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# JUSTIFYING SEARCHES ON THE BASIS OF EQUALITY OF TREATMENT

ROBERT L. MISNER

## I. INTRODUCTION

Fourth Amendment jurisprudence is in serious disarray. In searches associated with specific criminal conduct, the *per se* rule of *Johnson v. United States*<sup>1</sup> has been under siege almost since its inception. In searches associated with non-specific criminal conduct — airport stops,<sup>2</sup> border searches,<sup>3</sup> drug testing,<sup>4</sup> and sobriety checkpoints<sup>5</sup> — the Supreme Court has been reluctant to restrict police practices.<sup>6</sup> Yet, it has become very difficult to predict just how the dual objectives of the Fourth Amendment — protection against unjustified searches and protection against arbitrary searches<sup>7</sup> — will play out in any given set of facts.

There is, however, a rather surprising theme which seems to unify many of the Supreme Court decisions on the Fourth Amendment: The Supreme Court has become so concerned with the equal treatment of searched persons that the Court has often abandoned its role in providing protection for individual privacy. In many situations, the Supreme Court has become more interested in whether all searched persons are treated equally than whether the Fourth Amendment has protected persons in a substantive way. The concern for equality has allowed the Supreme Court to give great defer-

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<sup>1</sup> 333 U.S. 10 (1948) (searches not conducted pursuant to a search warrant are *per se* unreasonable.).

<sup>2</sup> See, e.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>3</sup> See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

<sup>4</sup> See, e.g., *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) discussed *infra* note 177 and accompanying text. See, also, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) discussed *infra* note 197 and accompanying text.

<sup>5</sup> See, e.g., *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) discussed *infra* note 216 and accompanying text.

<sup>6</sup> For a general discussion of recent developments in Fourth Amendment jurisprudence, see WAYNE R. LAFAVE, *SEARCH AND SEIZURE* (2d ed. 1987).

<sup>7</sup> See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974). Professor Mertens refers to these functions as "interest balancing" and "discretion control." William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 552-53 (1984).

ence to police and agency rules in determining the scope of protection offered by the Fourth Amendment. The emphasis on equality of treatment has turned the Court's attention away from the issues of privacy to the issues of procedural regularity of police and agency practices.

At first, the Court's emphasis on equality of treatment of searched persons, as guaranteed through police rules, was actually a step forward by the Rehnquist Court in the protection of civil liberties.<sup>8</sup> The emphasis on police rules in cases like *Colorado v. Bertine*<sup>9</sup> can be seen as an attempt to restrict an officer's unfettered discretion to search approved much earlier in *United States v. Robinson*.<sup>10</sup> In one class of cases — the post-arrest search cases — the Supreme Court's emphasis on equality of treatment has led to the substitution of police rules in place of a search warrant.<sup>11</sup> The arrest justifies the search and the existence of police rules guards against *arbitrariness* in enforcement. The search warrant is no longer necessary — its purposes have been met through other means. It should not be surprising that the warrant requirement has been supplanted in many instances by police regulations. After all, there is every indication that the application to the magistrate for the issuance of a search warrant is often little more than a ritual.<sup>12</sup>

However, in a number of recent cases in which a search was preceded by neither an arrest nor by a warrant, the emphasis on equality of treatment has gone beyond the issue of whether the search was conducted in an arbitrary fashion. Equality of treatment has been used in the drug testing cases and the sobriety checkpoint cases as a weighty factor in determining whether an intrusion by the State into the privacy of the individual was justified in the first place. Equality of treatment, as guaranteed through police or agency rules, has gone beyond being a substitute for the search warrant to protect against arbitrariness and has now taken a place in the balancing formula used to determine whether the search was justified. The result has been to turn the Court's attention away from the issue of privacy to the issue of the procedural regularity of police and agency practices.

A constitutional approach toward searches and seizures which

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<sup>8</sup> See *infra* note 135 and accompanying text.

<sup>9</sup> 479 U.S. 367 (1987).

<sup>10</sup> 414 U.S. 218 (1973).

<sup>11</sup> See *infra* note 130 and accompanying text.

<sup>12</sup> See Stanley Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"*, 36 VAND. L. REV. 1511, 1576 (1983); Wayne R. LaFare and Frank J. Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 992-93 (1965).

centers upon equality of treatment is not without its allure. It is easier to judge a police practice by its uniformity of application than by its conformity to a nebulous constitutional mandate regarding privacy. In determining whether a search is "reasonable," a comparative judgment must be made as to that which is "unreasonable."<sup>13</sup> It is common sense to conclude that a police practice which varies from group to group is inherently suspect as "unreasonable," particularly if the variation in police practice is dependent on such inherently suspect categories as race, age, sex, or sexual preference. But the converse is not true; simply because a person has received equal treatment does not necessarily mean that the search is reasonable under traditional Fourth Amendment values.

In addition, the tendency to view the Fourth Amendment more as a means of guaranteeing equal treatment than as a source of substantive privacy rights is given impetus by the role which the Supreme Court has taken in the area of race relations in the 35 years since *Brown v. Board of Education*.<sup>14</sup> There is a certain seductiveness in deciding cases on the grounds of equality, particularly when the development of Fourth Amendment jurisprudence is seen in its historical perspective. Enforcing equal rights is the business of the Supreme Court. The development of current search and seizure law, including such landmark cases as *Mapp v. Ohio*,<sup>15</sup> occurred at a time when the Supreme Court paid increasing attention to racial inequality in American society.<sup>16</sup> In a society which brings a disproportionate number of racial minorities into the criminal justice system,<sup>17</sup> it was, and remains, impossible to decide constitutional criminal procedure issues wholly devoid of race implications. The growing tendency in Supreme Court decisions is to permit searches if the searches invade equally the privacy interests of all those necessarily affected.

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<sup>13</sup> The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>14</sup> 347 U.S. 483 (1954).

<sup>15</sup> 367 U.S. 643 (1961).

<sup>16</sup> See, e.g., JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 524 (3d ed. 1986).

<sup>17</sup> In 1987, of 295,873 total inmates (excluding Federal and state prisons and other correctional institutions; state-operated jails in Connecticut, Delaware, Hawaii, Rhode Island, and Vermont, and other facilities that retain persons less than 48 hours), 124,267 were black, and 2,959 were other racial minorities. In 1988, blacks constituted 12.3 % of the total population, and other racial minorities constituted 3.4 % of the population. *Statistical Abstract of the United States, 1990*, p. 187, table 323; p. 12, table 11.

Although one might speculate as to the reason for the ascension of equal application as a guiding principle in Fourth Amendment jurisprudence, in practice the justification of equal treatment is an effective method of permitting the executive and legislative branches to give content to the Fourth Amendment.<sup>18</sup> An emphasis on equality of treatment has permitted the Supreme Court to rely upon police regulations and agency regulations to set the parameters of constitutionally-acceptable searches. In the end, the emphasis on equal treatment cloaks expedient searches in a new guise of acceptability. At a time when technological developments enable new attacks upon individual privacy,<sup>19</sup> it makes no sense to neuter the Fourth Amendment into a constitutional directive for equal treatment.

Any attempt to weave a single-strand theory of search and seizure law is doomed to failure. There is simply no dominant, unifying principle in Supreme Court cases on the Fourth Amendment.<sup>20</sup> Yet, one can conclude that post-arrest searches which minimize arbitrary application through police or agency rules will face a warm reception in the Supreme Court when the search is challenged on the ground of the failure to obtain a search warrant. In other searches not preceded by an arrest, such as drug tests and sobriety checkpoints, the existence of police or agency rules will be used by the Supreme Court not only to protect a person against arbitrary searches, but also to justify the searches themselves. In these cases a search is justified if the State can make a credible case

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<sup>18</sup> See *infra* note 130 and accompanying text.

<sup>19</sup> See, e.g., Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1 (1989).

