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## CRIMINAL LAW

### THE COURT'S "TWO MODEL" APPROACH TO THE FOURTH AMENDMENT: CARPE DIEM!

CRAIG M. BRADLEY\*

A traveller, lost in a strange city, can occasionally make three wrong turns and find himself on, if not necessarily the right road, at least one that is going in the right direction. Similarly, the United States Supreme Court, lost in the strange city of Fourth Amendment law,<sup>1</sup> has taken three wrong turns, but may yet find itself on a road that, if not "right," in terms of the Court's precedents, is logically defensible and will lead to a much more straightforward rule for police. However, like the traveller, if the Court fails to recognize what it has done, it will be doomed to continue its wayward course.

The three wrong turns that the Court has taken are *United States v. Robinson*<sup>2</sup> (a warrantless search incident to any custodial arrest may be a "full body search," including a search of any containers in the suspect's possession), *New York v. Belton*<sup>3</sup> (a warrantless search incident to arrest of an occupant of an automobile extends to all containers in the passenger compartment), and *California v. Acevedo*<sup>4</sup>

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<sup>1</sup> I once termed the Fourth Amendment " 'the Supreme Court's tarbaby'; a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only leaves them more profoundly stuck." Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985). As this Article went to press, two more articles heaping scorn on the Court's Fourth Amendment jurisprudence have appeared. See James Adams, *Search and Seizure as seen by Supreme Court Justices: Are They Serious or is this Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413 (1993); Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

<sup>2</sup> 414 U.S. 218 (1973).

<sup>3</sup> 453 U.S. 454 (1981).

<sup>4</sup> 111 S. Ct. 1982 (1991).

(warrantless automobile searches may extend to all containers found in the automobile searched).

This Article will discuss why these three cases were wrongly decided according to the Court's logic and precedents. That is, they are flatly inconsistent with the Court's oft-advanced claim that search warrants are ordinarily "required" subject to a "few specifically established and well-delineated exceptions."<sup>5</sup> It will further consider how these decisions will lead (indeed, largely have led) to the complete abandonment of the search warrant requirement for all searches conducted out of doors and will lead to the establishment of a "two model" approach to the Fourth Amendment, with warrants required for searches of structures, but not of other places. It will conclude with a model statute that will capture this new development in a succinct and comprehensible form.<sup>6</sup> This formulation will demonstrate that the Court has, apparently through inadvertence, presented itself with a golden opportunity to render Fourth Amendment law clearer and more straightforward than at any time since the "criminal procedure revolution" began.<sup>7</sup>

## I. THE WARRANT REQUIREMENT ABANDONED

### A. *UNITED STATES V. ROBINSON*<sup>8</sup>

In *Robinson*, the Court's first incorrect decision, a policeman spotted a man, whose driver's license he knew to have been revoked, driving a car.<sup>9</sup> The policeman stopped the car and placed the driver under arrest.<sup>10</sup> The officer then searched the driver incident to the arrest and felt an unknown object in the driver's breast pocket.<sup>11</sup>

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<sup>5</sup> *Id.* at 1991.

<sup>6</sup> In CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993), I argue that statutes rather than case law should be the means by which criminal procedure rules are promulgated. Supreme Court decisions, limited by the fact situation in the case before the Court, by *stare decisis* and by other factors, are inherently unsuited for declaring rules for police to follow. Such rules must be stated succinctly, not in a series of 30 to 40 page opinions, and must attempt to anticipate problems in advance, rather than being limited to a particular case before the Court. The United States is the only country to declare its criminal procedure rules in cases rather than through a code. *Id.* at 95-143. A criminal procedure code, however, could be drafted by a congressionally appointed body, pursuant to § 5 of the Fourteenth Amendment: the Fourth, Fifth, and Sixth Amendments have been incorporated into the Fourteenth Amendment by the Supreme Court, and § 5 of the Fourteenth Amendment allows Congress to enforce the terms of that Amendment. *Id.* at 145-46.

<sup>7</sup> For a discussion of how the Court came to take on the task of declaring rules of criminal procedure, see BRADLEY, *supra* note 6, at 6-36.

<sup>8</sup> 414 U.S. 218 (1973).

<sup>9</sup> *Id.* at 220.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 221-23.

He then removed the object, a crumpled cigarette package, from the driver's pocket.<sup>12</sup> He opened the package and found gelatin capsules of white powder which later were determined to be heroin.<sup>13</sup>

The Supreme Court upheld the admission of the heroin at the defendant's trial for narcotics possession. The majority, per Justice Rehnquist, held that the Court had long recognized, albeit in dicta, that a "search incident to arrest is a traditional exception to the warrant requirement."<sup>14</sup> The Court further held, though without any prior authority in dicta or otherwise, that such a search includes a "full search" of the arrestee, even where the arrest is for a crime (driving with a revoked permit) for which there is no evidence to be found.<sup>15</sup> Thus, the Court approved the seizure and opening of the cigarette pack, and, apparently, of any other containers found upon arrestees, upon no showing beyond that of a lawful arrest.

*Robinson* can be criticized on the ground that, even though most would agree that an arrestee should be routinely subject to a patdown for weapons,<sup>16</sup> it does not follow that an *evidentiary* search may be performed without probable cause that evidence may be found and, possibly, a warrant. Since in *Robinson* no evidence *could* have been found for the traffic violation for which the defendant was being arrested, there was no probable cause, much less a warrant. Therefore, any evidence seized from the suspect except a weapon (or something that could have been a weapon<sup>17</sup>) had to be suppressed. Both the D.C. Circuit and the *Robinson* dissent adopted this position.<sup>18</sup>

Professor Wayne LaFave agrees with the majority's result on this issue. He argues that "a limitation on the 'general authority' to search a person incident to arrest [to cases where there is] . . . probable cause that *particular* items of evidence are *presently* to be found on the person" would be a rule "impossible of application by the police."<sup>19</sup> While I agree that this broad limitation would probably do more harm than good, it is troubling that the Court permits a

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<sup>12</sup> *Id.* at 223.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 224.

<sup>15</sup> *Id.* at 235.

<sup>16</sup> The entire D.C. Circuit, as well as the entire Supreme Court, agreed with this proposition. *United States v. Robinson*, 471 F.2d 1082, 1098 (D.C. Cir. 1972) (en banc); *Robinson*, 414 U.S. at 250 (Marshall, J., dissenting).

<sup>17</sup> The policeman did not claim that he believed the cigarette pack was a weapon. *See Robinson*, 414 U.S. at 223.

<sup>18</sup> *See Robinson*, 471 F.2d at 1094; *Robinson*, 414 U.S. at 252 (Marshall, J., dissenting).

<sup>19</sup> WAYNE R. LAFAVE, 2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 448-49 (2d ed. 1987).

routine full search incident to arrest when the police not only lack probable cause that evidence will be found, but also have *no reason* after the frisk to believe that either of the justifications for searches incident to arrest—to find weapons and to find evidence—is present. Still, as LaFave points out, once one concedes that a full search of the arrestee's person is necessary to seek out weapons that might not be disclosed by a frisk, such as a razor blade, then the seizure of evidence found during such a search does not intrude further on the arrestee's privacy.<sup>20</sup>

However, as the *Robinson* dissenters noted, the search in that case exceeded even this rather lenient standard, because the *Robinson* majority also approved, without discussion, "a separate search of effects found on [the arrestee's] person."<sup>21</sup> As Justice Marshall observed in dissent, "even if the crumpled-up cigarette package had in fact contained some sort of a small weapon, it would have been impossible for respondent to have used it once it was in the officer's hands."<sup>22</sup> Thus, if there is to be a meaningful warrant requirement, the appropriate course of action by police would be to seize any containers, such as cigarette packs, wallets, purses and briefcases possessed by arrestees, and only open them with a search warrant based on probable cause that the receptacle contains evidence of a crime.

