that law enforcement officers could detain a suspect pending the completion of a search only when they had probable cause for his arrest.

Although neither the majority nor the dissenting Justices mentioned the fourth amendment's particularity requirement, that requirement might have had some bearing on the legality of the detention in *Summers*. The fourth amendment declares that warrants must particularly describe "the place to be searched, and the persons or things to be seized." In *Summers*, the police possessed a warrant describing the place to be searched and the things to be seized, but they did not possess a warrant describing even in general terms the persons to be seized. Of course, in *Summers*, it might not have been possible to describe these persons by name; but the police certainly had reason to suppose that the house that they proposed to search would be occupied. When the police sought a search warrant, they could have requested the authority to detain people whom the warrant might have described as "all occupants of the premises." The propriety of the interim police detention in *Summers* was sufficiently doubtful to divide the Supreme Court. For the police to have submitted their plan of action to a magistrate would have accorded with the basic fourth amendment principle that "[w]hen the right of privacy must reasonably yield to the right to search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[130] In other situations, moreover, police officers seeking a search warrant undoubtedly could specify the "persons to be seized" with greater particularity than the officers could have supplied in *Summers*.

Had the officers in *Summers* sought a warrant authorizing what they did, however, the magistrate who considered their request

128. *Id.* at 705 n.19.

129. *Id.* at 705.

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

would have been bound to deny it. All the Justices of the Supreme Court agreed that there was no probable cause for the detention in *Summers*, and the fourth amendment expressly declares that "no warrants shall issue, but upon probable cause." The ruling in *Summers* is therefore incongruous. It gives police officers greater power to make seizures than magistrates have to authorize them.

This anomaly illustrates the inappropriateness of the two-tiered view of the fourth amendment articulated in *Terry* and *Dunaway*. The language of the fourth amendment should not be construed to preclude judicial officers from determining in advance the reasonableness of intrusions such as the detention of eight people in *Summers*. Nevertheless, the constitutional language plainly would require a magistrate to make his determination of reasonableness within a framework of probable cause. A view of the fourth amendment that treats probable cause as a unitary standard while authorizing departures from this standard when police intrusions seem relatively minor effectively makes warrants unavailable as a means of controlling the lesser or second-tier intrusions.[131]

The majority and dissenting Justices agreed that law enforcement officers required a bright line rule to determine when the occupants of a place that the officers were about to search for contraband could be detained despite the absence of probable cause for their arrest. Very simply, the majority's rule was always, and the dissent's rule was never.

The dissenting Justices denied, in fact, that the fourth amendment ever had been read to authorize a departure from the probable cause standard simply because a search or seizure involved a minor intrusion. In their view, the Supreme Court's earlier decisions had authorized departures from the probable cause standard only to advance "some governmental interest independent of the ordinary interest in investigating crime and apprehending suspects."[132] To demonstrate this point, the dissenting opinion quoted language from *Terry v. Ohio*[133] in which the Supreme Court had declared that

> more than the governmental interest in investigating crime [is at issue]; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used

131. *See supra* notes 72-80 and accompanying text.
132. *Summers*, 452 U.S. at 707 (Stewart, J., dissenting).
133. 392 U.S. 1 (1968).

against him.[134]

This language appeared, however, in a portion of the *Terry* opinion that considered only the propriety of a "frisk" after a police officer had lawfully "stopped" a suspect. The dissenting Justices disregarded language that had appeared slightly earlier in the *Terry* opinion:

> One general interest is of course that of effective crime prevention and detection. It is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function that Officer McFadden was discharging when he decided to approach petitioner and his companions.[135]

Moreover, if *Terry* had held only what the dissenting Justices in *Summers* described it as holding, the ruling in that case would have been nonsensical. The officer in *Terry* plainly could have protected himself from assault simply by ignoring the suspects' reconnaissance of a store that they apparently planned to rob and by leaving the scene. If the officer was entitled to seize the suspects without probable cause instead, the explanation for his power obviously lay in the governmental interest in investigating possible criminal activity.

In a concurring opinion in *Terry*, Justice Harlan emphasized that "the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence";[136] but, of course, police officers sometimes stop suspects to investigate the possibility of nonviolent criminal behavior. The majority opinion in *Terry* declared that an officer's power to make a patdown search in this situation depended upon his ability to articulate reasons for believing that the suspect might be armed.[137] Under *Terry*, a frisk plainly is not an automatic incident of every stop. An officer may be entitled to make a stop when the self-protective interest that would justify a frisk is entirely absent. In this situation, in which the stop serves only the governmental interest in investigating possible criminal behavior, the dissenting Justices in *Summers* apparently would require that the stop be justified by the same stan-

134. *Id.* at 23 *(quoted in Summers*, 452 U.S. at 707 (Stewart, J., dissenting)).

135. *Id.* at 22.

136. *Id.* at 33 (Harlan, J., concurring).

137. *Id.* at 27 (majority opinion).

dard of probable cause that they would apply to an arrest. The Justices' misreading of *Terry* seemed to reflect a remarkable determination to treat unlike cases as though they were alike. In the opinion of the dissenting Justices, the fourth amendment establishes a unitary bright line standard for all investigative searches and seizures, treating a thirty-second streetcorner detention in the same manner as a decision to arrest a suspect and charge him with a crime.

The majority, however, was not to be outdone by the dissent in its determination to treat unlike cases alike; and it may be instructive to consider some of the many situations encompassed within the majority's categorical rule. Police officers who search for contraband usually have some idea whose contraband they seek. In a typical situation, an informant of proven reliability may have reported that he recently purchased heroin from Don the Dealer at Don's residence and that Don had a large supply on hand. When the police execute a warrant to search this residence, Don may be at home; but as soon as the officers exhibit their warrant, Don may propose to leave (perhaps for an island off the coast of Spain). Surely, in this situation, the officers have an adequate evidentiary basis for Don's detention. Indeed, the officers appear to have probable cause for Don's arrest. The informant claimed personal knowledge that drugs were located at Don's house and, in addition, that the drugs were owned by Don. If there was reason to believe the informant on the first point and to issue a search warrant, there was also reason to believe him on the second point. In this situation, probable cause to search also seems to be probable cause to arrest.