<sup>20</sup> See, e.g., Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289 (1981); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Wayne R. LaFave, *The Fourth Amendment Today*, 32 VILL. L. REV. 1061 (1987); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); Arnold H. Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. REV. 329 (1984); Arnold H. Loewy, *The Fourth Amendment As A Device For Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983); Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It Anyway*, 25 AM. CRIM. L. REV. 669 (1988); William J. Mertens, *The Fourth Amendment and Control of Police Discretion*, 17 U. MICH. J.L. REV. 551 (1984); Richard A. Posner, *Rethinking the Fourth Amendment* 1981 SUP. CT. REV. 49; Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law - Abiding Public*, 1989 SUP. CT. REV. 87; Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989); Nadine Strossen, *The Fourth Amendment In the Balance: Accurately Setting The Scales Through The Least Intrusive Alternative Analysis*, 63 N.Y.U.L. REV. 1173 (1988); Silas J. Wasserstrom and Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19 (1988).

for a significant social problem which can be mitigated by a limited search, and the agency has adopted guidelines which attempt to ensure that all persons are treated equally.<sup>21</sup>

## II. EQUALITY OF TREATMENT AS A SEARCH WARRANT SUBSTITUTE

In *Johnson v. United States*,<sup>22</sup> the Supreme Court held that all searches not conducted pursuant to a search warrant were *per se* unreasonable.<sup>23</sup> Over time, so many exceptions have been grafted onto the *per se* rule that the exceptions have virtually swallowed the rule.<sup>24</sup> In fact, many current exceptions to the *per se* rule are now exceptions grafted onto exceptions. These second generation exceptions, such as inventory searches<sup>25</sup> and searches of containers,<sup>26</sup> have often moved well beyond the original justifications announced by the Court for dispensing with the warrant requirement. As the Supreme Court cases have strayed farther and farther from the initial rationale for the *per se* rule of *Johnson*, the Court has become increasingly concerned with the issue of equal treatment of searched persons. The Court's initial emphasis on the need for regularized procedures in certain post-arrest searches was actually a movement toward some greater degree of protection of individual liberties.<sup>27</sup> In fact, the trend could be expanded from its current role in inventory and container cases to a broader range of searches subsequent to an arrest. In the post-arrest cases, concerns for equality of treatment as evidenced through an emphasis on police regulations are directed to the issue of the arbitrariness of the search. In recent cases, equality of treatment has entered the equation to justify the search. Ultimately, however, it is becoming clear that equality-based analysis will limit court protection of individual privacy concerns.

### A. THE EARLY CASES

The Supreme Court has continually acknowledged that all searches need not be made pursuant to a warrant. However, it was not until *Johnson v. United States*<sup>28</sup> that the Supreme Court established current Fourth Amendment methodology by holding that a "magistrate's warrant for a search may be dispensed with" only in

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<sup>21</sup> See *infra* note 223 and accompanying text.

<sup>22</sup> 333 U.S. 10 (1948).

<sup>23</sup> *Id.* at 14.

<sup>24</sup> See *LAFAVE*, *supra* note 6, at 118.

<sup>25</sup> See *infra* note 87 and accompanying text.

<sup>26</sup> See *infra* note 125 and accompanying text.

<sup>27</sup> See *infra* note 173 and accompanying text.

<sup>28</sup> 333 U.S. 10 (1948).

exceptional circumstances.<sup>29</sup> According to the Court in *Johnson*, one may not justify the failure to obtain a search warrant simply because of "the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate."<sup>30</sup> Exceptions to the warrant requirement can be justified if the "suspect was fleeing or likely to take flight,"<sup>31</sup> if the search was of a movable vehicle,<sup>32</sup> or if "evidence or contraband was threatened with removal or destruction. . . ."<sup>33</sup>

The justification for *Johnson* is the protection of a person's privacy. Judgments as to the propriety of a search must be made, when practicable, by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."<sup>34</sup> As Professor Amsterdam has commented, indiscriminate searches are prohibited by *Johnson* either because "they expose people and their possessions to interferences by government when there is no good reason to do so"<sup>35</sup> or because "indiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously. . . ."<sup>36</sup> The fear expressed in *Johnson* is that warrantless searches are suspect because they may be *unjustified* and because they may also be *arbitrary*.

Early cases applying *Johnson* did not center on the "arbitrary impact" prong of the *Johnson* rationale of the Fourth Amendment. Rather, they limited their discussion to the "unjustified - intrusion" prong. In *Chimel v. California*,<sup>37</sup> the Court did not face the arbitrariness issue since the Court found that the search was not conducted pursuant to a search warrant and was therefore unreasonable and unjustified.<sup>38</sup> In *United States v. Robinson*,<sup>39</sup> the seeds of Fourth Amendment inconsistency were sown both as to the issue of justifiable intrusions as well as to the issue of arbitrary impact. It was not until more than a decade after *Robinson* that the Supreme Court began to address the dangers of unequal treatment that it had created in *Robinson*.

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<sup>29</sup> *Id.* at 14-15.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 14.

<sup>35</sup> Amsterdam, *supra* note 7, at 411.

<sup>36</sup> *Id.*

<sup>37</sup> 395 U.S. 752 (1969).

<sup>38</sup> *Id.* at 768.

<sup>39</sup> 414 U.S. 218 (1973).



In *Chimel v. California*,<sup>40</sup> police officers searched an entire house while arresting Chimel in his home on a burglary charge.<sup>41</sup> The Supreme Court, in overturning Chimel's conviction, limited the scope of the warrantless search incident to an arrest to the area from which the person arrested might obtain weapons or evidentiary items.<sup>42</sup> The main thrust of the Court's opinion in *Chimel* centered on the unjustified nature of the search.<sup>43</sup> The dissenting opinion argued that no search warrant should be required to search Chimel's house once he had been arrested since the additional invasion was relatively minor.<sup>44</sup> In response, the Court stated:

We cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as minor. And we 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 despite the absence of a warrant that the Fourth Amendment would otherwise require.<sup>45</sup>

Of lesser concern to the Court was the arbitrariness which might result if a search of the entire house were approved. The Court feared that "by the simple expedient of arranging to arrest suspects at home rather than elsewhere," law enforcement agents would have the opportunity to engage in searches not justified by probable cause.<sup>46</sup> Putting aside the likelihood that the arrest of the defendant would give rise to probable cause to search his home, the Court's protection of Chimel's privacy interest in his home precluded the warrantless search. As a result, the Court did not face the concern that the right to search might be arbitrarily used or used pursuant to unacceptable criteria.

In dissent, Justice White would have permitted the warrantless search.<sup>47</sup> However, nowhere in his dissent is the issue of arbitrary enforcement addressed. Justice White gave no indication in his dissent that the police search was in any way dependent upon the existence of guidelines affecting the manner and scope of the search. Nor can one find in the dissent the substitution of police rules for the search warrant — a position similar to that adopted by the Court in an analogous automobile search some thirteen years later in

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<sup>40</sup> 395 U.S. 752 (1969).

<sup>41</sup> *Id.* at 753-54.

<sup>42</sup> *Id.* at 763.

<sup>43</sup> *Id.* at 767-68.

<sup>44</sup> *Id.* at 782 (White, J., dissenting).

<sup>45</sup> *Id.* at 766-67 n.12.

<sup>46</sup> *Id.* at 767.

<sup>47</sup> *Id.* at 781.

*United States v. Ross*.<sup>48</sup> Had the Supreme Court not centered its discussion on the privacy interest of *Chimel*, but had instead focused its attention upon whether all defendants and their homes would be searched in a similar manner, the Court could have created a bright-line rule allowing the total search in a manner similar to that in which it subsequently justified the search in *Ross*. In light of *Ross* and subsequent cases like *Colorado v. Bertine*<sup>49</sup> and *Florida v. Wells*,<sup>50</sup> one must question whether searches in *Chimel* situations will be approved in the future if the search is conducted pursuant to police rules which limit the discretion of the arresting officer. It is conceivable that in future *Chimel* situations the Supreme Court may allow a full, warrantless search of the house if there is probable cause to arrest and if the potential arbitrariness of the search is constrained by police rules. Of course, such a change in the law would alter decisions such as *Payton v New York*<sup>51</sup> and *Steagald v. United States*.<sup>52</sup> However, in the *Chimel* decision the Court centered its attention on the privacy interest of *Chimel*, insisting that the equal treatment of *Chimel* would apparently remain part of the responsibility of the magistrate who would issue the search warrant prior to the search of the house.

It was in *United States v. Robinson*,<sup>53</sup> decided four and one-half years after *Chimel* (and after four new Justices had been appointed to the Court), that the stage was set for the subsequent shift of the Supreme Court's attention to equality of treatment in search cases. In *Robinson*, the Supreme Court upheld a conviction of the defendant based upon a warrantless search in which the police discovered heroin.<sup>54</sup> *Robinson* was arrested while in his car for driving without a license.<sup>55</sup> Pursuant to police regulations, the police conducted a full-custody search<sup>56</sup> which revealed the heroin. Although in *Robinson* a case can be made that arbitrary enforcement of the right to search was limited by the District of Columbia police rules, the Court centered its attention only on the concern of intrusiveness. The Court asserted that: "A custodial arrest of a suspect based on

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<sup>48</sup> 456 U.S. 798 (1982).

<sup>49</sup> 479 U.S. 367 (1987).

<sup>50</sup> 110 S. Ct. 1632 (1990).

<sup>51</sup> 445 U.S. 573 (1980). In *Payton*, the Court held that an arrest warrant is required before the police may enter a suspect's home to make an arrest.