This approach is consistent with *United States v. Chadwick*,<sup>23</sup> in which the Court held that the warrantless search of a footlocker by police was unjustifiable, despite the presence of probable cause to search and despite the possessor's arrest. In *Chadwick*, federal narcotics agents seized a footlocker which they had probable cause to believe contained marijuana.<sup>24</sup> They later opened it without obtaining a search warrant and found marijuana on which basis the defendant was subsequently convicted.<sup>25</sup> The Court, per Chief Justice Burger, held:

In this case, important privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home

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<sup>20</sup> *Id.* at 455. However, LaFave goes on to suggest that, if the police are going to get a broad power to search people who are subjected to a "custodial arrest," more attention should be paid to the issue of whether a "custodial arrest" was justified in the first place, particularly in traffic cases like *Robinson*. *Id.* at 456-61.

<sup>21</sup> *Robinson*, 414 U.S. at 255 (Marshall, J., dissenting).

<sup>22</sup> *Id.* at 256 (Marshall, J., dissenting).

<sup>23</sup> 433 U.S. 1 (1977).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 4-5.

against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.<sup>26</sup>

In *Chadwick*, the Court rejected the Government's argument that since the Court permitted searches of cars without warrants, it should permit a search of the footlocker.<sup>27</sup> Although a footlocker, like a car, is mobile, the Court held that one had a lesser expectation of privacy in a car than in a footlocker. "Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects."<sup>28</sup> Even the two dissenters agreed that the government's argument, "restrict[ing] the protection of the Warrant Clause to private dwellings and a few other 'high privacy areas'" was "an extreme view of the Fourth Amendment."<sup>29</sup>

Thus *Chadwick*, decided after *Robinson*, specifically held that a footlocker and other "possessions within an arrestee's immediate control" were immune from warrantless searches, incident to arrest or otherwise.<sup>30</sup> One could dismiss the seemingly contrary result in

<sup>26</sup> *Id.* at 11.

<sup>27</sup> *Id.* at 12. The Court further noted that "the Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search." *Id.* at 11. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), however, the Government did argue that an automobile search extended to all containers found in the vehicle. *Id.* at 762. The Court rejected that argument, holding that a suitcase seized from a car could only be searched pursuant to a warrant. *Id.* at 763-64. The Court reversed *Sanders* in *California v. Acevedo*, 111 S. Ct. 1982 (1991). See *infra* notes 61-71 and accompanying text.

<sup>28</sup> *Chadwick*, 433 U.S. at 13.

<sup>29</sup> *Id.* at 17 (Blackmun, J., dissenting). Justice Blackmun, recognizing that the majority's rule was inconsistent with both *Robinson* and the auto search cases, would have held that "a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place." *Id.* at 19 (Blackmun, J., dissenting). Blackmun, however, did not explain how his position differed from what he considered the "extreme view" of the government. Indeed, he did not seem to recognize, either in *Chadwick*, or in his majority opinion in *Acevedo*, that the practical effect of his position in these two cases was to achieve the "extreme" result that he decried in *Chadwick*.

<sup>30</sup> *Id.* at 14-15. The *Chadwick* Court specifically distinguished *Robinson* as a case involving a "search of the person." *Id.* at 16 n.10. By contrast, "searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Id.*

It may be that this footnote was added by a concurring Justice. It seems inconsistent with the text of the Chief Justice's opinion which noted that the "search . . . cannot be viewed as incidental to arrest" because it occurred "long after respondents were securely in [police] custody." The opinion thus suggested that a warrantless search incident would have been appropriate at the time of the arrest. *Id.* at 15. Moreover, the footnote is completely inconsistent with *Illinois v. Lafayette*, 462 U.S. 640 (1983), also written by the Chief Justice, which assumed that a search of containers in the arrestee's possession was appropriate incident to arrest. See Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 28, 40-50 (suggesting that such footnote

*Robinson* by concluding that the Court simply did not consider the cigarette package a sufficiently important repository of personal effects, or its opening a sufficient intrusion, to require a warrant.<sup>31</sup> This view is bolstered by the fact that the *Robinson* majority did not discuss the search of the cigarette pack as a separate intrusion; they simply assumed that looking in it was part and parcel of a routine search incident to arrest (unlike the opening of a full-fledged “repository of personal effects”).<sup>32</sup>

Any such interpretation of *Robinson* is, however, discredited by the decisions in *United States v. Edwards*<sup>33</sup> and *Illinois v. Lafayette*.<sup>34</sup> In *Edwards*, the Court approved the post-detention seizure and search of an arrestee’s clothes<sup>35</sup> and also discussed with approval *Abel v. United States*<sup>36</sup> where “the defendant was arrested at his hotel but the [suitcase] taken with him to the place of detention was searched there.”<sup>37</sup> The *Edwards* Court characterized *Abel* as supporting the proposition that “searches and seizures that could be made on the spot at the time of arrest may legally be made at the place of detention.”<sup>38</sup>

In *Lafayette*, the Court approved a pre-incarceration “inventory search” at the stationhouse of an arrestee’s “purse-type shoulder bag.”<sup>39</sup> The Court, without specifically discussing the “container search” aspect of *Robinson*, apparently assumed that, since the bag could have been searched at the scene of the arrest under *Robinson* and *Chimel* as an area within the immediate control of the arrestee,<sup>40</sup> and since the custody at the police station is “no more than a continuation of the custody inherent in the arrest status,”<sup>41</sup> it followed

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insertion is a frequent practice of concurring Justices which can, as in *Chadwick*, lead to confusion about just what the rule is).

<sup>31</sup> The alternative way to distinguish *Robinson* and *Chadwick*—that a search incident to arrest may be broader in scope than a search based on probable cause—makes no sense as to containers. Such containers can as easily be held pending the obtainment of a warrant when they are seized incident to arrest as they can when seized for evidentiary search purposes.

<sup>32</sup> *Chadwick*, 433 U.S. 13.

<sup>33</sup> 415 U.S. 800 (1974).

<sup>34</sup> 462 U.S. 640 (1983).

<sup>35</sup> *Edwards*, 415 U.S. at 806.

<sup>36</sup> 362 U.S. 217 (1960).

<sup>37</sup> *Edwards*, 415 U.S. at 803 (citing *Abel*, 362 U.S. at 217).

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

<sup>39</sup> *Lafayette*, 462 U.S. at 641.

<sup>40</sup> In *Chimel v. California*, 395 U.S. 752 (1969), the Court held that a routine search incident to arrest could be performed on the arrestee and the “area within his immediate control.” *Id.* at 763. Neither *Chimel* nor *Robinson* discussed the propriety of searching containers, such as a suitcase, that could be easily secured until a warrant was obtained.

<sup>41</sup> *Lafayette*, 462 U.S. at 645.

that "any container or article in [the] possession" of an arrestee is subject to a full search, either at the scene of the arrest or at the stationhouse.<sup>42</sup> Thus, the Court in *Edwards* and *Lafayette* assumed what it had not explicitly held in *Robinson*: that a search incident to arrest includes a search of *all* containers in the possession of the arrestee, without any showing of cause for that search beyond what is required for the arrest itself.

Conceding that an arrest entails a serious intrusion on one's privacy, it is not obvious that a search of one's suitcase, briefcase or purse is not a substantial further intrusion. If the Court is serious about its oft-repeated claim that "searches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,"<sup>43</sup> then the searches approved in *Robinson* and *Lafayette* should have been struck down. There is no obvious reason why police cannot secure containers seized from arrestees and search them only after getting a search warrant based on probable cause. This would be consistent with the *Chadwick* requirements for containers seized from non-arrestees.<sup>44</sup> Once the Court agreed that such containers, as "repositories of personal effects," are subject to Fourth Amendment protection, it should have offered a justification for dispensing with this protection when a person is arrested.<sup>45</sup> Yet neither *Robinson* nor *Lafayette* contains any such justification: the *Robinson* Court assumed without

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<sup>42</sup> *Id.* at 648. It is true, as Justice Marshall pointed out in his dissenting opinion in *Lafayette*, that the majority did not quite say that a search of the shoulder bag would have been appropriate at the scene of the arrest as a search incident to arrest. *Id.* at 649 (Marshall, J., dissenting). However, it seems clear that suitcases, shoulder bags, and similar items are in the "area within the arrestee's immediate control" that the Court, citing *Chimel* and *Robinson*, held that police could search at the scene. *Id.* at 644.