To be sure, it might be unreasonable for the police to arrest Don without first searching his premises; if the search were unsuccessful, the justification for Don's arrest would largely disappear. Although a flexible standard of probable cause would permit a court to credit the argument that the police should search first and arrest later, that argument finds no support in the wooden definition of probable cause that the Supreme Court has advanced and that this article has considered.[138] Moreover, even if it would be unreasona-

138. *See supra* note 60 and accompanying text. "Probable cause" means "facts and circumstances [that] warrant a prudent man in believing that [an] offense has been committed" by a particular individual. The Supreme Court has not been at all receptive to arguments that a search or arrest supported by this sort of probable cause might be unreasonable because a less intrusive procedure could have satisfied legitimate law enforcement interests. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

ble for the police to transport Don to the station house before searching his residence, it plainly would be reasonable for them to detain him until the search had been completed.

Don's detention might give rise to concern on a somewhat different ground, for it could enable the police to evade the usual requirement that they obtain an arrest warrant before making an arrest in a private residence.[139] The arrest warrant requirement may be inapplicable, however, when the police have entered a residence lawfully with a search warrant. Law enforcement officers are permitted to make felony arrests in public places without warrants even when they have had ample opportunity to obtain them.[140] The apparent reason for requiring a warrant when the police make an arrest inside a dwelling is to insure a judicial determination that the invasion of the dwelling itself is justified. When a magistrate has issued a search warrant authorizing invasion of a home, the reason for treating home arrests differently from street arrests may well disappear. Nevertheless, the fourth amendment does not differentiate between search warrants and arrest warrants; it declares that any warrant must specify both the persons and the things to be seized. Permitting officers to seize unspecified persons when they have a warrant authorizing them to seize specified things seems to violate this requirement. The need for an arrest warrant therefore seems a doubtful issue in a case like Don's; but this issue aside, even the dissenting Justices in *Summers* probably would not object to Don's detention when a credible informant had identified him as the person in possession of contraband for which the police had been authorized to search.

A second situation encompassed by the majority's bright line rule requires a different analysis. In this situation, the police lack probable cause to arrest an occupant of the searched premises when they begin their search. Nevertheless, their suspicion of this occupant would ripen into probable cause for arrest if the search were to prove successful. This sort of case is unusual, but it was apparently the only sort of case that the majority and dissenting opinions in *Summers* considered.

It is doubtful that *Summers* itself truly fit the factual pattern that the Supreme Court addressed. Under the Court's apparent view of the circumstances of the case, the police may not have had adequate reason to arrest the defendant even following the comple-

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

140. United States v. Watson, 423 U.S. 411 (1976).

tion of their search. At the same time, facts overlooked by the Court suggest that the police may have had probable cause to arrest the defendant even before their search began. An examination of these alternatives will indicate how rarely the issue addressed by the Court is likely to arise. The discovery of contraband for which there was probable cause to search is unlikely to supply probable cause for the arrest of someone whom the police could not have arrested earlier.

The majority reported that the defendant did not "challenge the conclusion that the evidence found in his home established probable cause to arrest him."[141] Nevertheless, the defendant's failure to make this argument might have established a distinct basis for relief—that he had not received the effective assistance of counsel. In fact, both the trial court and the Michigan Court of Appeals had concluded that the police lacked probable cause to arrest the defendant after the search had been completed.[142] The Michigan Supreme Court had found no occasion to consider the issue because it had held that the initial detention of the defendant was improper.[143] The argument that the defendant declined to make was, therefore, one that consistently had proven successful in the courts below. Under the applicable state law, evidence that narcotics had been found in a house that the defendant occupied with other people would have been inadequate to support his conviction for possessing these drugs,[144] and the Michigan Court of Appeals had relied on a decision by the United States Supreme Court that

141. *Summers*, 452 U.S. at 695 n.3.

142. *See* People v. Summers, 68 Mich. App. 571, 243 N.W.2d 689 (1978), *aff'd*, 407 Mich. 432, 286 N.W.2d 226 (1979), *rev'd*, 452 U.S. 692 (1981).

143. People v. Summers, 407 Mich. 432, 286 N.W.2d 226 (1979), *rev'd*, 452 U.S. 692 (1981).

144. People v. Davenport, 39 Mich. App. 252, 197 N.W.2d 521 (1972). The Supreme Court majority noted:

> The Michigan Court of Appeals relied on *Davenport* to conclude that the officers did not have probable cause to arrest or search respondent . . . . Judge Bashara, dissenting in the Court of Appeals, . . . and the three dissenting justices of the Michigan Supreme Court . . . pointed out that *Davenport*, which concerns the proof necessary to support a conviction, is not dispositive of the question whether the police had probable cause to arrest.

Summers, 452 U.S. at 695 n.3.

The apparent implication of the Supreme Court's statement was that, apart from Judge Bashara, the judges of the Michigan Court of Appeals were ignorant of the difference between the proof necessary to justify an arrest and the proof necessary to convict. Nevertheless, the judges in the majority had recognized exactly what Judge Bashara had recognized—that a decision on the sufficiency of the evidence to convict was not "dispositive." *See* 68 Mich. App. at 582, 243 N.W.2d at 693-94. Surely these judges cannot be faulted for considering it relevant to the prob-

seemed very nearly on point when it held the defendant's arrest invalid.[145] Although the Supreme Court majority indicated that it would have upheld the defendant's arrest even in the absence of his implicit concession of the issue,[146] one wonders whether the discovery of the illicit drugs in *Summers* would have supplied probable cause for the arrest of all eight people whom the police had detained. Surely the fact that the defendant owned the premises provided only a tenuous basis for differentiating him from the other residents or for concluding that he, rather than one of the others, had owned or exercised control over the drugs.[147]

If the defendant's ownership of a home where drugs were located was determinative, moreover, that circumstance might have justified the defendant's arrest even prior to the police search. Although the Supreme Court indicated that the police had discovered the defendant's ownership only after their search had been completed, police testimony at the defendant's preliminary examination strongly suggested that he had revealed his ownership at the time of his initial encounter with the officers.[148] The police had probable cause to believe that illicit drugs were in the house at this time. Their later discovery of the drugs added somewhat to the justification for arresting the defendant, but it added only a little.

More importantly—and contrary to the Supreme Court's apparent assumption—the police were not at all ignorant of whose drugs they were likely to find at the defendant's house. The affidavit for the search warrant in *Summers* recited the statement of an informant, not only that he had purchased heroin at the premises to be searched, but also that he had purchased this heroin from a black male named George. The informant described "George" as a per-

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able cause determination that the evidence possessed by the police would have been legally insufficient to support a conviction.

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

146. 452 U.S. at 695 n.3.