<sup>52</sup> 451 U.S. 204 (1981). In *Steagald*, the Court held that a search warrant is required before the police may look for a suspect in the home of a third party.

<sup>53</sup> 414 U.S. 218 (1973).

<sup>54</sup> *Id.* at 236-37.

<sup>55</sup> *Id.* at 220-21.

<sup>56</sup> *Id.* at 221-23 n.2.

probable cause is a reasonable intrusion under the Fourth Amendment."<sup>57</sup> In upholding the search, the Court justified the absence of a warrant on the twin bases of the need to preserve evidence and the need to disarm the arrestee.<sup>58</sup> The Court drew a brightline rule for all arrests and for all crimes. The Court refused to allow a case-by-case adjudication as to "whether or not there was present one of the reasons supporting the authority for a search. . . ."<sup>59</sup>

The circumstances in *Robinson* suggest that Robinson was treated differently than the majority of traffic offenders.<sup>60</sup> Indeed, it is unlikely that all traffic offenders in the District of Columbia were fully searched by police officers. The police knew Robinson and were alerted to the risk that he was currently involved in criminal conduct. The District of Columbia police procedures apparently did limit the discretion of the arresting officer,<sup>61</sup> yet, the Court concluded that "[s]uch operating procedures are not, of course, determinative of the constitutional issues presented by this case."<sup>62</sup> In *Gustafson v. Florida*,<sup>63</sup> a companion case to *Robinson*, the Court held that it was not constitutionally significant that in *Gustafson* police regulations did not require that the defendant be taken into custody.<sup>64</sup> The Court's concern in *Robinson* and *Gustafson* focused on the lack of additional intrusiveness of a search conducted after an arrest despite the fact that the risk of arbitrary enforcement was very high. In fact, the dissent in *Robinson* was more interested in the further intrusiveness in the full-custody search even though the dissent did not ignore the risk of arbitrariness.<sup>65</sup> Objections to *Robinson* and *Gustafson* centered primarily on the failure of the Court to recognize the temptation to accept arbitrariness.<sup>66</sup> The result in *Robinson* was, for all practical purposes, to eliminate protection from arbitrary enforcement from under the purview of the Fourth Amendment in post-arrest cases. The cases after *Robinson* look to the arrest to jus-

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<sup>57</sup> *Id.* at 235. See also *id.* at 237, in which Justice Powell in a concurring opinion noted, "I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. . . ."

<sup>58</sup> *Id.* at 234.

<sup>59</sup> *Id.* at 235.

<sup>60</sup> See *id.* at 221 n.1.

<sup>61</sup> *Id.* at 221-23 n.1, 2.

<sup>62</sup> *Id.* at 223 n.2.

<sup>63</sup> 414 U.S. 260 (1973).

<sup>64</sup> *Id.* at 265.

<sup>65</sup> *Id.* at 259 (Marshall, J., dissenting). "I, for one, cannot characterize any of these intrusions into the privacy of an individual's papers and effects as being negligible incidents to the more serious intrusion into the individual's privacy stemming from the arrest itself."

<sup>66</sup> See, e.g., LAFAVE, *supra* note 6, at § 5.2(b).

tify the search and look to police rules to guard against arbitrariness in conducting the search.

#### B. THE SECOND GENERATION CASES

The next generation of exceptions to the *per se* rule of *Johnson* drift away from the *Chimel* and *Robinson* justification of police protection and evidence preservation for waiving the warrant requirement. Instead, the cases most often uphold police conduct by reasoning that all searched persons will be treated equally. In these cases, the reliance on the equality-of-treatment rationale, as guaranteed through police agency rules, first appears. The search-incident-to-an-arrest cases,<sup>67</sup> the automobile cases,<sup>68</sup> the closed container cases,<sup>69</sup> and the inventory search cases<sup>70</sup> are good examples of these second generation cases, which begin to move toward a justification for the warrantless search based on the equal application of the agency rules authorizing the search. At the same time, these cases minimize the privacy interests of the defendants. Here, police rules are sometimes used as a substitute for the warrant process. Privacy interests are minimized on the basis that the greater intrusion (the arrest) takes the lesser intrusion (the search subsequent to the arrest) out from under the *per se* rule.

##### 1. *Automobile and Inventory Cases*

The history of the automobile exception to the *per se* rule has its origin in the prohibition case of *Carroll v. United States*.<sup>71</sup> The rationale in *Carroll*, which stressed the movable nature of the automobile,<sup>72</sup> eventually gave way to the warrantless search of the automobile even after the automobile had been immobilized. In *Chambers v. Maroney*,<sup>73</sup> the Supreme Court upheld a warrantless search of an automobile at the police station sometime after the occupants of the automobile had been arrested.<sup>74</sup> In the cases which followed *Chambers*,<sup>75</sup> the Supreme Court has readily allowed a war-

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<sup>67</sup> See *supra* section II.A.

<sup>68</sup> See *infra* section II.B.1.

<sup>69</sup> See *infra* note 101 and accompanying text.

<sup>70</sup> See *infra* note 125 and accompanying text.

<sup>71</sup> 267 U.S. 132 (1925).

<sup>72</sup> *Id.* at 153.

<sup>73</sup> 399 U.S. 42 (1970).

<sup>74</sup> *Id.* at 43.

<sup>75</sup> The Court took a slight detour in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In *Coolidge*, as Professor Saltzburg notes, "[a] plurality held *Carroll* to be inapplicable here, because of the absence of exigency. This is the first and last Supreme Court case where a warrantless automobile search was held to be unconstitutional for that reason." STEPHEN A. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE* 233 (3d ed. 1988).

rantless search at the police station if the automobile search could have been made immediately after the arrest on the street.<sup>76</sup> As Professor LaFave notes,<sup>77</sup> since the exigency rationale of movability often was not apparent in searches which the Supreme Court was willing to uphold, the Court in *Cady v. Dombroski*,<sup>78</sup> *Cardwell v. Lewis*,<sup>79</sup> and *South Dakota v. Opperman*<sup>80</sup> began to emphasize the diminished expectation of privacy which surrounds the automobile. The degree of criticism from commentators which the diminished expectation rationale created<sup>81</sup> did not deter the Court in using its handy justification.

The often unstated assumption in the automobile cases is that a brightline rule sets the stage for equal treatment of all arrestees. Although the language used to justify the warrantless search varies from case to case and Justice to Justice, a distinct theme emerges in the post-arrest search cases. In the words of Justice Blackmun from his dissent in *Chadwick*: "As the Court in *Robinson* recognized, custodial arrest is such a serious deprivation that various lesser invasions of privacy may be fairly regarded as incidental."<sup>82</sup>

The approach which allows warrantless searches of automobiles and of the containers<sup>83</sup> therein, does so on two bases. First, the resulting search does not offend a legitimate privacy right since the arrest is the greater intrusion; and second, the search is not arbitrary as it comes after a determination that there is probable cause to arrest. The Court never explicitly admits that it has little faith in the warrant process. However, the Court strongly implies that there are no significant privacy interests of the arrestee remaining that will justify the inconvenience of interjecting a magistrate into the process. If the subsequent search is seen as a minimal intrusion once the arrest has been made, the Court, in order to make the magis-

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<sup>76</sup> See, e.g., *Florida v. Myers*, 466 U.S. 380 (1984); *United States v. Ross*, 456 U.S. 798 (1982).

<sup>77</sup> WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE § 7.2(b) (2d ed.1987).

<sup>78</sup> 413 U.S. 433 (1973).

<sup>79</sup> 417 U.S. 583 (1974).

<sup>80</sup> 428 U.S. 364 (1976).

<sup>81</sup> See, e.g., Lewis R. Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 569-72 (1982); Vivian D. Wilson, *The Warrantless Automobile Search: Expectations Without Justification*, 32 HASTINGS L.J. 127 (1980). See LAFAVE *supra* note 6, at 457-61.

<sup>82</sup> *United States v. Chadwick*, 433 U.S. 1, 20 (1977) (Blackmun, J., dissenting).

<sup>83</sup> The term "container cases" is used to describe those cases in which the Court has wrestled with the issue of whether an individual has a higher expectation of privacy in a closed container within an automobile than the individual has generally within the interior of the car. See *Florida v. Jimeno*, 111 S. Ct. 1801, 1805 (1991) (Marshall, J., dissenting).

trate's role a meaningful one, would have been required to overturn such cases as *United States v. Watson*<sup>84</sup> and require arrest warrants issued by a magistrate whenever possible. The concern soon shifts in the automobile cases and container cases from the Fourth Amendment privacy interest to a question of whether the authority of the police to search all arrestees, their automobiles, and their closed containers has been unequally exercised.