<sup>43</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967). See also *United States v. Ross*, 456 U.S. 798, 825 (1982). But see *Bradley*, *supra* note 1, at 1473-74 (pointing out that the Court has created over 20 exceptions to this "rule").

<sup>44</sup> *United States v. Chadwick*, 433 U.S. 1 (1977). Indeed, Justice Blackmun, dissenting in *Chadwick*, conceded that "impounding the footlocker without searching it would have been a less intrusive alternative in this case. The police could have waited to conduct their search until after a warrant had been obtained." *Id.* at 19 (Blackmun, J., dissenting). However, he concluded that "the mere fact that a warrant could have been obtained while the footlocker was safely impounded does not necessarily make the warrantless search unreasonable." *Id.* (Blackmun, J., dissenting). Yet this conclusion is flatly inconsistent with a *warrant requirement*, which declares warrantless searches *per se* unreasonable subject to a few narrow, and presumably justifiable, exceptions.

<sup>45</sup> One such justification might be the potential dangerousness of containers seized from suspects. Of course, as the Court noted in *Chadwick*, if "officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives," a warrant is not required. *Id.* at 15 n.9. The fact that some packages might be dangerous is hardly a reason for dispensing with a warrant requirement for all packages.



discussion that the "container search" in that case was valid, and the *Lafayette* Court used that assumption as the starting point for concluding that pre-incarceration, "no cause" stationhouse searches of containers were also valid.<sup>46</sup>

B. *NEW YORK V. BELTON*<sup>47</sup>

The Court made its second "wrong" turn in *New York v. Belton*. In that case, a highway patrolman stopped a speeding car, smelled marijuana, and saw an envelope marked "Supergold" on the floor of the car.<sup>48</sup> He recognized "Supergold" as a street name for marijuana.<sup>49</sup> He ordered the occupants out of the car and arrested them for possession of marijuana. He then searched the passenger compartment of the car. He found marijuana in the envelope and cocaine in the zippered pocket of a jacket on the back seat.<sup>50</sup>

The Supreme Court upheld the search and conviction, citing the need for "a set of rules which, in most instances, makes it possible [for the police] to reach a correct determination beforehand as to whether an invasion of privacy is justified."<sup>51</sup> Accordingly, the majority held that the passenger compartment of an automobile, including containers found therein, may always be searched "incident to arrest" of the occupants without any additional showing of cause or exigent circumstances because that compartment is generally, if

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<sup>46</sup> One might argue that a full "no cause" search is a necessary concomitant of incarceration, and since such a search is going to take place at the stationhouse anyway, there is no reason to bar it at the scene. As the Court in *Lafayette* argued at some length, there are additional reasons for allowing a full pre-incarceration search that do not apply at the time of arrest. *Lafayette*, 462 U.S. at 645-46 (inventory searches safeguard the arrestee's belongings from theft). However, none of these reasons is a very convincing ground for dispensing with a serious warrant "requirement," and, in any case, many arrests don't lead to incarceration.

Alaska and Hawaii appear to be the only states that have limited pre-incarceration searches to simply sealing containers that the police lack cause to open. See, e.g., *State v. Kaluna*, 520 P.2d 51, 61-62 (Haw. 1974), *overruled on other grounds by State v. Jenkins*, 619 P.2d 108 (Haw. 1980); *Reeves v. State*, 599 P.2d 727, 736-37 (Alaska 1979). Cf. *People v. Walker*, 228 N.W.2d 443, 446 (Mich. Ct. App. 1975), *overruled on other grounds by People v. Johnson*, 268 N.W.2d 259 (Mich. Ct. App. 1978) ("It would be naive and pointless to assume that law enforcement officials may store an arrestee's personal effects without first determining what it is they are inventorying.").

In England, searches of arrestees may only be performed upon "reasonable ground for suspicion" that evidence of a crime will be found, although a full inventory search is permitted if the arrestee is taken to the stationhouse. Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L., 171, 178 (1993).

<sup>47</sup> 453 U.S. 454 (1981).

<sup>48</sup> *Id.* at 455-56.

<sup>49</sup> *Id.* at 456.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 458 (quoting Wayne R. LaFave, "Case by Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1976 SUP. CT. REV. 127, 142).

not inevitably, an "area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]."52

Yet, as Justice Brennan pointed out in dissent, the "clear rule" of *Belton* is not especially clear53 and "abandons the justifications underlying *Chimel*."54 That is, *Chimel v. California*55 had limited searches incident to arrest to areas "within [the] immediate control" of the arrestee.56 By contrast, *Belton* allowed such a search, without cause, of both the passenger compartment of the car and of the containers found therein, even after the arrestee had been removed from the car and the car's contents were "unaccessible"57 to him. Worse, *Belton*, by permitting police to conduct no-cause searches of cars incident to a custodial arrest encouraged police to take people into custody for traffic offenses in order to get a look at the car's contents.58 Such a broad license to search is completely incompatible with a meaningful warrant requirement which demands a warrant unless there is a very good reason not to get one.

Thus, after *Belton* and *Robinson/Edwards/Lafayette*, if the police had probable cause that an individual had committed a crime, they could arrest her, search her person, search any containers she was carrying and search any vehicle she was in at the time of arrest. Still, the *Chadwick* warrant requirement remained in force as to the indi-

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

53 *Id.* at 470 (Brennan, J., dissenting). For example, Brennan asked:

Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car? . . . Does [this search] include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"?

. . . .

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

*Id.* (Brennan, J., dissenting) (citations omitted).

54 *Id.* (Brennan, J., dissenting) (citing *Chimel v. California*, 395 U.S. 752 (1969)).

55 395 U.S. 752 (1969).

56 *Id.* at 763.

57 The New York Court of Appeals found the car's contents "unaccessible" to the arrestee. *State v. Belton*, 407 N.E.2d 420, 421 (N.Y. Ct. App. 1980), quoted in *Belton*, 453 U.S. at 467.

58 See *Robbins v. California*, 453 U.S. 420, 450-51 (1981) (Stevens, J., dissenting). See also 3 LAFAYE, *supra* note 19, at 12-21, for further criticisms of the *Belton* holding.

vidual whom the police had probable cause to believe possessed evidence, but for whom there was no probable cause, or no desire, to arrest. Until recently, *Chadwick* also applied to automobile searches, as the Court stated in *Arkansas v. Sanders*.<sup>59</sup> That is, if police had probable cause only to search a suitcase or other container found in an automobile, they had to obtain a search warrant before opening the container. But, as *United States v. Ross*<sup>60</sup> held, if they had probable cause to search the automobile generally, then they could search it fully, including opening any containers found therein.

### C. CALIFORNIA V. ACEVEDO<sup>61</sup>

The third wrong decision is *California v. Acevedo*, decided in 1991, nine years after the *Ross* rule went into effect. *Acevedo* set out to resolve the tension between *Sanders* and *Ross*, which, when read together, stated that police, with probable cause to believe that evidence is in a container in an automobile, could search that container without a warrant if they had probable cause to search the vehicle generally, but not if their probable cause was "container specific."<sup>62</sup>

In *Acevedo*, the police saw a suspect place a paper bag, containing what they had probable cause to believe was marijuana, in the trunk of his car.<sup>63</sup> They stopped the car, opened the trunk, and opened the bag which contained marijuana.<sup>64</sup> Since probable cause was aimed at the bag alone, rather than at the car as a whole, under the *Chadwick/Sanders* rule, the police should have obtained a search warrant before opening the bag.