147. The defendant in *Summers* was never charged with possessing the drugs that the police found in his basement. He was charged with possessing drugs that the police found on his person during a search incident to his arrest. *See* 452 U.S. at 693-94.

148. *See* Joint Appendix at 16, Michigan v. Summers, 452 U.S. 692 (1981):

The Court: [How did the defendant] get inside of the house?

The Witness: He accompanied us inside.

The Court: What do you mean he accompanied you inside?

The Witness: He said it was his house, your Honor.

The Court: Oh. Did you tell him to come in?

The Witness: I told him to come in.

son of medium build and complexion; with short hair; five feet, ten inches tall; and approximately thirty-one to thirty-three years old.[149] The first name of the defendant in *Summers* was George. The record does not reveal the extent to which he matched the informant's description. Although the testimony of police officers often described the person whom they detained as "George," the record does not reveal with clarity when they first learned his identity. The inadequacy of the record in *Summers* might have kept a court from finding that the police had probable cause to arrest the defendant as soon as they encountered him. On its historic facts, however, *Summers* may well have been a case like that of Don the Dealer. There was probably an adequate evidentiary basis for the defendant's arrest even before the search began.

The Supreme Court treated *Summers* as the type of case in which only the discovery of drugs following a search had supplied probable cause for the defendant's arrest. Although this sort of case would plainly be rare, it could, of course, arise. The Court offered several reasons for permitting a detention of the suspect in this situation, and all except one of them seemed trivial. The Court observed:

> A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were being searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself.[150]

The relevance of this comment is difficult to discern. Perhaps the Court's theory was that once the legitimate needs of law enforcement have justified hitting a person hard, it is a matter of little consequence that he has been hit again.[151]

The majority in *Summers* also suggested that detention would "minimiz[e] the risk of harm to the officers"[152] and that "the orderly completion of the search may be facilitated if the occupants of the premises are present. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is

149. *Id.* at 61.

150. 452 U.S. at 701.

151. *But cf.* Chimel v. California, 395 U.S. 752, 766-67 n.12 (1969) ("[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed . . .").

152. 452 U.S. at 702.

not only damaging to property but may also delay the completion of the task at hand."[153] Nevertheless, it is difficult to understand how permitting someone to leave the premises would risk harm to the officers; perhaps the fear is that this person would return with an army. Moreover, if the occupants of the searched premises wished to facilitate the search by opening doors and containers voluntarily, it would not be necessary to detain them.

The majority advanced a much more substantial argument when it noted "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found."[154] In cases in which the police have probable cause to search but in which their suspicion of a particular occupant would ripen into probable cause for arrest only in the event that the search proved successful, detention of the occupant until the search is completed does seem reasonable. In this situation, the majority's bright line rule yields an appropriate result.

The rule that "a warrant to search for contraband . . . carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," however, extends well beyond this atypical situation. The majority said that "[i]t is . . . appropriate to consider the nature of the articulable and individualized suspicion on which the police base the detention of the occupant of a home subject to a search warrant,"[155] but the majority's rule reaches many situations in which there is no articulable or individualized basis of suspicion whatever—situations in which even successful completion of the search will not supply probable cause for arresting people whom the police have detained.

Exactly how far beyond its basis in reason the majority's rule extends seems somewhat uncertain, for the word "occupant" may not be a word of bright line precision. The usual usage of this word is probably clear. Everyone who attends a concert is an occupant of the concert hall, and if the majority intended the word "occupant" to be understood in its usual sense, its bright line rule would authorize police officers to detain 500 people at an Elks Club dance while the officers executed a warrant to search the ballroom for contraband. Surely the detention of all of these people would not be supported by "articulable and individualized suspicion," and surely the

153. *Id.* at 703.
154. *Id.* at 702.
155. *Id.* at 703.

discovery of contraband in the ballroom would not supply probable cause for the arrest of all 500.[156]

In a footnote the majority referred to the "routine detention of residents of a house,"[157] and perhaps the majority used the word "occupant" only as a synonym for "resident." Although this usage might seem unusual, it would not be unprecedented. A nonresident who notices an envelope on a hall table addressed simply to "occupant" usually does not feel entitled to open it. A narrow construction of the word "occupant," however, sometimes would require police officers to engage in case-by-case adjudication before applying the Supreme Court's bright line rule. Although a police officer would not need probable cause to consider a person a criminal before detaining him, he apparently would need probable cause to consider this person a resident. Upon encountering a large group of people in a living room, a police officer therefore might inquire, "Sir, do you live here, or are you a guest? Do you have a driver's license that shows your home address? Very well, you may leave. And you, madam? Over there against the wall please."[158]

Even a narrow construction of the majority's flickering bright line rule would leave the rule much broader than its asserted justification. As this article has noted, police officers who search for contraband usually know whose contraband they seek. The detention of someone suspected of owning this contraband presents one sort of issue; the detention of other people presents another. A credible informant may have reported, for example, that Junior keeps drugs at his home. When the police arrive with a warrant to search for these drugs, they may find Junior at home and Mom and Pop as well. When Pop attempts to leave, the police may detain him.[159] Under any view of the Supreme Court's rule, this detention seems authorized. The Supreme Court proclaimed that suspicion of criminal activity justified the detention in *Summers*, but it articulated a rule that reaches situations in which there is no basis for suspecting criminal activity on the part of the people detained. The ruling in *Summers* therefore extends *Terry*, not only by authorizing detentions

156. *See* LaFave, *supra* note 18, at 328 n.116.

157. 452 U.S. at 705 n.21.

158. Although *Summers* holds that police officers may detain the occupants of places that they are about to search, the Supreme Court has held that the police may not automatically frisk these people for purposes of self-protection. Ybarra v. Illinois, 444 U.S. 85 (1979).

159. Pop's desire to leave may not be as callous as it seems. He may simply wish to go to the neighborhood tavern to see if he can persuade Paul Newman to represent Junior.

substantially more intrusive than the detentions permitted by that case, but also by eliminating *Terry*'s requirement that investigative detentions governed by the fourth amendment be based on reasonable suspicion.

When a legislature enacts a generalized rule, the reason is usually that some interest group has perceived a generalized problem meriting a generalized solution. Before enacting the rule, the legislature is likely to have investigated the extent of the problem as well as the merits of the solution that the interest group has proposed. In *Michigan v. Summers*, however, the Supreme Court considered an unusual situation (one that may not have been presented even by the circumstances of the case before the Court); imagined that this situation presented a common, recurring problem; and then articulated a rule that extended beyond the situation that the Court appeared to address.