The Court's emphasis on equality of treatment in search cases took a giant leap forward in the inventory case of *South Dakota v. Opperman*.<sup>85</sup> Opperman's car was inventoried prior to his arrest "using a standard inventory form pursuant to standard police procedures."<sup>86</sup> The Court held that its decisions pointed unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable.<sup>87</sup> The Court noted that the "police did not breach a legitimate expectation of privacy because such an expectancy with respect to one's automobile is significantly less than that relating to one's home or office."<sup>88</sup> In addition, the Court did not require the police to have a search warrant because the search was "carried out in accordance with standard procedures in the local police department,"<sup>89</sup> and therefore the likelihood of unequal and arbitrary enforcement was significantly reduced. The Court pointed out that "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigating police motive."<sup>90</sup> A police officer testified that all impounded vehicles were searched, noting that: "[An] officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policies and occur whenever an automobile is seized."<sup>91</sup>

The emphasis upon equality of treatment through the operation of police rules by the majority and concurring Justices in *Opperman* caused Justice Marshall in dissent to remark that the Court's decision seems to *require* a "routine search of nearly every car im-

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<sup>84</sup> 423 U.S. 411 (1976). In *Watson* the Court refused to require that the police obtain an arrest warrant whenever practicable. The Court stated a preference for arrest warrants but refused to require that an arrest warrant be issued prior to a routine arrest.

<sup>85</sup> 428 U.S. 364 (1976).

<sup>86</sup> *Id.* at 366.

<sup>87</sup> *Id.* at 372.

<sup>88</sup> *Id.* at 367.

<sup>89</sup> *Id.* at 375 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 443 (1973)).

<sup>90</sup> *Id.* at 376.

<sup>91</sup> *Id.* at 383 (Powell, J., concurring).

pounded.”<sup>92</sup> In subsequent cases, the Court was quick to point out the existence of departmental policies governing inventory searches of impounded vehicles as a justification for the warrantless search.<sup>93</sup>

## 2. Searches Incident to An Arrest and Searches of Containers

The reliance in *Opperman* upon the existence of police rules limiting discretion in the inventory cases was not emphasized in the early cases involving the proper scope of searches incident to an arrest. In *New York v. Belton*,<sup>94</sup> the Supreme Court confronted the issue of the “proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”<sup>95</sup> After Belton and his companions had exited their car and had been searched, a state police officer searched the passenger compartment of the car and found Belton’s leather jacket.<sup>96</sup> The police officer unzipped one of the jacket pockets and discovered cocaine.<sup>97</sup> Under the rubric of creating a brightline rule for police officers to follow, the Court concluded: [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. . .[and] may also examine the contents of any container found within the passenger compartment.<sup>98</sup>

The Court justified its brightline test as one created as a by-product of the exclusionary rule and the need to create “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.”<sup>99</sup>

Yet, it is not clear why the Court in *Belton* chose the particular bright-line rule of permitting the search of everything within the passenger compartment. Clearly, the Court could have announced a rule that permitted no search of the contents of the automobile once the parties were outside the automobile. The car could be subsequently impounded and searched pursuant to police procedure required in *Opperman*. Another approach following the Court’s lead in *Opperman* would have been to require a search of the automobile pursuant to police regulations. If it is true that police need a “famil-

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<sup>92</sup> *Id.* at 392 (Marshall, J., dissenting).

<sup>93</sup> *See, e.g.,* *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

<sup>94</sup> 453 U.S. 454 (1981).

<sup>95</sup> *Id.* at 459.

<sup>96</sup> *Id.* at 456.

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

<sup>98</sup> *Id.* at 460.

<sup>99</sup> *Id.* at 458 (citing WAYNE R. LAFAVE, “Case-by-Case Adjudication” versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142).

iar standard” because they are unable to quickly “reflect on and balance the social and individual interests involved in the specific circumstances they confront,”<sup>100</sup> it does not necessarily follow that the particulars of the rule are best created by the Court. The arrest of the driver or a passenger in a car allows the Court to justify the waiver of the *per se* rule. The intrusion associated with the arrest subsumes the intrusion associated with the subsequent search. There is no additional protection, as the warrant relates to probable cause, to be gained by requiring the magistrate to authorize the search of the automobile. Yet, the warrant is also used to protect against arbitrariness. This is the same arbitrariness issue found in *Johnson* and *Opperman*: not every car which is stopped will be searched fully. If the Court in *Opperman* thought that police procedures would restrict the dangers of arbitrary enforcement of inventory searches, it is difficult to understand why that same concern was not evident in *Belton*. The search in *Belton* was merely a form of an inventory search conducted on the street immediately after the arrest.

An approach similar to that taken by the Court in *Belton* appeared a year later in the container case of *United States v. Ross*.<sup>101</sup> In *Ross*, the defendant was arrested for possession of heroin. A search of the trunk of Ross’s car at the scene of the arrest revealed a brown paper bag which contained glassine bags of heroin. A more thorough search of the automobile at the police station revealed a zippered pouch containing cash.<sup>102</sup> A three judge panel of the District Court determined that Ross had a reasonable expectation of privacy in the pouch but not in the paper bag.<sup>103</sup> The pouch could only be searched pursuant to a warrant.<sup>104</sup> The Circuit Court *en banc* rejected a constitutional distinction based upon the type of container.<sup>105</sup> The court held that “[t]he Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decision-makers would rank in the luggage line.”<sup>106</sup> With this nod toward equality of application, the court held that the police could not search either container without a search warrant.<sup>107</sup>

In reversing the Court of Appeals, the Supreme Court rejected

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<sup>100</sup> *Id.* at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

<sup>101</sup> 456 U.S. 798 (1982).

<sup>102</sup> *Id.* at 801.

<sup>103</sup> *Id.* at 801-02.

<sup>104</sup> *Id.* at 802.

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

<sup>106</sup> *Id.* (quoting *United States v. Ross*, 655 F.2d 1159, 1161 (1981)).

<sup>107</sup> *Id.* at 803.



its earlier decision in *Robbins v. California*<sup>108</sup> and portions of its opinion in *Arkansas v. Sanders*,<sup>109</sup> and allowed the warrantless “search of every part of the vehicle and its contents that may conceal the object of the search.”<sup>110</sup>

Writing for the Court, Justice Stevens rejected any constitutional distinction based upon “worthy” versus “unworthy” containers. Justice Stevens asserted that:

For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.<sup>111</sup>

Once more, the Court approved a warrantless search, however this time the Court openly admitted that some degree of equality of application was at the core of its concern.<sup>112</sup> Yet, the impact of *Ross* is not to protect rich and poor alike, but rather to expose the possessions of the rich and poor equally, and without cause, to the eyes of the King’s henchmen.

The *Ross* decision mirrors *Belton* from the standpoint that the Court saw a need to create a rule to give clear guidance to police.<sup>113</sup> The result in *Belton* was to excuse the necessity to have the search guided by a warrant. The Court in *Ross* pointed out that “[t]he scope of a warrantless search based on probable cause is no narrower — and no broader — than the scope of a search authorized by a warrant supported by the probable cause.”<sup>114</sup> The odd part of the *Ross* decision comes from the Court’s emphasis on the equality, before the law, of rich person’s and poor person’s possessions.<sup>115</sup> Yet, no attempt is made to face the practical realization that all parts of all automobiles of all arrestees will not be searched. Since no warrant is necessary, no magistrate will guard against arbitrary enforcement. And in *Ross*, as in *Belton*, the Court made no attempt to limit arbitrary enforcement through the mechanism of police rules.

In his dissent, Justice Marshall complained that the majority of the Court had taken “a first step toward an unprecedented ‘prob-

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<sup>108</sup> *Id.* at 824.

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

<sup>110</sup> *Id.* at 825.

<sup>111</sup> *Id.* at 822.

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

<sup>113</sup> *Id.* at 803-04. See also *id.* at 826 (Powell, J., concurring).

<sup>114</sup> *Id.* at 823.

<sup>115</sup> *Id.* at 822.

able cause' exception to the warrant requirement."<sup>116</sup> The search of the containers within the automobile were "inconsistent with those established Fourth Amendment principles concerning the scope of the automobile exception and the importance of the warrant requirement."<sup>117</sup> The fact that the new rule in *Ross* would effect all persons without regard to status did not impress Justice Marshall, who argued that "[t]he Court derives satisfaction from the fact that its rule does not exalt the rights of the wealthy over the rights of the poor. A rule so broad that all citizens lose vital Fourth Amendment protection is no cause for celebration."<sup>118</sup> But even Justice Marshall does not center upon a compromise position suggested by the Court in *Opperman*: the excusing of the warrant requirement if the danger of arbitrary enforcement was limited by the existence of police rules governing the post-arrest search.<sup>119</sup>

### C. RECENT CASES

The emphasis on equal treatment has become even more prominent as the Supreme Court has broadened its exceptions to the *per se* rule of *Johnson*. In *Illinois v. Lafayette*,<sup>120</sup> the defendant was arrested for disturbing the peace after an altercation with a theater manager.<sup>121</sup> Lafayette carried a shoulder-bag which the police took from him during the booking process.<sup>122</sup> They then inventoried the contents of the shoulder bag.<sup>123</sup> Within the bag, the officer found amphetamine pills.<sup>124</sup>

The Supreme Court upheld the search, holding that "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."<sup>125</sup> The Court extended the analysis it had begun in *South Dakota v. Opperman*.<sup>126</sup> The justification for the inventory search does not rest on probable cause, and therefore a warrant is not a requirement.<sup>127</sup> The inventory search is merely "an incidental ad-

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<sup>116</sup> *Id.* at 828 (Marshall, J., dissenting).