The Court, however, came out the other way, holding that the *Chadwick/Sanders* rule "has devolved into an anomaly such that the more likely the police are to discover drugs in a container, the less authority they have to search it. . . . The . . . rule is the antithesis of a 'clear and unequivocal' guideline."<sup>65</sup> Thus, citing the confusion caused by "our Fourth Amendment jurisprudence,"<sup>66</sup> *Acevedo* held that "[t]he police may search an automobile and the containers

<sup>59</sup> 442 U.S. 753 (1979). In *Sanders*, the police had probable cause that a green suitcase carried by the suspect contained marijuana. The suitcase was searched after the police stopped the taxi in which the suspect had placed it. *Id.* at 755. Citing *Chadwick* and the warrant requirement, the Court struck down the search. *Id.* at 762-64.

<sup>60</sup> 456 U.S. 798, 825 (1982).

<sup>61</sup> 111 S. Ct. 1982 (1991).

<sup>62</sup> For criticism of the *Ross* rule, see Yale M. Kamisar, *The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncertainty*, in 3 THE SUPREME COURT, TRENDS AND DEVELOPMENTS 69 (1982).

<sup>63</sup> *Acevedo*, 111 S. Ct. at 1984.

<sup>64</sup> *Id.* at 1985.

<sup>65</sup> *Id.* at 1990 (citations omitted).

<sup>66</sup> *Id.*

within it where they have probable cause to believe contraband or other evidence is contained.”<sup>67</sup> That is, in *Acevedo*, even though their probable cause was “container specific,” the police could search the container on the spot, without first obtaining a search warrant.

As the *Acevedo* Court made clear, however, two protections remain. First, as with any search, the search may not exceed the scope of the probable cause.<sup>68</sup> Thus, if probable cause is “container specific,” police may only search the car for the container and the container for the evidence. They may not, for example, look in the glove compartment if they believe that the evidence is in a suitcase.<sup>69</sup> Nor may they look in the glove compartment, or in a suitcase, if the *kind* of evidence they are seeking, such as illegal aliens, could not be concealed there.<sup>70</sup> However, this first limitation applies to all searches, whether by warrant or not. Thus, it does not represent any continuing vitality for the warrant requirement as to these types of searches.

In contrast, the second limitation does rest on the warrant requirement. If such a suitcase or briefcase is not found in a vehicle, *Acevedo* suggests that *Chadwick* will still apply. That is, absent an arrest, a warrant must still be obtained before the suitcase, the purse or the pockets of a person walking down the street may be searched, even if the police have probable cause that such a receptacle contains evidence of a crime.<sup>71</sup>

But, as both the *Acevedo* dissenting and concurring opinions rightly point out,<sup>72</sup> the *Acevedo* holding leaves a new, even uglier, anomaly lurking one step to the right of the old one. Why should a person walking down the street with a locked suitcase containing his personal effects be protected against warrantless search, but *lose* that protection when he locks the suitcase in the trunk of his car?<sup>73</sup> This makes even less sense than the old rule.

Indeed, it makes so little sense that it leads Professor James Tomkovicz to conclude that the Court may be on the verge of over-

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<sup>67</sup> *Id.* at 1991.

<sup>68</sup> *Id.* at 1988.

<sup>69</sup> “[P]olice did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.” *Id.* at 1991.

<sup>70</sup> See *United States v. Ross*, 456 U.S. 798, 824 (1982).

<sup>71</sup> In *Acevedo*, the Court made it clear that it was the need to “adopt one clear-cut rule to govern automobile searches” that prompted it to overrule *Sanders*. *Acevedo*, 111 S. Ct. at 1991.

<sup>72</sup> *Id.* at 1993 (Scalia, J., concurring); *id.* at 2000-01 (Stevens, J., dissenting).

<sup>73</sup> *Id.* at 2001 (Stevens, J., dissenting).

ruling *Chadwick* and abandoning the warrant requirement altogether as to searches conducted out-of-doors. This would, in effect, limit the requirement to "homes and other private buildings . . . and, perhaps, private conversations."<sup>74</sup>

The Court in *Acevedo* claims that this is just another narrow case interpreting the automobile exception, and that the "cardinal principle that searches conducted . . . without prior approval by a judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions," is still in force.<sup>75</sup> But the logic of *Acevedo*, combined with that of *Robinson* and *Belton*, suggests a different conclusion as noted above.

Suppose, for example, that *Acevedo* had placed his bag of marijuana in the basket of a bicycle, rather than in the trunk of a car. Surely that would not have entitled him to any *more* protection than he got in the case before the Court. Nor would he have been entitled to more protection if he had his bag on an airport luggage carrier. Each of these vehicles is mobile—indeed, under certain circumstances, each may be more elusive than an automobile. And surely each of these vehicles offers its user much less privacy than an automobile. Thus, the reasons given for the automobile exception to the warrant requirement in the first place—mobility and lessened expectations of privacy—are even more apparent in the case of the bicycle and luggage carrier than in the case of an automobile.<sup>76</sup>

But if the suspects with the containers on the bicycle and the luggage cart are not afforded any greater Fourth Amendment protection than the suspect in a car, then surely the suspect on foot, carrying his briefcase in his hand, cannot be either. There is simply no logical hook on which to hang a warrant requirement once that requirement has been abandoned in all of the cases discussed above. Since cars and pockets are the two areas outside the home in which one has the *greatest* expectation of privacy, once the warrant requirement has been abandoned for containers found in those areas there is nothing left of the warrant requirement.<sup>77</sup>

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<sup>74</sup> James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1115 n.86 (1992). See also *Acevedo*, 111 S. Ct. at 1992-93 (Scalia, J., concurring). In contrast to professor Tomkovicz, I see this as a positive development, at least in pragmatic terms. See Morgan Cloud, *Pragmatism, Positivism and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993) (discussing how such pragmatism underlies many Fourth Amendment decisions).

<sup>75</sup> *Acevedo*, 111 S. Ct. at 1991 (citations omitted).

<sup>76</sup> The Court conceded this point in *United States v. Ross*, 456 U.S. 798 (1982), but held, despite this logic, that when probable cause was "container specific" a warrant must be obtained, as *Chadwick* and *Sanders* had held. *Id.* at 809.

<sup>77</sup> One remaining area, not specifically covered by any of the decided cases, or by the

In each of the three “wrong” cases, had the burden been placed on the government to justify the abandonment of the warrant “requirement,” it would have been unable to do so. Assuming that the warrant requirement is a good rule, then there is no compelling reason why police cannot seize containers found on suspects, or in their cars, incident to arrest or otherwise, but open them only upon demonstrating probable cause to a judicial officer. In individual cases, there may of course be some exigent circumstances that compel the waiver of the rule. But if the warrant requirement is taken seriously outside the home, then absent an emergency, the vehicles in which people are riding, the containers that they possess and the pockets of their clothing could only be searched with a warrant (or, for weapons only, incident to arrest). Instead, in an effort to craft “clear rules for police to follow,” the Court, by not requiring a warrant in these cases, has abandoned the warrant requirement.

Many would argue that these cases are “wrong” because the warrant requirement is a valuable protection of civil liberties that must be imposed whenever possible. Such critics are, however, simply arguing as a tenth Justice that “if I was on the Court, things would be different.”<sup>78</sup> A tenth Justice who was more in step with the nine sitting could argue equally well that the warrant requirement makes no sense in outdoor searches: it is unduly burdensome and may actually result in more, rather than less, of an intrusion on civil rights, since time-consuming warrant procedures, possibly involving extended detention of suspects, might force searches to be

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anticipated abandonment of *Chadwick*, is the pockets of a person not subject to custodial arrest. But if a purse is to be subject to a warrantless search, and if everybody’s person is subject to a warrantless frisk for weapons on reasonable suspicion as well as a full search upon probable cause to arrest, then it makes little sense to try to single out the pockets of a person whom the police have probable cause to search but not to arrest. Indeed, unlike containers, which can be readily seized while a warrant is sought, requiring a warrant for the search of a person’s pockets would result in a greater loss of civil liberty than the contrary rule because the person would have to be held for the time it took to get a warrant. It would also pose a greater danger for police who would have to stand guard over a person while awaiting the warrant, possibly for several hours, without having fully searched, or, in the absence of reasonable suspicion that he was armed and dangerous, even frisked, his person.