Perhaps the Supreme Court failed to recognize the breadth of the rule that it announced. Perhaps it simply did not consider Mom and Pop and all those folks at the Elks Club dance. Or perhaps the Court thought that police officers lack the ability that ordinary people possess to differentiate gratuitous detentions from those that serve a purpose. The Court truly might have concluded that police officers require a rule treating all "detentions incident to searches" as a class. The first hypothesis—that the Court failed to anticipate the variety of situations encompassed by its rule—suggests one danger of judicial efforts to develop bright line rules, while the second—that the Court doubted the ability of police officers to observe the general standards of decency that the rest of us are expected to observe—advances an even more troublesome view of judicial efforts to reduce the fourth amendment to bright line formulas.

VI. SEARCHES INCIDENT TO DETENTIONS AGAIN: *NEW YORK V. BELTON*

Although Professor LaFave has voiced approval of the decisions in *Dunaway*, *Robinson* and *Summers*,[160] one bright line ruling of the Supreme Court has provoked his criticism.[161] In *New York v. Belton*,[162] a state trooper stopped a car for speeding, discovered evidence of marijuana use, ordered the four people inside the car to

160. *See* LaFave, *supra* note 18, at 323-24 (*Dunaway*), 323 (*Robinson*), 328 (*Summers*).
161. *See id.* at 324-33.
162. 453 U.S. 454 (1981).

step out of it and arrested them. After frisking the suspects, the officer "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other."[163] The officer then searched each of the suspects more thoroughly, returned to the automobile, searched its passenger compartment, opened a zippered pocket in a black leather jacket that he found on the automobile's rear seat and discovered some cocaine. It was undisputed that the officer's arrest of the four suspects was lawful, and the Supreme Court upheld the officer's search of the automobile and the jacket pocket as an incident of the arrest.

Of course, *Chimel v. California*[164] had stated that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which render . . . its initiation permissible"[165] and had concluded that a search incident to an arrest could not extend beyond "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence."[166] The Supreme Court did not contend in *Belton* that the jacket on the rear seat was within grabbing distance of any of the four suspects on the highway.

Nevertheless, the Court discussed at length both the division of lower courts on the appropriate scope of searches incident to arrest when suspects have been arrested in or near automobiles and the need of front-line officers for bright-line standards. The Court concluded:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." . . . In order to establish the workable rule this category of cases requires, we read *Chimel*'s definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[167]

The Court added that the search incident to arrest could include the opening of closed glove compartments;[168] of "luggage, boxes, bags,

163. *Id.* at 456.
164. 395 U.S. 752 (1969).
165. *Id.* at 762 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).
166. *Id.* at 763.
167. *Belton*, 453 U.S. at 460.
168. *Id.* at 461 n.4.

[and] clothing" within the automobile;[169] and even of small containers that "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested."[170] In a footnote, however, the Court declared: "Our holding encompasses only the interior of the passenger compartment . . . and does not encompass the trunk."[171]

If any bright line rule had been necessary to resolve the issue in *Belton*, it would have been the opposite of the rule that the Court announced. Indeed, the claim that "articles inside the relatively narrow compass of the passenger compartment . . . are . . . generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]' " was almost as farfetched as the proposition that evidence might have been destroyed or a weapon secured on the facts of *Belton* itself. It is difficult to search an automobile while its occupants remain inside. An officer who attempts this task constantly must ask the occupants to slide over and move their feet. Accordingly, the occupants almost invariably are removed before an automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there.

Although the principle of *Chimel v. California* does not seem difficult to apply to cases like *Belton*, the Supreme Court maintained that lower "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."[172] Indeed, the Court noted that the applicability of the doctrine of search incident to arrest had produced a division of opinion among the judges who had considered *Belton* itself. One possible reason for this division of opinion might be that some judges cheat, but a more charitable explanation would concede *Chimel*'s ambiguity on one issue. When *Chimel* spoke of the area within an arrestee's immediate control, did it include the area that had been within his control at the time of arrest although the arrestee was no longer near that area, or did *Chimel* refer only to the area that remained within an arrestee's control at the time of the

169. *Id.*
170. *Id.* at 461.
171. *Id.* at 461 n.4.
172. *Id.* at 460.

search?[173]

The Supreme Court could have resolved this ambiguity simply by noting that the doctrine of search incident to arrest is designed to guard against real dangers; its function is not to give police officers a bonus for a job well done. The "grabbing area" to which *Chimel* referred was accordingly the "actual grabbing area" of an arrestee, not some "hypothetical grabbing area" measured by reference to a time other than the time at which a search occurs. With this minor clarification, the *Chimel* doctrine would have seemed as easy to apply as the supposedly bright line rule that the Court developed in *Belton*.

The ruling in *Belton* was so obviously artificial that one may wonder whether its announcement was part of a hidden agenda or responsive to concerns other than those which the Supreme Court expressed. In fact, the Court's hidden agenda was hardly hidden at all. In its judging of categories rather than cases, the Supreme Court has treated automobiles as a class apart from houses, boxes and other things that may conceal incriminating evidence. This categorization has led to significant incongruities and embarrassments, and the Supreme Court apparently concluded in *Belton* that the doctrine of search incident to arrest offered an escape route. Nevertheless, the escape route chosen by the Court led only to a deeper portion of the dungeon.

Except in an emergency situation in which a law enforcement officer lacks a realistic opportunity to obtain a judicial warrant, the fourth amendment usually requires the issuance of a warrant as a prerequisite to a search.[174] The Supreme Court has indicated, however, that the requirement of a warrant is subject to an "automobile exception."[175] This exception apparently does not apply when a police officer could have obtained a warrant well in advance of his seizure of an automobile.[176] Nevertheless, when an officer properly may seize an automobile without a warrant and when he has probable cause to search the automobile's interior, he may make this search without a warrant. The automobile exception applies even

173. *See* People v. Fitzpatrick, 32 N.Y.2d 499, 508, 300 N.E.2d 139, 143 (1973) ("it is not at all clear that the 'grabbing distance' authorized in the *Chimel* case is conditioned upon the arrested person's continued capacity 'to grab.' ").

174. *See, e.g.*, Katz v. United States, 389 U.S. 347, 356-59 (1967).

175. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982).

176. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); *but see* Cardwell v. Lewis, 417 U.S. 583 (1974).

when the officer's search occurs long after the automobile's impoundment at a time when he easily could seek the approval of a magistrate.