<sup>117</sup> *Id.* at 831 (Marshall, J., dissenting).

<sup>118</sup> *Id.* at 842-43 (Marshall, J., dissenting).

<sup>119</sup> *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976).

<sup>120</sup> 462 U.S. 640, 641 (1983).

<sup>121</sup> *Id.* at 641.

<sup>122</sup> *Id.* at 641-42.

<sup>123</sup> *Id.* at 642.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 648.

<sup>126</sup> *Id.* at 647.

<sup>127</sup> *Id.* at 643.

ministrative step following arrest and preceding incarceration.”<sup>128</sup> The Court pointed out that “[i]t is the fact of the lawful arrest which establishes the authority to search.”<sup>129</sup> The Court stressed the need for standardized procedures but concluded that it would not use the procedures as the basis for a “‘less intrusive’ means” test.<sup>130</sup> The Court concluded that it was not its “function to write a manual on administering routine, neutral procedures of the station house.”<sup>131</sup> The emphasis on “neutral procedures” implied the need to guarantee that police treated arrestees with equality. Equality of treatment is assured if there is a “station-house search of every item carried on or by a person who has been lawfully taken into custody by the police.”<sup>132</sup>

Two cases following on the heels of *Lafayette, Colorado v. Bertine*<sup>133</sup> and *Florida v. Wells*,<sup>134</sup> continued the Court’s *Prouse-Lafayette* methodology. The Court’s attention in *Bertine* and *Wells* began to stray from the privacy interests of the arrestee and moved toward an examination of whether the search process significantly guaranteed that police would treat all arrestees equally. It is in these closed-container cases that the Supreme Court’s emphasis on equal treatment became its paramount concern.

In *Bertine*, the defendant was arrested for driving while under the influence of alcohol.<sup>135</sup> After Bertine was in custody, but before the police impounded his van, an officer inventoried the contents of Bertine’s van in accordance with local police procedures.<sup>136</sup> In a closed backpack, the officer found drugs, cash, and drug paraphernalia.<sup>137</sup> The Court held that the inventory exception to the *per se* rule, particularly as applied in *South Dakota v. Opperman* and *Illinois v. Lafayette*, justified the warrantless search of the van and the contents of the backpack.<sup>138</sup> In so deciding, the Supreme Court disagreed with the Colorado Supreme Court decision which held that the search was unreasonable because there were no exigencies to justify the warrantless search.<sup>139</sup> The police towed Bertine’s van to a “secure, lighted facility,” and Bertine “could have been offered

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<sup>128</sup> *Id.* at 644.

<sup>129</sup> *Id.* at 645 (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

<sup>130</sup> *Id.* at 647.

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

<sup>132</sup> *Id.* at 648.

<sup>133</sup> 479 U.S. 367 (1987).

<sup>134</sup> 110 S. Ct. 1632 (1990).

<sup>135</sup> *Bertine*, 479 U.S. at 368.

<sup>136</sup> *Id.* at 368-69.

<sup>137</sup> *Id.* at 369.

<sup>138</sup> *Id.* at 374-75.

<sup>139</sup> *People v. Bertine*, 706 P.2d 411, 418 (Colo. 1985).

the opportunity to make other arrangements for safekeeping of his property.”<sup>140</sup> But, the United States Supreme Court concluded that “[r]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though the courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.”<sup>141</sup>

In *Bertine*, however, the Supreme Court met the first challenge to its dependence upon equal treatment in order to justify a warrantless search. Bertine argued “that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place.”<sup>142</sup> In rejecting this argument, Chief Justice Rehnquist, writing for majority, concluded:

Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriations of parking and locking a vehicle rather than impounding it.<sup>143</sup>

There was no showing that the police “chose to impound Bertine’s van in order to investigate suspected criminal activity.”<sup>144</sup>

The Court in *Bertine* had effectively shifted its inquiry away from the approach in *Johnson*, which relied upon probable cause and a search warrant to protect against unjustified and arbitrary intrusions by the State. After *Bertine*, searches are justified if conducted subsequent to the greater intrusion of an arrest. Arbitrariness is staved off by the existence of reasonable police regulations administered in good faith.<sup>145</sup> The emphasis by the majority and the concurring Justices was on regulated discretion to deter police and to insure “that inventory searches will not be used as a purposeful and general means of discovering evidence of crime.”<sup>146</sup> The reasonableness of the inventory search for Fourth Amendment purposes depended upon the lawfulness of the original arrest and the existence of discretion-limiting police regulations.

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<sup>140</sup> *Bertine*, 479 U.S. at 373.

<sup>141</sup> *Id.* at 374. For a discussion of the least intrusive alternative analysis, see Strossen *supra* note 20.

<sup>142</sup> *Bertine*, 479 U.S. at 375.

<sup>143</sup> *Id.* at 375-76.

<sup>144</sup> *Id.* at 376.

<sup>145</sup> *See id.* at 374.

<sup>146</sup> *Id.* at 376 (Blackmun, J., concurring).

The concurring opinion<sup>147</sup> and the dissenting opinion<sup>148</sup> framed the question beginning to be posed in *Bertine* as: How much discretion in determining the scope of an inventory search will cause the Court to strike down the search on the basis of arbitrariness of enforcement?

The concurring opinion of Justices Blackmun, joined by Justices Powell and O'Connor, reads as if the Fourth Amendment jurisprudence had always considered the preeminent issue to be associated with the manner in which a search was conducted as opposed to whether the search unreasonably interfered with the person's reasonable privacy interest.<sup>149</sup> The concurring opinion leads one to believe that the authority to restrict searches has always been delegated to the police to determine reasonableness through promulgation of internal rules. As Justice Blackmun wrote for the three-justice concurrence:

I join the Court's opinion, but write separately to underscore the importance of having such inventories conducted only pursuant to standardized policy procedures. The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. . . . The absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.<sup>150</sup>

If Justice Jackson, the author of the Court's opinion in *Johnson*, were to read the *Bertine* opinion, he would be startled to discover that the reasonableness of a search is no longer determined on a case-by-case basis by a magistrate. A search is now reasonable when a case-by-case analysis is forbidden. Police regulations are deemed a more effective method of eliminating arbitrariness in searches than the search warrant.

In dissents, Justices Marshall and Brennan disagreed with the Court's method of determining reasonableness and refused to join in what they considered to be the total abandonment of the warrant requirement in the area of automobile searches.<sup>151</sup> The justifications for permitting warrantless inventory searches were not applicable to *Bertine*, especially since the police took much of the

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<sup>147</sup> *Id.* (Blackmun, J., concurring).

<sup>148</sup> *Id.* at 378 (Marshall, J., dissenting).

<sup>149</sup> *Id.* at 376-77 (Blackmun, J., concurring).

<sup>150</sup> *Id.* (Blackmun, J., concurring) (citation omitted).

<sup>151</sup> *Id.* at 387 (Marshall, J., dissenting).

damning evidence from a backpack. Justice Marshall noted that: "Whatever his [Bertine's] expectation of privacy in his automobile generally, our prior decisions clearly established that he retained a reasonable expectation of privacy in the backpack and its contents."<sup>152</sup> But even if one were to agree with the majority and concurring opinions that the "inventory searches are reasonable only if conducted according to standardized procedures,"<sup>153</sup> there were "no standardized criteria [to] limit a Boulder police officer's discretion."<sup>154</sup> For Justice Marshall, "[s]tandardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent."<sup>155</sup> Even if one accepted the analytical framework of the majority, Justice Marshall concluded: "By allowing the police unfettered discretion, Boulder's discretionary scheme, like the random spot checks in *Delaware v. Prouse*, is unreasonable because of the 'grave danger' of abuse of discretion."<sup>156</sup>

After *Bertine*, one must conclude that the issue of reasonableness of searches of the automobiles of arrestees will center almost solely on the question of whether the search process significantly guarantees that police will treat all arrestees equally.<sup>157</sup> In *Florida v. Wells*,<sup>158</sup> the Supreme Court validated this conclusion.