The mails are a further “outside” area as to which the Court has not yet abandoned the search warrant requirement. See *Chadwick*, 433 U.S. at 10. If the Court abandoned the warrant requirement for searches of the mails, such searches should, and could, be protected by a federal statute in the same manner that telephone conversations are currently protected. See 18 U.S.C. §§ 2510 *et seq.* (1988) (regulating electronic surveillance by state and federal agents).

<sup>78</sup> Indeed, the *Acevedo* dissent did a good job of arguing that, if you start with a warrant “requirement,” then the Court’s reasoning in that case is nonsense. *Acevedo*, 111 S. Ct. at 1994 (Stevens, J., dissenting).

come more drawn out and extensive.<sup>79</sup>

I do not conclude that *Robinson*, *Belton* and *Acevedo* are “wrong” because they abandon the warrant requirement, which, in any case, is based on questionable historical authority—especially when applied out of doors.<sup>80</sup> Rather, they are wrong because, while abandoning the warrant requirement, the Court insists that it is retaining, indeed cherishing, it! Such praise for the emperor’s clothes inevitably tends to confuse the issue of what his future wardrobe should look like.

To summarize the state of the law of outdoor searches, assuming that the *Chadwick* rule is doomed: an individual walking down the street may be arrested without a warrant and his person and any container he is carrying may be fully searched incident to arrest if there is probable cause that he has committed any arrestable offense, as *Robinson* and *United States v. Watson*<sup>81</sup> make clear. If police only have probable cause that he possesses evidence, but not that he has committed a crime, he may be stopped and his person and any containers he is carrying may be fully searched for that evidence. Although the search cannot exceed the scope of the probable cause (for example, his pockets cannot be searched for machine guns), it is not, assuming *Chadwick*’s demise, subject to a warrant requirement. Similarly, if the suspect is driving, pedaling or flying, his vehicle (even a recreational vehicle in which he lives<sup>82</sup>) can be stopped and searched without a warrant, to the extent of the probable cause. Finally, if there is probable cause to arrest anybody in a car, the passenger compartment of that car and any containers found therein may be searched incident to that arrest—even if the arrest is for a traffic violation that could produce no evidence, and even if the automobile is not an “area within the immediate control” of the arrestee at the time of the search.<sup>83</sup>

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<sup>79</sup> This is, indeed, the argument that the majority made in *Acevedo*:

If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.

.....

We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one.

*Id.* at 1988-89.

<sup>80</sup> See Bradley, *supra* note 42, at 1486. For an extended historical discussion see, Tomkovicz, *supra* note 74, at 1129-41; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19 (1969).

<sup>81</sup> 423 U.S. 411 (1976) (no warrant required for arrest in public place).

<sup>82</sup> See *California v. Carney*, 471 U.S. 386 (1985).

<sup>83</sup> Furthermore, the trunk of a car and containers found therein can be searched prior to impoundment without either probable cause or a warrant. See *Colorado v. Bertine*, 479 U.S. 367 (1987).

## II. THE TWO MODEL APPROACH

In a 1985 article entitled *Two Models of the Fourth Amendment*,<sup>84</sup> I urged that the Court abandon the fictitious warrant "requirement," which at the time was subject to about twenty exceptions, and adopt one of two approaches. First, the Court could treat the warrant requirement seriously and require a warrant (obtained by telephone if necessary) before *every* search, subject only to a single, rigorously enforced, exigent circumstances exception.<sup>85</sup> Alternatively, the Court could forthrightly admit that the warrant requirement is unworkable and simply judge each search on the basis of its reasonableness, as the Fourth Amendment, by its terms, requires.<sup>86</sup>

It now appears that the Court, citing the "extent to which our Fourth Amendment jurisprudence has confused the [lower] courts,"<sup>87</sup> is on the verge of adopting the reasonableness approach to outside searches while retaining the warrant requirement as to homes and related structures. Justice Scalia, citing my Article in his concurring opinion in *Acevedo*,<sup>88</sup> urged the Court to do this openly:

[T]he path out of this confusion should be sought by returning to the first principle that the "reasonableness" requirement of the Fourth Amendment affords the protection that the common law afforded [for instance, warrants required for searches of the home but not otherwise]. . . . [T]he supposed "general rule" that a warrant is always required does not appear to have any basis in common law . . . and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances, as the anomaly eliminated, and the anomaly created by today's holding both demonstrate.<sup>89</sup>

The remainder of this Article assumes that the Court adopts the

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<sup>84</sup> Bradley, *supra* note 1.

<sup>85</sup> *Id.* at 1471. As I noted, this approach "revitalizes the proposition of Justice Frankfurter in his dissent in *United States v. Rabinowitz* that 'a search is unreasonable unless a warrant authorizes it, barring only exceptions justified by *absolute necessity*.'" *Id.* at 1497 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950)) (emphasis added). *Rabinowitz* was overruled by *Chimel v. California*, 395 U.S. 752 (1969).

<sup>86</sup> Bradley, *supra* note 1, at 1471. As I noted, "there is considerable historical evidence that [this] view of the [F]ourth [A]mendment . . . is exactly what the framers of the Constitution had in mind and that the warrant requirement . . . has 'stood the [F]ourth [A]mendment on its head' from a historical standpoint." *Id.* at 1486 (quoting TAYLOR, *supra* note 80, at 23-24). See also Tomkovicz, *supra* note 74, at 1136-41 (finding the historical data inconclusive). Professor Tomkovicz, after a thorough discussion of the reasons for and against retaining the warrant requirement, concludes "[i]f the choice were mine, the warrant rule would survive." *Id.* at 1163.

<sup>87</sup> *California v. Acevedo*, 111 S. Ct. 1982, 1990 (1991).

<sup>88</sup> *Id.* at 1992 (Scalia, J., concurring).

<sup>89</sup> *Id.* at 1993 (Scalia, J., dissenting) (citations omitted). The common law protection Scalia refers to is the warrant requirement applied to searches of the home, but not otherwise.



approach that Scalia and the logic of *Acevedo* suggest, and discusses the appearance of the new Fourth Amendment terrain. That is, will the new approach be a “path out of this confusion”<sup>90</sup> or simply a Fourth Amendment that, while less restrictive on police, is every bit as bewildering as the approach of the last thirty years? In my view, such a bifurcated approach could, if the Court handles it properly, result in significant gains in the clarity and the workability of Fourth Amendment doctrine. Thus, in that pragmatic sense, I argue that three wrongs—*Robinson*, *Belton* and *Acevedo*—can make a “right.”

As noted, the crucial first step toward developing such a workable, “two model” approach to the Fourth Amendment is to admit that the warrant requirement is to be partially abandoned. The *Acevedo* majority, to the contrary, stoutly insisted that the warrant requirement survived and that the case was simply a further explication of one of the “specifically established and well-delineated exceptions.”<sup>91</sup> But, as discussed above, such a claim is nonsense as to outdoor searches in light of *Robinson*, *Belton*, and particularly *Acevedo*.<sup>92</sup>

By contrast, the warrant requirement does retain its cloak of authority as to searches of the home. For example, in order to arrest a person at home, the police must obtain an arrest warrant,<sup>93</sup> and to arrest him in the home of another, the police must obtain a search warrant.<sup>94</sup> A search incident to arrest of a person arrested out of doors may not extend into the home without a warrant,<sup>95</sup> and “application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.”<sup>96</sup>

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<sup>90</sup> *Id.* (Scalia, J., dissenting).