The automobile exception usually is traced to the Supreme Court's 1925 decision in *Carroll v. United States*.[177] In *Carroll*, however, the occupants of an automobile that had been stopped on a highway apparently were not under arrest and could not have been arrested lawfully.[178] Had law enforcement officers left the suspects and the vehicle while seeking a warrant, it is unlikely that the officers would have been able to find the vehicle and execute the warrant upon their return. The warrantless search in *Carroll* therefore involved no departure from customary fourth amendment principles, and the Supreme Court emphasized this fact. Chief Justice Taft's opinion for the Court declared, "In cases where the securing of a warrant is reasonably practicable, it must be used."[179] In the Court's view, the distinction between structures and automobiles was simply that it might not be "practicable to secure a warrant [for an automobile search] because the vehicle [could] be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[180]

In 1970, however, in *Chambers v. Maroney*,[181] the Supreme Court upheld the warrantless search of an automobile after its occupants had been arrested and the automobile taken to the police station. In the course of an elaborate opinion, the Court insisted that

177. 267 U.S. 132 (1925).

178. The Supreme Court concluded that federal officers had probable cause to search the vehicle that they had stopped, and there may have been probable cause to arrest the occupants of the vehicle as well. Nevertheless, the occupants could have been arrested only for a misdemeanor, and their arrest without a warrant would have been lawful only if the misdemeanor had occurred in the officers' presence. The defendants maintained, "The true rule is that unless the offense is discoverable without a search, it is not, in legal contemplation, committed in the presence of the officer." *Id.* at 137 (argument for the plaintiffs in error). The Supreme Court apparently accepted this argument and ruled that the search of the vehicle could not be justified as the incident of a lawful arrest because any arrest of the defendants would have been unlawful. It said:

> The argument of defendants is based on the theory that the seizure in this case can only be thus justified. If their theory were sound, their conclusion would be. The validity of the seizure then would turn wholly on the validity of the arrest without a seizure. But the theory is unsound. The right to search and the validity of the seizure are not dependent on the right to arrest.

Id. at 158.

179. *Id.* at 156.

180. *Id.* at 153.

181. 399 U.S. 42 (1970).

the "mobility of the car . . . still obtained at the stationhouse."[182] Seven years later, however, the Supreme Court confessed,

> Our treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a judicial warrant impracticable. Nevertheless, we have also sustained "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent."[183]

Once the Supreme Court had bent the warrant requirement in automobile cases, government lawyers tested the Court's willingness to bend the requirement in other cases. The Department of Justice urged the Court to hold the warrant requirement applicable only to governmental invasions of conversational privacy and to the search of homes and offices. If the Court was unwilling to endorse that position, the government urged that the Court at least hold the warrant requirement inapplicable to the search of personal luggage. Luggage, although not self-propelled, is mobile. The Supreme Court rejected both suggestions in *United States v. Chadwick*.[184] After *Chadwick*, the warrant requirement apparently applied to the search of big boxes called houses and small boxes called suitcases, but it ordinarily did not extend to the search of middle-sized boxes called automobiles.[185]

Not surprisingly, the Court soon was asked to consider the search of a suitcase that had been found inside an automobile. The Court held in *Arkansas v. Sanders*[186] that a container did not lose the protection of the warrant clause simply by being placed inside an automobile. After *Sanders*, although law enforcement officers could search a glove compartment without a warrant, they needed a warrant to search a box on the automobile's front seat. Although officers could search an automobile trunk without a warrant, they could not open a trunk within the trunk except upon a magistrate's approval.

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182. *Id.* at 52.

183. United States v. Chadwick, 433 U.S. 1, 12 (1977) (quoting Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973)).

184. 433 U.S. 1 (1977).

185. For further analysis of both *Chadwick* and the "sophisticated four-tier analysis" that sometimes makes "the size of the box that the police propose to open" the primary determinant of whether a search warrant is necessary, see Alschuler, *Burger's Failure: Trying Too Much to Lead*, NAT'L L.J., Feb. 18, 1980, 19 at 26, cols. 3 & 4.

186. 442 U.S. 753 (1979).

The artificiality of the *Sanders* rule led to artificial proposals for its limitation. In a concurring opinion, Chief Justice Burger suggested that the Court might require search warrants in cases like *Sanders*, in which law enforcement officers lacked probable cause to search an entire automobile but had probable cause to search a particular container within the vehicle. When police officers had probable cause to search an entire automobile, however, the Chief Justice suggested that they should be allowed to open containers inside the vehicle without a warrant by virtue of the automobile exception.[187]

Moreover, a footnote to the majority opinion in *Sanders* declared: "Not all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers . . . by their very nature cannot support any reasonable expectation of privacy . . . ."[188] This statement led some lower courts to distinguish "worthy containers," whose search ordinarily would require advance judicial approval, from "unworthy containers," which police officers could search without warrants and without probable cause.[189] Indeed, in *Robbins v. California*,[190] a case decided the same day as *Belton*, one Supreme Court Justice proposed a tripartite classification of containers. Justice Powell suggested a bright line rule requiring advance judicial approval for the search of containers like personal luggage that, he said, are "inevitably associated with the expectation of privacy." He proposed a different bright line rule dispensing with judicial warrants for the search of containers like plastic cups and grocery sacks—containers that, he said, "consistently lack such an association." Finally, Justice Powell proposed a regime of case-by-case adjudication for what he labeled "ambiguous containers"—containers such as cardboard boxes and laundry bags.[191]

Although the Supreme Court seemed to bend the warrant requirement only a little to create the automobile exception, that piece of artificial categorization led to a monstrosity of incoherent law. In *Belton*, the Court responded to the difficulties that its earlier deci-

187. *Id.* at 766, 767 (Burger, C.J., concurring).

188. *Id.* at 764-65 n.13 (majority opinion).

189. *E.g.*, United States v. Mannino, 635 F.2d 110 (2d Cir. 1980); United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980); United States v. Mackey, 626 F.2d 684 (9th Cir. 1980); State v. DeLong, 43 Or. App. 183, 602 P.2d 665 (1979).

190. 453 U.S. 420 (1981).