The police stopped Wells for speeding and subsequently arrested him for driving under the influence of alcohol.<sup>159</sup> Wells' car was impounded and an inventory search produced marijuana and a locked suitcase in the trunk.<sup>160</sup> The police opened the suitcase and found it to contain a large amount of marijuana.<sup>161</sup>

The record below contained no evidence that the Florida Highway Patrol had a "policy on the opening of closed containers found during inventory searches."<sup>162</sup> Consequently, applying *Colorado v. Bertine*, the Florida Supreme Court held that the trial court had erred in refusing to suppress the marijuana found in the suitcase.<sup>163</sup> The Florida Supreme Court centered upon the language of the con-

<sup>152</sup> *Id.* (Marshall, J., dissenting).

<sup>153</sup> *Id.* at 377 (Marshall, J., dissenting).

<sup>154</sup> *Id.* at 379 (Marshall, J., dissenting).

<sup>155</sup> *Id.* at 378 (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)).

<sup>156</sup> *Id.* at 381 (quoting *Prouse*, 440 U.S. at 662).

<sup>157</sup> See Justice Marshall's rather lengthy criticism of the Boulder Police Department. *Id.* at 378-83.

<sup>158</sup> 110 S. Ct. 1632 (1990).

<sup>159</sup> *Id.* at 1634.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> 479 U.S. 367 (1986).

ccurring opinion in *Bertine*, which had required the police to open either all containers, or no containers, during an inventory search.<sup>164</sup>

The majority of the United States Supreme Court rejected the "all-or-nothing" approach ascribed to *Bertine* by the Florida Supreme Court even though the Court eventually found the search to be unconstitutional.<sup>165</sup> The purpose of the inventory search is to produce an inventory.<sup>166</sup> The police must be able to exercise some latitude in determining which articles to search, but the inventory search must not be turned into "a purposeful and general means of discovering evidence of crime."<sup>167</sup> The police officer may take the nature of the search and the nature of the particular container into consideration. The Court noted that:

Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.<sup>168</sup>

The Supreme Court affirmed the decision of the Florida Supreme Court because the Florida Highway Patrol had no policy whatever as to the opening of closed containers during an inventory search, and "that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment."<sup>169</sup> Since the United States Supreme Court in *Wells* tacitly approved the opening of all closed containers, its reference to sufficient regulation of discretion to satisfy the Fourth Amendment must refer to its fear of arbitrary enforcement. In other words, since all closed-container inventory searches are justified, the fear of the Supreme Court was a fear of arbitrary and thus unequal enforcement.

The concurring opinions in *Wells* echo this sentiment. In his concurrence, writing for himself and Justice Marshall, Justice Brennan continued with his position that absent "consent or exigency, police may not open a closed container found during an inventory search of an automobile."<sup>170</sup> But if *Bertine* is to be followed, "open-

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<sup>164</sup> *Id.*

<sup>165</sup> *Wells*, 110 S. Ct. at 1635.

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

<sup>167</sup> *Id.* (quoting *Colorado v. Bertine*, 479 U.S. 367, 376 (1987)) (Blackmun, J., concurring).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1638 (Brennan, J., concurring).

ing a container constitutes such a great intrusion that the discretion of the police to do so must be circumscribed sharply to guard against abuse."<sup>171</sup> Inventory searches are reasonable "under the Fourth Amendment only if done in accordance with standard procedures that *limit* the discretion of the police."<sup>172</sup> Justice Blackmun wrote a separate concurrence pointing out the dangers of giving an individual policeman discretion during an inventory search. Justice Blackmun pointed out that: "The exercise of discretion by an individual officer, especially when it cannot be measured against objective, standard criteria, creates the potential for abuse of Fourth Amendment rights our earlier inventory-search cases were designed to guard against."<sup>173</sup> For Blackmun, as well as for the majority in *Wells*, it is not the warrantless nature of the search that is problematic. Rather, it is the danger of unequal treatment which causes concern.

The development of the Fourth Amendment from *Johnson* to *Wells* should not be seen necessarily as a continuing process moving away from the protection of individual privacy rights. Once one accepts the philosophy behind *Robinson*, one may posit that *Prouse*, *Lafayette*, *Bertine*, and *Wells* have actually centered upon a way to protect against arbitrary enforcement through the requirement that certain searches be conducted according to police regulations. It may even be that police regulations are a more effective control over police conduct than the warrant process, as practiced, could ever be. The danger in relying upon the mechanism of police regulations to combat arbitrariness, however, is that courts will allow police regulations to be so broad as to be meaningless.<sup>174</sup> One need only read the dissent in *Bertine* to bring this concern to the forefront.<sup>175</sup> Also, if one determines the reasonableness of a search for Fourth Amendment purposes by reference to the adequacy of police regulations, the stage may also be set to refer to police regulations for the proper remedy if the regulations are not followed. The exclusionary rule may well be the next victim of the movement toward the dependence of the Fourth Amendment upon police regulations.<sup>176</sup>

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

<sup>172</sup> *Id.* at 1637.

<sup>173</sup> *Id.* at 1639 (Blackmun, J., concurring).

<sup>174</sup> See, *LAFAVE supra* note 6, at 141. For an excellent discussion of the possible roles of police rules in Fourth Amendment jurisprudence, see *Alschuler supra* note 20 at 227-31.

<sup>175</sup> 479 U.S. 367, 378-83 (1987) (Marshall, J., dissenting).

<sup>176</sup> Already there is some indication that the good faith exception to the exclusionary rule will admit evidence seized unlawfully but under statutory authority. *Illinois v. Krull*, 480 U.S. 340 (1987).



Even if one views the Court's emphasis on equality of treatment as a guard against arbitrariness in the post-arrest cases, recent uses of the equality justification to authorize searches in non-arrest cases cause other grave concerns.

### III. EQUALITY OF TREATMENT AS A JUSTIFICATION FOR WARRANTLESS, SUSPICIONLESS SEARCHES

In recent cases, the Supreme Court has upheld searches of persons to screen for drugs and to check for drunk drivers where no probable cause existed and no search warrant issued. In permitting both drug screening and sobriety checkpoints, the Court has elevated its concerns regarding equality of treatment above the legitimate expectations of privacy of its citizens. In the post-arrest cases discussed earlier, the Court raised questions regarding equality of application only after it determined that the search of the individual was justified by individualized suspicion — the search was justified because there was probable cause to arrest. The greater intrusion of an arrest justified the lesser intrusion of a subsequent search. In the drug screening and sobriety checkpoint cases, however, equality of treatment is used to *justify* the search and to guarantee that the search is not conducted in an *arbitrary* manner. Equality of treatment, which is generally related to concerns of arbitrariness, is no justification for the initial breach of individuals' rights of privacy. It is not enough to find that all persons will be treated equally by the state in its denial of individuals' reasonable expectations of privacy.

#### A. RECENT SUPREME COURT DECISIONS: DRUG TESTING

In *Skinner v. Railway Labor Executives Ass'n*,<sup>177</sup> the Federal Railroad Administration (FRA) promulgated regulations requiring some railroad employees to provide blood and urine samples if the employees were involved in any way in certain train accidents.<sup>178</sup> The Supreme Court held that the "special needs" exception constructed by the Court in *New Jersey v. T.L.O.*<sup>179</sup> justified dispensing both with the warrant requirement and the probable cause requirement of the Fourth Amendment when "'special needs,' beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."<sup>180</sup>

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<sup>177</sup> 489 U.S. 602 (1989). See Schulhofer *supra* note 20.

<sup>178</sup> *Id.* at 606.

<sup>179</sup> 469 U.S. 325 (1985).

<sup>180</sup> *Railway Labor Executives Ass'n*, 489 U.S. at 619 (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987), quoting *T.L.O.*, 469 U.S. at 325 (Blackmun, J., concurring)).