<sup>91</sup> *Id.* at 1991.

Our holding today neither extends the *Carroll* doctrine nor broadens the scope of the permissible automobile search . . . It remains a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

*Id.*

<sup>92</sup> Or, as Professor LaFave branded another aspect of the decision, “unmitigated poppycock.” 3 LAFAVE, *supra* note 19, at 16 (Supp. 1994).

<sup>93</sup> See *Payton v. New York*, 445 U.S. 573 (1980). Cf. *United States v. Watson*, 423 U.S. 411 (1976) (no warrant required to arrest a suspect out of doors).

<sup>94</sup> See *Steagald v. United States*, 451 U.S. 204 (1981). The difference is that an arrest warrant for an individual at his own home would stay in force indefinitely, whereas a search warrant for an individual at someone else’s home must specify why the police have reason to believe that he is there now.

<sup>95</sup> *Vale v. Louisiana*, 399 U.S. 30 (1970).

<sup>96</sup> *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

Two cases, decided just a year apart, illustrate the Court's differing approach to home versus outdoor searches. In *United States v. Knotts*,<sup>97</sup> the Court unanimously approved the warrantless placement of an electronic beeper in a can of chemicals used in drug manufacture in order to follow a car transporting the chemicals. The majority held that this was not a "search."

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another . . . . Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.<sup>98</sup>

However, in *United States v. Karo*<sup>99</sup> when a similarly bugged container was used to determine whether the chemicals were still inside a house, the Court concluded by a 7-2 vote<sup>100</sup> that the monitoring of the beeper inside the house, even though the owner of the container had agreed to the installation of the bug, was a "search" for which a warrant was required.

Private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant. . . . Our cases have not deviated from this basic fundamental principal. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.<sup>101</sup>

The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant.<sup>102</sup>

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<sup>97</sup> 460 U.S. 276 (1983).

<sup>98</sup> *Id.* at 281-82. Four Justices concurred only in the judgment, arguing that the majority had unnecessarily discussed the "open fields" doctrine, and that, just because the enhancement of senses by technological means was unobjectionable in this case didn't mean it always would be. *Id.* at 287-88 (Blackmun and Stevens, JJ., concurring in the judgment).

<sup>99</sup> 468 U.S. 705 (1984).

<sup>100</sup> Justice O'Connor, joined by Justice Rehnquist, disagreed with this portion of the Court's reasoning, arguing that since the homeowner had no possessory interest in the container, he lacked standing to protest the monitoring of it. *Id.* at 721-28 (O'Connor, J., concurring in part and concurring in the judgement). Three other Justices concurred in part and dissented in part.

<sup>101</sup> *Id.* at 714-15. Compare this strong statement to the "specifically established and well-delineated exceptions" language in discussing outdoor searches. *See, e.g., California v. Acevedo*, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring).

<sup>102</sup> *Karo*, 468 U.S. at 715. Since the agents would not know in advance where the bugged container would be taken, the warrant requirement would be satisfied by "describ[ing] the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested." *Id.* at 718.

Even Justices O'Connor and Rehnquist, who disagreed with this portion of the opinion, would have required a warrant if the agents had bugged the defendant's *own* container, but contended that the defendant had no expectation of privacy in someone else's container.<sup>103</sup> Thus, there is general agreement on the Court as to the special protection to be afforded the home, even when it comes to the extremely limited intrusion afforded by a beeper device that tells nothing about the private lives of the residents.<sup>104</sup>

This protection is not limited to houses. It unquestionably extends to other structures such as apartments<sup>105</sup> and hotel rooms,<sup>106</sup> even though neither is owned by the protected occupants, and both are subject to entry by people other than the occupants and their invitees. The protection also extends to police searches of offices,<sup>107</sup> schools,<sup>108</sup> and business premises,<sup>109</sup> and apparently even includes outbuildings on a farm.<sup>110</sup>

The Court has also recognized that one particular outdoor area may be subject to the warrant requirement, absent exigent circumstances. This is the curtilage of a house—the outdoor area immediately surrounding the structure.<sup>111</sup> However, this is because the

<sup>103</sup> *Id.* at 723, 727 (O'Connor, J., concurring in part and concurring in the judgment). The dissenters likened *Karo* to *United States v. White*, 401 U.S. 745 (1971), in which the Court approved the warrantless monitoring of a bug worn by a police informant inside the suspect's house. The majority noted that a warrant would not have been required if, as in *White*, a co-conspirator had been cooperating with the government. *Id.* at 716 n.4.

<sup>104</sup> Of similar effect are *United States v. Watson*, 423 U.S. 411 (1976), which does not require an arrest warrant to arrest someone on the street, and *Payton v. New York*, 445 U.S. 573 (1980), which does require a warrant for an arrest in the home.

<sup>105</sup> See *Chapman v. United States*, 365 U.S. 610 (1961).

<sup>106</sup> See *Stoner v. California*, 376 U.S. 483 (1964).

<sup>107</sup> In *O'Connor v. Ortega*, 480 U.S. 709 (1987), all nine Justices agreed that a police search, at least of a private or semi-private office, would be illegal absent a search warrant, whether or not the employer was a private or public entity. The Justices differed over the propriety of the search in that case, which was conducted by a government employee's supervisor.

<sup>108</sup> See *New Jersey v. T.L.O.* 469 U.S. 325 (1985).

<sup>109</sup> See *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

<sup>110</sup> In *United States v. Dunn*, 480 U.S. 294 (1987), the Court noted that "we have assumed, but not decided," that a barn was an area protected by the Fourth Amendment warrant requirement. *Id.* at 304.

<sup>111</sup> In *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984), the Court did not "consider . . . the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself." In *Dunn*, 480 U.S. at 301, the Court spoke of the curtilage as being "placed under the home's 'umbrella' of Fourth Amendment protection" and assumed, but did not explicitly hold, that a warrant was required to trespass on the curtilage.

The *Dunn* Court also tried to define what is, and what is not, curtilage.

[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which

curtilage is considered to be part and parcel of the home where the "intimate activities of the home" are carried on and is under the "umbrella" of the home's protections.<sup>112</sup> Thus, it is essentially consistent with the indoor/outdoor dichotomy.

Also, though the government has consistently won cases in the Supreme Court in which various technological devices were used to surveil areas that are visible from outdoors, such as the area around a factory or the contents of a greenhouse, the Court has made it clear that homes and curtilage will not be subject to the sort of high-tech surveillance that would interfere with a citizen's ordinary expectations of privacy, even though there was no physical trespass on the citizen's property.<sup>113</sup> Thus, the Court seems to have recognized the *potential* to require a warrant for certain high-tech outdoor searches, but only when these searches intrude into structures or curtilage.

In particular, in *Dow Chemical Co. v. United States*,<sup>114</sup> the Court, while approving the use of a sophisticated camera to take aerial photos of the outdoor areas of petitioner's factory complex, observed that "[i]t may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."<sup>115</sup>

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the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

*Id.* at 301.

Thus, as Kamisar, LaFave and Israel summarized *Dunn*:

[T]he Court then concluded [that] the barn into which the police looked was not within the curtilage, as it was 60 yards from the house, was outside the area surrounding the house enclosed by a fence, did not appear to the police to be "used for intimate activities of the home," and the fences outside the barn were not of a kind "to prevent persons from observing what lay inside the enclosed area." The Court added that even assuming the barn was protected business premises, it still was no search to look into the open barn from an open field vantage point.

YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 156-57 (7th ed. 1990).

This protection is limited because ordinarily, when the police see something in the curtilage, it is in plain view. Accordingly, information so obtained may be used, even though no warrant was obtained. Moreover, since the police viewing frequently gives rise to exigent circumstances, an immediate seizure of the viewed person or thing may also be appropriate.

<sup>112</sup> See, e.g., *Dunn*, 480 U.S. at 300-02.