191. *Id.* at 434 n.3 (Powell, J., concurring).

sions had created by adding another layer of incoherency. The factual situation in *Robbins v. California*, the case that the Court decided with *Belton*, was almost identical to the situation in *Belton* itself. Nevertheless, the lawyer who argued *Robbins* for the state of California failed to argue that the search of containers within a vehicle had been justified as an incident of the driver's arrest.[192] The Supreme Court apparently seized on this failure[193] and considered only the applicability of the automobile exception in *Robbins*. In essence, the Court abandoned the hint that it might develop a "worthy container" rule and reaffirmed *Sanders*, holding that the police could not open two packages wrapped in green opaque plastic that they had found inside an automobile without first obtaining a warrant.

Although *Robbins* preserved the facade of the Supreme Court's prior decisions on the scope of the automobile exception, *Belton* undid their substance. In some situations, police officers who stop an automobile may have probable cause to search the vehicle but no justification for arresting any of its occupants. In these rare situations, exigent circumstances of the sort presented in *Carroll* are likely to justify a warrantless search of the automobile and containers within it. More commonly, police officers who stop an automobile do have probable cause to arrest one or more of its occupants. In these situations, *Belton* permits the officers to search all containers within the passenger compartment of the automobile incident to the arrest. Under *Belton*, it is unnecessary to determine whether the police have probable cause to search an entire automobile or merely a container within it; a search incident to an arrest does not require probable cause of either type. Similarly, it is unnecessary to distinguish worthy from unworthy containers; the police may search them all.

The Supreme Court's apparent resolution of the automobile search imbroglio in *Robbins* and *Belton* lasted less than a year. In

192. In a telephone interview on November 3, 1981, this lawyer, Ronald E. Niver, a Deputy Attorney General of California, explained that prosecutors in the courts below had not attempted to justify the search as an incident of the driver's arrest because the law on this point seemed clearly settled in the defendant's favor. *Belton* and *Robbins* may suggest that lawyers in cases likely to reach the Supreme Court should not take too seriously the ethical admonition against advancing apparently unsupportable arguments. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2).

193. *See Robbins*, 453 U.S. at 430 (Powell, J., concurring).

1982, in *United States v. Ross*,[194] the Court overruled *Robbins* and adopted the position that Chief Justice Burger had proposed in *Sanders*. When law enforcement officers have probable cause to search an entire automobile, they may open and search containers within the automobile by virtue of the automobile exception. They need not obtain a warrant for this search.[195]

Although *Ross* overruled *Robbins*, it left *Belton* intact; and *Belton* goes well beyond *Ross* in one respect. The automobile exception applied in *Ross* is an exception only to the requirement that law

194. 456 U.S. 798 (1982).

195. One commentator claimed that *"Ross* has indeed established a 'bright line' . . . ." Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 185 (1982). Nevertheless, the application of *Ross* can prove as mind-boggling in some situations as the application of other automobile search rulings. In the course of its opinion, the Supreme Court articulated three circumstances that it thought differentiated *Ross* from situations in which search warrants should be required. First, "suspicion was not directed at a specific container." 456 U.S. at 814. Second, "police officers had probable cause to search respondent's entire vehicle." *Id.* at 817. Third, probable cause to search the container did not exist before the container was placed inside the automobile. *Id.* at 814.

The difficulty is that all of these circumstances may not be present at the same time. For example, an informant of proven reliability might have reported that two people who are currently driving from Florida to Illinois are carrying stolen diamonds in a small silk purse located somewhere within their vehicle. In this situation, suspicion plainly would be directed to a specific container, but there also would be probable cause to search the entire vehicle (for the container). Moreover, in this case, probable cause for searching the container would not have arisen until after the container had been placed in the vehicle; perhaps the case would be different if the informant had described the container and its contents before the couple began their journey. In an even more confusing case, an informant might report that stolen diamonds could be found in one of three containers within a car—a silk purse, a sow's ear, or a baby bottle. (Of course, a police officer who heard any of these accounts might be tempted to minimize litigation by advising his informant to tell him only that the diamonds could be found somewhere within the car.)

Resolution of the uncertainties of *Ross* is difficult because *Ross*, like its predecessors, creates an unprincipled rule. Suppose, for example, that David Dupe, an honest and credulous youth, has been hired to carry plans for a shopping center from Texas to New York in an automobile owned by the Great Gonzo Merchandising Company. In fact, the locked green briefcase that he is to carry has been filled by a company officer, Gonzo, with illicit drugs, and the automobile that he is to drive has been loaded with drugs as well. A reliable informant within the company has told the police of the plan to deceive David and deliver the drugs, and as David approaches the car with the briefcase, the police approach him. The police realize that they do not have probable cause to arrest David; his *actus reus* is accompanied by an innocent mind. Although the doctrine of search incident to arrest is therefore inapplicable, the police have probable cause to search both the briefcase and the vehicle. They conduct these searches without first securing a warrant. Inside the vehicle, the police discover a locked green briefcase like the one that David had in his hand. They search this second briefcase without a warrant as well. Under *Ross*, the search of the green briefcase found within the automobile is legal; the search of the briefcase that David was carrying, illegal. A rule that treats these two searches differently cannot offer principled guidance to an officer confronted with an ambiguous case; resolution of the "borderline issues" posed by *Ross* ultimately must depend on guesswork.

enforcement officers obtain a warrant before making a search; even when this exception applies, the search of an automobile and containers within it must be supported by probable cause. *Belton*, however, permits a law enforcement officer to invoke the doctrine of search incident to arrest to justify the search of an automobile, luggage and other containers and to make this search in the absence of probable cause.

The Supreme Court's expansion of the doctrine of search incident to arrest in *United States v. Robinson*[196] pales beside the Court's later extension of this doctrine in *Belton*. Indeed, *Robinson*, which permitted a police officer to search the person of a motorist whom he had arrested for a licensing violation, suddenly seems a cautious and conservative ruling. After *Belton*, an officer who makes a lawful custodial arrest for a traffic offense not only may remove and search any purse, wallet or crumpled cigarette package that the arrestee is carrying; he also may search the arrestee's car and luggage or other containers within it. The officer may make this search simply to satisfy his curiosity, to pursue vague suspicions, or even to harass. *Belton* gives anyone who drives an automobile and cares about his privacy a new and powerful incentive to obey the rules of the road.

In *Belton*, the Supreme Court purchased what proved to be a transient solution to the difficulties that its automobile search rulings had created, and the Court paid a heavy price. Seeking a face-saving escape from the embarrassing box that its earlier rulings had constructed, the Court to some extent abandoned the security that the fourth amendment was designed to preserve. Moreover, although *Belton*'s sacrifice of privacy may have been an inordinate price in itself, the Court paid a second price as well. Rather than clarify the law of search and seizure, the Supreme Court's supposedly bright line rule cast the doctrine of search incident to arrest into a state of disarray.