The Court decided that the privacy interest of the employee invaded through urine testing was minimal.<sup>181</sup> In addition, the Court held that the two countervailing governmental interests in deterring employees from using alcohol and drugs and in determining the cause of a particular train accident<sup>182</sup> justified the FRA regulations and therefore justified waiving the requirement of probable cause or any notion of individualized suspicion.<sup>183</sup> Furthermore, individuals have a limited expectation of privacy by "reason of their participation in an industry that is regulated pervasively, to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."<sup>184</sup> The need to preserve blood and urine samples quickly after a train accident justifies waiving the warrant requirement.<sup>185</sup>

Although the Court unequivocally held that the mandated taking of blood and urine samples were searches under the Fourth Amendment,<sup>186</sup> the Court moved far away from the *per se* rule of *Johnson* and used its "special needs" methodology adopted and implemented in cases like *T.L.O. v New Jersey*.<sup>187</sup>

The Court in *Railway Labor Executives Ass'n* reminded us that generally the warrant requirement serves the dual role of guaranteeing that the intrusion is justified and that the search is not the random or arbitrary act of government agents.<sup>188</sup> As to the justification for the search, the Court allowed the agency regulations both to limit the reasonable privacy expectation of the employee so that probable cause was not required and to do so without the necessity of a warrant.<sup>189</sup> Railroad employees have a limited expectation of privacy precisely because the railroad is conducting a highly-regulated activity.<sup>190</sup> The Court concluded that an employee cannot have a reasonable expectation of privacy precisely because the employee knew at the time of employment that the agency had determined, through its regulations, that employees have limited on-the-job privacy interests.<sup>191</sup> As to the protection against the arbitrariness

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<sup>181</sup> *Id.* at 624.

<sup>182</sup> *Id.* at 630.

<sup>183</sup> *Id.* at 624.

<sup>184</sup> *Id.* at 627.

<sup>185</sup> *Id.* at 631.

<sup>186</sup> *Id.* at 616.

<sup>187</sup> *Id.* at 618. For a discussion of the "special needs analysis," see Maclin *supra* note 20 at 721.

<sup>188</sup> *Railway Labor Executives Ass'n*, 489 U.S. at 621-22.

<sup>189</sup> *Id.* at 624.

<sup>190</sup> *Id.* at 627.

<sup>191</sup> *Id.* See Schulhofer *supra* note 20, at 135-36. The question not entirely addressed in *Railway Labor Executives Ass'n* is the question of the scope of the deference which the

ness of an individual search, the Court was willing to excuse the need for a search warrant and to rely in its place upon the agency's regulations to protect against the "random or arbitrary acts of government agents."<sup>192</sup> A warrant would "do little to further these aims"<sup>193</sup> under the facts of *Railway Labor Executives Ass'n*, "[i]ndeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate."<sup>194</sup>

The Court's reasoning has a seductive simplicity to it but it relies upon the assumption that the content of an individual's reasonable expectations of privacy should be greatly dependent upon the reasonable expectations of privacy which regulators are willing to concede. The Court's reasoning also requires a belief that equality of treatment should play a major role in determining whether a search is justified and therefore reasonable for Fourth Amendment purposes. In the Court's own words, to require a warrant would do little to assure any additional "certainty and regularity [over that] already offered by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program."<sup>195</sup>

The Court's emphasis on equality does not go just to the issue of the need for a warrant. It is also intended to influence the issue of the reasonableness of the intrusion itself. Equality of treatment as guaranteed through agency regulations is not intended just to meet head-on the question of arbitrariness, but is also intended to justify the search itself. The Court's "special needs" analysis encourages the agency to react to a social problem in a procedurally fair way. If the social problem is great and the procedure fair, the invasion of individual rights will then be seen as "minimal," particularly when the agency has warned persons that they should not expect to be free from searches in certain situations. Although we might well justify the search in *Railway Labor Executives Ass'n* on the grounds that a warrant is impractical and the chaotic nature of a serious train accident makes it practical only to test all on-site employees,<sup>196</sup> the approach taken by the Court goes a long way toward making the reasonableness determination of the Fourth Amend-

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Court is willing to grant to the defining of "reasonable expectation of privacy" by an agency through its regulations.

<sup>192</sup> *Railway Labor Executives Ass'n*, 489 U.S. at 621-22.

<sup>193</sup> *Id.* at 622.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 624.

<sup>196</sup> *Id.* at 631.

ment turn on equality of application analysis. In doing so, the Court has moved a long way toward making the content of the Fourth Amendment dependent upon the content of the agency's regulations. A decision handed down the same day as *Railway Labor Executives Ass'n* confirms this trend.

In *National Treasury Employees Union v. Von Raab*,<sup>197</sup> the Commissioner of the United States Customs Service promulgated regulations requiring an employee drug testing program for employees directly involved in drug interdiction, for employees required to carry a firearm, or for employees who handle classified materials.<sup>198</sup> The Court held that Customs employees who interdict drugs or employees who carry firearms have a diminished expectation of privacy regarding mandatory drug testing.<sup>199</sup> The agency's insistence on drug testing, and therefore the interference with privacy rights, are outweighed by the Government's "compelling interests in safeguarding our borders and the public safety. . . ."<sup>200</sup>

The Court once more used the "special needs" methodology which it had applied in *Railway Labor Executives Ass'n*.<sup>201</sup> The Court concluded that because the testing program was "not designed to serve the ordinary needs of law enforcement,"<sup>202</sup> there is no need to refer to the usual presumptions in favor of warrants to determine the reasonableness of the search within the Fourth Amendment.<sup>203</sup> The lesser privacy rights of employees, coupled with the Government's need to deter drug use by its personnel, allowed the Court to conclude that the drug test can be conducted without probable cause or individualized suspicion, and without a search warrant.<sup>204</sup> Just as in *Railway Labor Executives Ass'n*, as long as there was a perceived serious social problem and the agency had devised an apparently fair process to implement its regulations, the Court was willing to find only a minimal privacy intrusion. Again, it is clear that the equality of treatment in the search situation impacted upon both the initial justification for the search and the waiver of the warrant requirement to guard against arbitrariness.

The Court, in negating the need for a search warrant, stressed the awareness of employees of the existence of regulations mandat-

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<sup>197</sup> 489 U.S. 656 (1989).

<sup>198</sup> *Id.* at 660-61.

<sup>199</sup> *Id.* at 672.

<sup>200</sup> *Id.* at 677.

<sup>201</sup> *Id.* at 665-66.

<sup>202</sup> *Id.* at 666.

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

<sup>204</sup> *Id.* at 666-72.

ing drug screening.<sup>205</sup> Since the drug screening process is automatic, an employee knows that whenever an employee seeks a transfer to a covered position, the employee will be required to submit to a drug test.<sup>206</sup> The mandatory nature of the rules negate arbitrariness and therefore no search warrant is needed since "there are simply 'no special facts for a neutral magistrate to evaluate.'"<sup>207</sup> For the Court, the same lack of discretion in the agency rules also lowers employees' expectations of privacy and therefore serves to justify the initial intrusion as well.

The Court remanded the case to the Court of Appeals to determine whether drug tests of all persons who apply for promotion to positions where they would handle classified information was reasonable.<sup>208</sup> The Court found the record on this issue to be inadequate,<sup>209</sup> but in listing all persons apparently covered by this "classified material" designation, (from Animal Caretaker to Baggage Clerk) questions regarding arbitrariness were clearly in the Court's mind.<sup>210</sup>

Justice Scalia's dissent in *Von Raab* emphasized the deference which the majority was willing to give to the agency once it determined that all persons would be affected by the agency regulations in an equal manner. For Justice Scalia, "[t]he Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees."<sup>211</sup> Justice Scalia, joined by Justice Stevens in dissent, placed less emphasis on the role that equal treatment plays in the determination of reasonableness. For Justice Scalia, the fact that the regulations would require all employees to be treated equally is insufficient reason to justify a drug program whose sole purpose is the symbolic condemnation of drug use.<sup>212</sup>

In the drug-testing cases, the Supreme Court is willing to give great discretion to government agencies to mandate drug testing if the agency can marshal a credible justification for its program and apply the program equally to all affected persons. The Court has taken a similar course in upholding the constitutionality of the so-

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<sup>205</sup> *Id.* at 660-61.

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

<sup>207</sup> *Id.* at 667 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976)) (Powell, J., concurring).

<sup>208</sup> *Id.* at 678.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 681 (Scalia, J., dissenting).

<sup>212</sup> *Id.* at 686-87.

briety checkpoint in *Michigan Dep't of State Police v. Sitz*.<sup>213</sup>

#### B. RECENT SUPREME COURT DECISIONS: SOBRIETY CHECKPOINTS

Roadblocks as means to detect drunk driving are searches which potentially affect a large and broad sector of the citizenry.<sup>214</sup> Other than choosing to drive in an area designated by police as an area with a high incidence of drunk driving, the seized person has done nothing to cause suspicion. In fact, the rationale for roadblocks appears to be deterrence of future violations and not the detection of current violators.<sup>215</sup>

In *Michigan Dep't of State Police v. Sitz*,<sup>216</sup> the Supreme Court held that the Michigan roadblock practice was consistent with the Fourth Amendment.<sup>217</sup> In *Sitz*, the sobriety checkpoint operation in question lasted 1 1/4 hours.<sup>218</sup> During that time, 126 vehicles were stopped for an average time of 25 seconds per car.<sup>219</sup> Two drivers were "detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol."<sup>220</sup> The police also arrested a third driver, who failed to stop at the roadblock, for drunk driving.<sup>221</sup> They selected the checkpoints under guidelines which also required that all vehicles passing through the checkpoint would be stopped. The police briefly examined all drivers for signs of intoxication.<sup>222</sup>

The Michigan Court of Appeals held that the checkpoints violated the Fourth Amendment.<sup>223</sup> Following the United States Supreme Court's decision in *Brown v. Texas*,<sup>224</sup> the Michigan court balanced the state's interest in curbing drunk driving with the court's conclusion that the roadblocks were generally ineffective and that the stops were a substantial intrusion on individual liberties.<sup>225</sup>

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<sup>213</sup> 110 S. Ct. 2481 (1990).