<sup>113</sup> In *Florida v. Riley*, 488 U.S. 445 (1989), a majority of the Court agreed that warrantless surveillance of a house or curtilage from a helicopter flying at less than 400 feet would be inappropriate. *Id.* at 452-56 (O'Connor, J., concurring in the judgement); *id.* at 456-67 (Brennan, J., dissenting); *id.* at 467-68 (Blackmun, J. dissenting).

<sup>114</sup> 476 U.S. 227 (1986).

<sup>115</sup> *Id.* at 238. *Accord* *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986) ("The State acknowledges that 'aerial observation of curtilage may become invasive, either due to

The dissenters in *Dow Chemical* protested that the use of a "sophisticated aerial mapping camera" that cost more than \$22,000 and was capable of taking detailed photographs from as high as 1200 feet, *was* the sort of high-tech intrusion that interfered with the petitioner's reasonable expectations of privacy.<sup>116</sup>

The majority in *Dow Chemical* was surely influenced by several factors that made the aerial search more palatable than other law enforcement uses of high-tech equipment. First, *Dow* involved an administrative search for air pollution violations. Second, the area surveilled was an industrial complex that fell "somewhere between 'open fields' and curtilage."<sup>117</sup> The Court specifically emphasized that "unlike a homeowner's interest in his dwelling, 'the interest of the owner of commercial property is not one in being free from inspections.'"<sup>118</sup> Finally, the photographs in question were "not so revealing of intimate details as to raise constitutional concerns."<sup>119</sup>

By contrast, "[an] electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions."<sup>120</sup> Obviously, the warrantless use of such devices on a private residence would raise insuperable constitutional difficulties.

Thus, it seems clear that, not only physical trespass, but also certain other technological intrusions into buildings and/or curtilages, are subject to the warrant requirement under current law and would continue to be subject to it under the new regime.<sup>121</sup> However, there is little in these cases to suggest that high-tech surveillance of public places or open fields would or should be subject to the warrant requirement. On the contrary, since the Court has held that intrusions into "open fields" and public places are not searches

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physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'").

<sup>116</sup> *Dow Chemical*, 476 U.S. at 240 (Powell, J., concurring in part and dissenting in part).

<sup>117</sup> *Id.* at 236.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 238.

<sup>120</sup> *Id.* at 239.

<sup>121</sup> The Court's suggestion in *Dow Chemical* that certain high-tech searches outside the curtilage (which are open fields by definition) may be subject to the warrant requirement, is inconsistent with its repeated insistence that an intrusion even onto a fenced and posted "open field" is not a search. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 178 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983) (narcotics dog's sniffing of luggage is not a search, even though it intrudes upon luggage, a protected area).

at all,<sup>122</sup> it follows that no search warrant could be required, regardless of the sophistication of the electronic intrusion. Thus, it seems likely that, despite the reservation expressed in *Dow Chemical*, the use of satellite technology to surveil a field which is suspected of being a staging area for arms smugglers, or a public street where criminals are thought to congregate, for example, would be allowed without a warrant, because such surveillance is not a "search."

A more difficult challenge to the indoor/outdoor formulation is posed by the telephone booth in *Katz v. United States*,<sup>123</sup> which, it might be argued, is not "indoors" in any meaningful sense, but is still, as *Katz* held, protected by the warrant requirement. Much of the discussion in *Katz* could be read as applying equally to a phone on a post by the roadside.<sup>124</sup> However, there is actually considerable support in the opinion for the position that it was in fact the "indoor" aspect of the phone booth that dictated the majority's result, and distinguished phones in booths from other public phones.<sup>125</sup> The statutory formulation below distinguishes phone booths from other public phones—a distinction that, if not entirely satisfactory, is nevertheless clear.<sup>126</sup> The point is that enclosing oneself in a structure is the key to triggering the Fourth Amendment's search warrant protection. In any event, this particular issue has been rendered moot by federal law which requires a warrant to tap either kind of telephone.<sup>127</sup>

A difficult problem is posed by car phones. Even though cars

<sup>122</sup> *Oliver*, 466 U.S. at 178.

<sup>123</sup> 389 U.S. 347 (1967).

<sup>124</sup> For example, the Court in *Katz* made the following statement:

[The] effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

*Id.* at 351-52.

<sup>125</sup> The explicit holding of *Katz* is that, "one who occupies [a telephone booth], *shuts the door behind him*, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352 (emphasis added). In his concurring opinion, which established the "expectations of privacy" formulation for which *Katz* is known, Justice Harlan stated that he understood the majority to be saying that "an enclosed telephone booth is an area, where, like a home, . . . a person has a constitutionally protected expectation of privacy. . . . [C]onversations in the open would not be protected against being overheard." *Id.* at 361 (Harlan, J., concurring).

<sup>126</sup> It must be emphasized that the only expectation of privacy that one has in a phone booth is that the *call* will not be electronically monitored without a warrant. One has no greater expectation of privacy in a phone booth than he does on the street as to warrantless arrests or searches for physical evidence.

<sup>127</sup> See 18 U.S.C. §§ 2510 *et seq.* (1988). Both state and federal authorities are required

are not subject to the warrant requirement, a car is a Fourth Amendment protected area such that entry into it is a "search" requiring probable cause. Furthermore, one would seem to have as great an expectation of privacy in his car as he does in a phone booth. Nevertheless, the Court has surely become too firmly attached to the automobile exception to require a warrant to overhear a car phone under the Fourth Amendment (although Title III would again limit such electronic surveillance).<sup>128</sup> Moreover, while one may have as great an expectation of privacy in his car as in a phone booth against *physical* intrusion, he also recognizes that phone conversations from a car, beamed as they are over the airways rather than over a wire, are not as secure as a call from a booth.

Thus, the statutory formulation below would not require a warrant to surveil automobiles and conversations held therein, or other mobile containers, except "as otherwise required by law"—in this case, by Title III.

Another exception to the inside/outside distinction under current law is *United States v. White*.<sup>129</sup> In *White*, the Court approved the warrantless, but consensual, bugging of an informant who held conversations with the defendant in the defendant's home that were overheard electronically by federal agents.<sup>130</sup> A four Justice plurality<sup>131</sup> held that, just as the recipient of Katz' phone call could have allowed police to overhear it and/or could report conversations to the police, so could an informant allow police to listen in electronically on his conversation.<sup>132</sup>

However, the limits of *White* were established in *United States v. Karo*,<sup>133</sup> where the majority held that the intrusion in *White* was not a "search" because the defendant had no reasonable expectation that the informant would not reveal the contents of the conversation to another.<sup>134</sup> Thus, although *White* remains good law, it is limited to cases where one's trust in a confidant is misplaced.

A more troubling, albeit partial, exception to the in-

to conform electronic surveillance to the federal standards. *KAMISAR ET AL.*, *supra* note 111, at 344.

<sup>128</sup> See 18 U.S.C. §§ 2510 *et seq.*

<sup>129</sup> 401 U.S. 745 (1971).

<sup>130</sup> *Id.* at 753.

<sup>131</sup> Justice Black, the critical fifth vote on this issue, concurred only in the judgement. *Id.* at 754 (Black, J., concurring). Justice Brennan, who also concurred in the judgement, felt that such electronic overhearing should be subject to the warrant requirement. *Id.* at 755 (Brennan, J., concurring).

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

<sup>133</sup> 468 U.S. 705 (1984).