Like the dissenting Justices in *Belton*, Professor LaFave has noted that *Belton*'s bright line rule has fuzzy edges.[197] For example, although the Supreme Court said that an automobile search would fall within its bright line rule only if the search were a "contemporaneous incident" of the arrest, the Court offered no basis for determining whether a search conducted thirty minutes or an hour after

196. 414 U.S. 218 (1973).

197. *See* LaFave, *supra* note 18, at 327-28 n.114.

an arrest would remain a "contemporaneous incident." This sort of uncertainty may be more troublesome than the uncertainty inherent in a system of case-by-case adjudication, for, as Professor James B. White has noted, "[i]f [a] 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."[198] To determine the boundaries of the *Belton* rule, law enforcement officers and courts must guess. Limitations of the rule can be only limitations by fiat.

The uncertain boundary of the Supreme Court's bright line rule is a relatively minor part of the uncertainty that *Belton* has created. More significant than the "boundary issues" that Professor LaFave has discussed are issues that might be termed "spillover issues." How will *Belton* affect cases in which the Court's bright line rule is not directly applicable? What effect will the decision have on the doctrine of search incident to arrest generally? What additional bright line rules may the Supreme Court ultimately articulate for the search of filing cabinets in offices, lunch boxes in factories, tool chests at construction sites, duffel bags in Winnebagoes, and jackets that arrestees have left on living room sofas?

Consider, for example, a case in which a police officer has made a lawful custodial arrest for hitchhiking. After the arrest, the officer has ordered the arrestee to stand beside a police vehicle with his feet apart and his hands against the vehicle. The officer then has opened a small backpack that had been at the arrestee's feet at the time of his arrest but which was about twenty-five feet away from the arrestee at the time of the search. In this backpack, the officer has discovered some marijuana.

A prosecutor might note in this case that the arrestee was probably as close to his backpack as the arrestee in *Belton* had been to his jacket. Moreover, the fact that the backpack was not inside an automobile made the possibility that the arrestee might gain access to this luggage somewhat greater than the possibility that the arrestee in *Belton* might have gained access to his jacket. The prosecutor might argue that the hitchhiker's failure to enclose his backpack within an automobile should not immunize it from the search without a warrant and without probable cause that would have been appropriate had the backpack been located inside a car; if anything,

198. White, *supra* note 116, at 203.

the absence of a larger container around the smaller container should have the opposite effect.

The defense attorney might respond that *Belton* had addressed only the special problems presented by automobile searches and was therefore inapplicable to hitchhiking cases. Moreover, because the Supreme Court did not base its resolution of *Belton* on the equities of that case, it is immaterial that the equities of this hitchhiking case might be similar. Bright line decisions cannot be treated as ordinary judicial precedents, the defense attorney might argue; instead they must be treated in the same manner as statutes.

The prosecutor then might agree to speak of categories rather than cases. He might suggest that just as law enforcement officers require a bright line rule concerning the scope of searches incident to arrest in automobile cases, they require a bright line rule concerning the scope of searches incident to arrest when they have found luggage and other containers in the possession of an arrestee or near his person at the time of his detention. The prosecutor might argue that these containers are "generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " Moreover, the prosecutor might note that courts and law enforcement officers have found the search of luggage and other containers following an arrest even more problematic than they have found the search of automobiles.[199] Accordingly, the need for a bright line rule in cases like this one is clearer than the need for a bright line rule had been in *Belton*.

At a minimum, the prosecutor might add, *Belton* resolved the possible ambiguity of *Chimel* by endorsing a "hypothetical grabbing area" concept. The Supreme Court plainly viewed the legitimacy of the search in *Belton* from the vantage point of the moment of arrest rather than the moment at which the search occurred. Even if courts reject the invitation to develop additional bright line rules and insist on case-by-case adjudication, the Supreme Court's apparent endorsement of this "hypothetical grabbing area" concept has significant implications. Just as the Court permitted an officer to search a jacket in an automobile that had been near an arrestee at the time of his arrest despite the fact that the arrestee had been removed from the area, an officer should be allowed to search a jacket in a room that an arrestee no longer occupies so long as the jacket

199. *See* 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5(a) (1978 & 1983 Pocket Part).

had been within the arrestee's "grabbing area" at the time of arrest. Similarly, an officer should be allowed to search a backpack that was at a hitchhiker's feet at the time he was detained.

At this point, the defense attorney might insist that, although the Supreme Court did not say so, *Belton* was a response to the difficulties that the Court had encountered in determining the scope of the automobile search exception. If *Belton* endorsed a "hypothetical grabbing area" concept (a point that the defense attorney certainly would not concede), it did so only to save the Court from further difficulties in automobile search cases.

The prosecutor might respond that the defense attorney's effort to psychoanalyze the Supreme Court was unbecoming and irrelevant. In his best country drawl, the prosecutor might remark that the defense attorney, by arguing repeatedly that *Belton* was only for automobiles, reminded him of the Vermont justice of the peace who, having to pass upon a charge of stealing a black horse, announced that in his law book he could find references only to bay horses and roans and that the defendant must be discharged.[200] Legislatures sometimes may enact rules only for bay horses or only for automobiles, but ruling by fiat is inapproriate in a system of adjudication. If a court cannot articulate a reason for treating hitchhikers and motorists differently (a better reason than that the Supreme Court once got itself into an awfully bad box in automobile cases), the court must apply the same rule to both. Whatever the motives that prompted the decision in *Belton*, the Supreme Court and other courts must accept the *Belton* ruling at face value and apply its principles consistently.

After this mini-lecture on the nature of the judicial process in hitchhiking cases, both attorneys might leave the issue to the judge. Sometimes it is nice not to be a judge. Does *Belton* provide a rule only for automobile searches? Can the implications of this decision for the search of containers other than automobiles simply be ignored in any adjudicative system that has not abandoned its commitment to principle?

If, for a moment, the bright line rule of *Belton* yielded a reasonably clear resolution of the automobile search imbroglio, it simultaneously divorced the doctrine of search incident to arrest from its moorings. *Belton* converted this doctrine from a rule with a reason

200. *See* Sutherland, *Prologue to an Introduction*, in THE HARVARD LAW REVIEW ASSOCIATION, AN INTRODUCTION TO LAW vii, ix (1962).

to a gratuity for a job well done. Moreover, the size of this gratuity is now anyone's guess. At best, *Belton* offered a lesson in hydraulics by pushing uncertainty from one legal problem to another. Perhaps the case teaches some other lessons as well: nonsense is likely to yield nonsense, and nonsense rules are likely to prove difficult to apply.