<sup>214</sup> If one accepts Professor Loewy's premise that the primary purpose of the Fourth Amendment is to protect innocent persons from governmental intrusion, clearly the sobriety checkpoint cases create the greatest danger to the Fourth Amendment. See Loewy *supra* note 20, at 329-30.

<sup>215</sup> See *Sitz*, 110 S. Ct. at 2498-99 (Stevens, J., dissenting).

<sup>216</sup> *Id.* at 2481.

<sup>217</sup> *Id.* at 2488.

<sup>218</sup> *Id.* at 2484.

<sup>219</sup> *Id.*

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

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Sitz v. Department of State Police*, 170 Mich. App. 433, 429 N.W.2d 180, 182 (1988).

<sup>224</sup> 443 U.S. 47 (1979).

<sup>225</sup> *Sitz*, 110 S. Ct. at 2484.

The United States Supreme Court reversed the Michigan court.<sup>226</sup> The Court conceded that the stop was clearly a seizure within the ambit of the Fourth Amendment.<sup>227</sup> After detailing the seriousness of the drunken driving problem,<sup>228</sup> the Court found the intrusion on motorists to be minimal<sup>229</sup> and the likelihood that the program was effective to be at an acceptable level.<sup>230</sup> The manner in which the Supreme Court justified its conclusion that the intrusion was minimal is instructive. First, the Court noted that the intrusion was on an equal footing with roadblocks used to detect illegal immigrants.<sup>231</sup> The Court pointed out that there is "virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints [sobriety checkpoints and illegal immigrant checkpoints] which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask."<sup>232</sup> Since illegal immigrant checkpoints have been continually approved by the Supreme Court, sobriety checkpoints are also constitutionally permissible.<sup>233</sup>

The Supreme Court then turned to the issue of equality of application to bolster its conclusion. The Supreme Court noted that the "guidelines governing checkpoint operation minimize the discretion of the officers."<sup>234</sup> The Court noted that "checkpoints are selected pursuant to the guide lines, and uniformed police officers stop every approaching vehicle."<sup>235</sup> The type of fear and surprise condemned by the Court in *United States v. Ortiz*<sup>236</sup> was no more present in *Sitz* than was present in the illegal immigrant stops approved in *United States v. Martinez-Fuerte*.<sup>237</sup> The sobriety checkpoint approved in *Sitz* was to be distinguished from the random stops condemned in *Delaware v. Prouse*<sup>238</sup> as the "kind of standardless and unconstrained discretion [which] is the evil the Court has discerned

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<sup>226</sup> *Id.* at 2483.

<sup>227</sup> *Id.* at 2485.

<sup>228</sup> *Id.* at 2485-86.

<sup>229</sup> *Id.* at 2486.

<sup>230</sup> *Id.* at 2487-88.

<sup>231</sup> *Id.* at 2486.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 2486-87.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 2487.

<sup>236</sup> 422 U.S. 891 (1975). In *Ortiz* the Court refused to sanction searches at traffic checkpoints removed from the border.

<sup>237</sup> 428 U.S. 543 (1976). In *Martinez-Fuerte* the Court approved warrantless stops at fixed checkpoints in order to detect the transportation of illegal immigrants.

<sup>238</sup> 440 U.S. 648 (1979). In *Prouse* the Court excluded evidence seized when a car was stopped and searched without probable cause or even articulable suspicion. The state

when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent."<sup>239</sup>

By any analysis, *Sitz* is a different case than *Railway Labor Executives Ass'n* or *Von Raab*, although at first blush the cases appear to share many similarities. In all three cases, agency rules are intended to negate the danger of arbitrariness. Again, in all three cases, equality of treatment as guaranteed through agency rules goes beyond the issue of arbitrariness and spills over to a justification for the search itself. Again, in all three cases, the Court's "real methodology" presents itself: given a serious social problem and agency rules to enforce its detection policy in an even-handed manner, individual privacy intrusion is deemed to be minimal.

Yet, as Justice Stevens points out in dissent, *Sitz* is a very different case than either *Railway Labor Executives Ass'n* or *Von Raab*. In *Sitz*, there is no notice to a relatively small group of individuals — railroad workers and drug enforcement personnel — that they must be prepared to have their privacy invaded on a limited number of occasions.<sup>240</sup> In *Sitz*, the universe of persons whose privacy rights are invaded is almost coterminous with the population as a whole. In *Railway Labor Executives Ass'n* and in *Von Raab*, there is the intent for the search to be "beyond the normal need for law enforcement." In *Sitz*, state police operated the road block precisely to detect criminal behavior. But perhaps the most telling difference between *Railway Labor Executives Ass'n* and *Von Raab* on the one hand and *Sitz* on the other, is the amount of discretion (and therefore the risk of arbitrariness) which resides in *Sitz* to decide *if*, *when*, and *where* to search. In *Railway Labor Executives Ass'n*, the triggering mechanism for the search was an accident. If there is an accident and a person has chosen to work on the railroad, there is a search.<sup>241</sup> In *Von Raab*, if a person applies for a drug enforcement position or seeks a promotion, there will be a search.<sup>242</sup> Yet in *Sitz*, virtually the entire population is at risk of arbitrary enforcement, and even the apparent guidelines adopted by the Michigan Department of State Police cannot remove that risk. If one suspects arbitrariness in operation, one must also question the justification for the stop itself. If one believes that the search is justified not on the basis of individualized suspicion but rather on a substantial risk of individual violations by

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attempted to justify the stop as a random stop to check the driver's license and registration. *Id.* at 650.

<sup>239</sup> *Sitz*, 110 S. Ct. at 2487 (quoting *Prouse*, 440 U.S. at 661).

<sup>240</sup> *Id.* at 2492 (Stevens, J., dissenting).

<sup>241</sup> *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 609 (1989).

<sup>242</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-61 (1989).



unknown persons, this belief is undermined if the search is in danger of being used as a pretext for other purposes.

One cannot read the Court's opinions in *Railway Labor Executives Ass'n* and *Von Raab* without realizing the role which equality of application plays in both justifying the initial search and in negating the need for a search warrant. At the very least, the classes of searched persons in these two cases are small in number and aware of the potential invasion of their privacy interests. At least in *Railway Labor Executives Ass'n* and *Von Raab*, distinct and limited events trigger the searches. In these cases, it is simply wrong to justify a search on the ground that similar persons are treated similarly. However, the rationale to justify the search in *Sitz* stands on even weaker grounds. The class of searched persons in *Sitz* is broad and has no notice. There is no unique triggering event which can be used at all to justify the search or guarantee against arbitrary enforcement. The breadth of the class of searched persons also invites arbitrary searches because of the breadth of the class itself. The *Sitz* decision combines the worst features of arbitrariness in *Robinson* with the worst features of justification in *Railway Labor Executives Ass'n* and *Von Raab*.

In *Sitz*, the Court again uses its "real methodology" developed in *Railway Labor Executives Ass'n* and *Von Raab* to uphold the constitutionality of the sobriety checkpoint: if the State can make a credible case for a significant social problem which can be tempered by a limited type of search, the intrusion into the privacy rights of the individual will be deemed to be minimal if the agency has adopted guidelines which attempt to guarantee equal treatment of all persons during the search.

### III. CONCLUSION

As the Court places greater emphasis upon equality of treatment as a factor in determining the reasonableness of a search, one can predict that in some situations, the respect for individual privacy interests will be enhanced. These situations include those such as *Bertine* and *Wells* in which the arbitrariness invited by *Robinson* and *Belton* is potentially stemmed by a requirement for police regulations limiting discretion. The reality of privacy protection in these areas will eventually depend upon whether the Supreme Court is willing to review carefully, and with a cynical eye, the likelihood that the police guidelines actually limit officer discretion. One can also predict that the Court's emphasis on equality of application will continue to denigrate privacy interests when equality of application is

used to justify the initial intrusion. It simply is not enough to justify a search on the basis that all searched persons will be treated equally. The Fourth Amendment protects privacy. It does not simply guarantee procedural regularity.