At the same time that the Supreme Court decided *Belton*, Justice Rehnquist observed in a dissenting opinion in *Robbins*:

> I think that probably any search for "bright lines" short of overruling *Mapp v. Ohio*[201] is apt to be illusory. Our entire profession is trained to attack "bright lines" the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the "functional equivalent" of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.[202]

The implication of this statement is that bright line rules might prove workable if only lawyers would cease their hound-like howling. Nevertheless, it is not simply our profession's indoctrination in sophistry that accounts for its dogged behavior. One thing may be the equivalent of another, not just in the minds of some lawyers, but in fact. It is sometimes a lawyer's duty to argue the equivalence of equivalent things and a judge's duty to treat equivalent things alike. If this process generally leads to the breakdown of bright line rules, the reason may be that the process exposes defects too serious to ignore in the rules that collapse.

VII. CONCLUSION: THE INCREDIBLE HULK ATTENDS THE POLICE ACADEMY

It is possible to view bright line fourth amendment rules simply as political gimmicks. Both activist hawks and activist doves, when they have the upper hand, may be tempted to play for higher stakes than the appropriate resolution of a case. If the Supreme Court's assertion of the need for bright line rules is taken at face value, however, the Court seems to regard law enforcement officers as incapable of case-by-case judgment. Perhaps, after this lengthy attempt at responsible scholarship, you are ready for an attempt at irresponsible whimsy. I therefore present to you the highest ranking graduate of the police academy class of 1990. He is green and muscular; his name is Officer Gazenga; and these are his words:

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201. 367 U.S. 643 (1961).

202. *Robbins*, 453 U.S. at 443 (Rehnquist, J., dissenting).

> Gazenga is a good officer. He has memorized all 437 Supreme Court bright line rules for search and seizure. For example, Gazenga has made a lawful arrest in a car. Gazenga rip that car apart! But Gazenga never touch trunk of car unless there is probable cause, for Gazenga has read footnote 4 of *Belton* opinion.
>
> Now Gazenga has made a lawful arrest in a house. Different bright line rule apply to a house. Gazenga may search glove compartment of car when suspect far away, but may not search desk drawer in living room unless suspect right there. Why? Supreme Court say so.[203] Gazenga just a cop.
>
> Gazenga now has made lawful arrest in cabin cruiser. Oh no! Supreme Court forgot to give Gazenga bright line rule for cabin cruiser! What is poor Gazenga to do?

Of course, this picture of Officer Gazenga's lessons at the police academy is overdrawn, and so is the following depiction of another lesson that might be taught at the police academy of 1990—a lesson that would teach most of what an officer would need to know about the fourth amendment in about sixty seconds:

> Ladies and gentlemen, the fourth amendment forbids unreasonable searches and seizures. It requires you to have a strong and persuasive reason before you make a search, seizure or arrest. I emphasize that your reason for invading someone's privacy must be a reason that another person is likely to find persuasive, for very frequently you will not be the final judge of your actions. A court that passes on these actions ought to recognize the difficulty of the situation that confronted you, but it cannot credit whims, hunches or insubstantial reasons. What is more, you are expected to take your reasons to a judge before making a search or seizure whenever you can. You must do this by filing a sworn written statement that describes the relevant facts in detail and by asking the judge to issue a search or arrest warrant. Of course there may be situations in which you believe that you have a persuasive reason for a search or seizure and a judge disagrees. Basically, however, if you act in a decent manner, respect the other person's privacy and seek a warrant whenever you can, your actions will not violate the fourth amendment.

Professor LaFave titled his 1982 Mellon Lectures "The Fourth Amendment in an Imperfect World";[204] and even in a more perfect world, a one-minute lecture on the fourth amendment might be in-

203. In *Belton*, 453 U.S. at 458, the Supreme Court quoted a declaration of Chimel v. California, 395 U.S. 752, 763 (1969): The doctrine of search incident to arrest cannot justify "routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers of other closed or concealed areas in that room itself."

204. LaFave, *supra* note 18.

sufficient. This article has recognized that the development of presumptive rules for the resolution of recurring fourth amendment issues is desirable, and presumptive rules concerning such issues as the credibility of anonymous tipsters, of citizen informants and of first-time police informants certainly should be part of the police academy course. Similarly, police cadets should learn of doctrines like that concerning searches incident to arrest (although the principled *Chimel* version of the "search incident" doctrine undoubtedly would be easier to master than the supposedly bright line version of *Belton*).

This article also has argued that a system of case-by-case adjudication can communicate important principles; and police academy instructors might attempt to convey the law of search and seizure in the same way that Bracton,[205] Hale,[206] and Hawkins[207] did—by describing a series of individual cases and their resolution. All in all, it might be worthwhile to devote an hour or even more of the police academy course to the fourth amendment.

Although the curriculum that I have proposed might be appropriate in 1990, it plainly would be inadequate to convey the current law of search and seizure. Any police academy superintendent who followed these suggestions today would deserve to be fired if not prosecuted. Indeed, the claim that law enforcement officers cannot comprehend the current law of search and seizure after much more extensive training than I have proposed is probably well-founded.

What renders substantive fourth amendment law incomprehensible, however, is not the lack of categorical rules but too many of them. The application of different principles to seizures of persons than to seizures of things, the development of differing rules for arrests in restaurants than for arrests in houses, the attempt to articulate two tiers of justification for a thousand kinds of seizures, the proliferation of distinctions between and among containers—all of these and more have rendered the fourth amendment a Ptolemaic system. Only a police officer who studies Professor LaFave's three-volume treatise on evenings and weekends can master the epicycles. As Dean Leon Green once said of another body of law, "The answer lies in a revolt from the supremacy of rules."[208] The phrase

205. 2 H. BRACTON, *supra* note 86, at 356-58.

206. 1 M. HALE, *supra* note 87, at 587-88; 2 *id.* at 80-81.

207. 2 W. HAWKINS, *supra* note 89, at 118.

208. L. GREEN, JUDGE AND JURY 222 (1930).

"unreasonable searches and seizures" can rarely be reduced much further. Abandoning the judging of categories, courts should resume the judging of cases. In that way, they might make the law of search and seizure substantially more comprehensible to the police and to the rest of us.