<sup>134</sup> *Id.* at 716 n.4.

door/outdoor dichotomy is *Chimel v. California*.<sup>135</sup> While *Chimel* is a case that established limits on the power of police to search incident to arrest in a home, in one important respect, it is guilty of not taking the warrant requirement seriously, in essentially the same manner as *Robinson*. Even though the Court paid tribute to the warrant requirement,<sup>136</sup> it allowed a warrantless search, not only of the arrestee's person, which could be justified by the exigencies of the arrest,<sup>137</sup> but also of "the area 'within his immediate control' [—] the area from within which he might gain possession of a weapon or destructible evidence."<sup>138</sup>

As in *Robinson*, this gives the police power that is inconsistent with the warrant requirement. In the course of effecting an arrest, the police should, in my view, have all the power they need to eliminate even a slight chance that the arrestee might gain control of a weapon. Thus, they can search her body and move her away from grabbing distance of any suspicious drawers or niches, or interpose themselves between the arrestee and such places. However, the *Chimel* Court also allows warrantless, no-probable-cause searches for evidence of areas within the "immediate control" of the arrestee, apparently without regard to whether the arrest is for an offense that *could* produce evidence or whether the arrestee in the instant case actually has a capacity to grab for anything.<sup>139</sup> Thus, the police are entitled to arrest someone for bail jumping and to search the bureau drawer near her place of arrest despite the fact that there is no evidence to be found for this offense nor any apparent danger that she might reach in the drawer for a weapon. Worse, as LaFave points out, lower courts have interpreted *Chimel* as permitting a search of the entire room in which a suspect is arrested,<sup>140</sup> and of places where the arrestee no longer can grab because the police have subdued her.<sup>141</sup>

To achieve its goal of declaring a clear and logical set of rules, the Court, under the new two models regime, should limit searches

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<sup>135</sup> 395 U.S. 752 (1969).

<sup>136</sup> "We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.* at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

<sup>137</sup> See *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>138</sup> *Chimel*, 395 U.S. at 763.

<sup>139</sup> For a discussion of the overbreadth of *Chimel*, especially as interpreted by the lower courts, see 2 LAFAVE, *supra* note 19, at 623-35.

<sup>140</sup> *Id.* § 6.3(c) n.28.

<sup>141</sup> *Id.* § 6.3(c) nn.29 & 30. See also *United States v. Turner*, 926 F.2d 883 (9th Cir. 1991) (search incident to arrest valid because area was within immediate control of arrestee before he was handcuffed and removed from the room).



incident to arrests inside the home to full searches of the person. Searches of other areas should be governed by the probable cause/search warrant standard, subject only to exigent circumstances and consent exceptions. Thus, the Court should not permit a search for weapons unless there is an immediate danger that cannot be diffused by less intrusive means, such as handcuffing the suspect, and warrantless searches for evidence should be forbidden absent both probable cause and exigent circumstances.<sup>142</sup>

To summarize, with surprisingly few exceptions,<sup>143</sup> the Court has been moving toward a “two model” approach to the Fourth Amendment, requiring warrants to search inside of structures but no warrants to search elsewhere, including searches of persons and the containers they are carrying. As noted, if this approach could actually resolve the myriad questions and doubts that have arisen under the false “warrant requirement,” it would be a major advance for Fourth Amendment jurisprudence. In my view, it would be well worth the very minor impact on civil liberties to abandon the last straw of warrant protection out of doors—the *Chadwick* container search warrant requirement.

Civil liberties are protected more fully by clear rules than by unclear rules that only seem more protective on their face. If the rules are unclear, the police, out of either ignorance or frustration, will violate them, resulting in a loss of civil liberty for the suspect. Then, since the suspect cannot be “unsearched,” society will suffer a further loss when the evidence is excluded to deter police misconduct and a criminal is possibly set free or receives a favorable plea bargain. If the rules are clearer, even if somewhat less restrictive on police, neither undesirable outcome—breaches of suspects’ rights nor the subsequent evidentiary exclusion—need occur so often.<sup>144</sup>

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<sup>142</sup> Of course, this exigent circumstance exception would not apply to evidence which police had pre-existing probable cause to seize but neglected to mention in the warrant.

<sup>143</sup> Another “inside” case that is not consistent with a meaningful warrant requirement is *Murray v. United States*, 487 U.S. 533 (1988). In *Murray*, the Court admitted evidence initially discovered during an illegal, warrantless, break-in of a warehouse on the ground that the evidence was only *seized* pursuant to a search warrant that was based on probable cause that predated the break-in. The properly obtained search warrant was an “independent source” and thus the evidence was not a fruit of the poisonous break-in. *Id.* However, as I argued at the time, “[t]he holding in *Murray* will encourage future police to break into houses, see if there is anything there, and then go for a warrant. The ‘warrant requirement,’ as a protection of the citizenry against unauthorized police intrusions is thus rendered nugatory.” Craig M. Bradley, *Murray v. United States, the Bell Tolls for the Search Warrant Requirement*, 64 *IND. L.J.* 907 (1989). If the Court is to be rigorous in the application of an “indoor” warrant requirement, then *Murray*, as well as *Chimel*, should be overruled.

<sup>144</sup> I recognize, of course, that this argument cannot be extended to its limits. A *really* clear rule for police would be, “search whenever you feel like it; no warrants required.”

### III. A STATUTORY SYNTHESIS

My support for this "two model" development is purely pragmatic. Accordingly, it depends upon whether a relatively simple and straightforward rule can be crafted that will not disintegrate under the weight of exceptions, unlike the present warrant "requirement." A statutory formulation that would make the two model approach both easy to grasp and criticize, would read as follows:

#### A. THE SEARCH WARRANT STATUTE

##### A. *Definitions:*

1. Structure: anything built by man that is not readily mobile and has a roof.
2. Curtilage: the outdoor area immediately surrounding a residence.
3. Search: any physical or technological intrusion into an area in which anyone has a reasonable expectation of privacy.

##### B. *Warrant Required:*

Searches of structures or of curtilage by law enforcement authorities for criminal evidence must be performed upon a search warrant, based on probable cause and issued by a judicial officer. This requirement will be waived only if the government establishes by a preponderance of evidence that the government agents reasonably believed either that exigent circumstances demanded proceeding without a warrant, or that a party whose interests were intruded upon had consented.<sup>145</sup>

##### C. *Warrant Not Required:*

No other searches require a warrant except as otherwise provided by law, but all searches must be reasonable.

#### B. DISCUSSION

This statutory scheme, requiring a warrant for searches of

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This rule would also result in no loss of civil liberties (as well as no evidentiary exclusion) in individual cases since there would be no civil liberties left to lose.

<sup>145</sup> Though searches incident to arrest are encompassed by this section, for the sake of clarity it would be wise to have a separate section specifically governing such searches.

##### A. *Searches Incident to Arrest:*

1. Police may perform a full body search of anyone subject to custodial arrest, as well as a search of any vehicle in which the suspect is found, without any showing of cause.
2. Any further warrantless searches of structures for evidence following an arrest must be based upon probable cause and exigent circumstances or consent.
3. A protective sweep of areas other than the room in which the arrest occurs may be performed if there is reasonable suspicion that people or objects in such areas pose an immediate danger.

structures, and of the curtilage of the home, but not for outdoor areas, is consistent with the approach taken by other countries. A study of the criminal procedure rules of six countries—Australia, Canada, England, France, Germany and Italy—revealed that “out-door” searches never require a warrant.<sup>146</sup> Indeed, in most countries, the warrant requirement was not even consistently applied to searches of the home,<sup>147</sup> although a warrant requirement for inside searches is the general rule.

This code, in abandoning the warrant requirement for outdoor searches may be thought to favor police to the detriment of citizens’ rights. However, as discussed, it does not favor police significantly more than the Court’s current stance. Furthermore, by taking the search warrant requirement seriously as to arrests in the home and searches incident to those arrests, it also increases civil rights in a significant way. More importantly, by providing a clear rule, it advances the interests of *both* police and citizenry by avoiding confusion and mistakes. Anybody with a high school education can, I believe, grasp when a warrant is and is not required under this code, in all but the most arcane cases.

### C. SECTION BY SECTION ANALYSIS<sup>148</sup>

¶ *A* § 1. This definition is essentially drawn from *California v. Carney*, 471 U.S. 386 (1985), in which the Court held that a warrant was not required to search an RV that was traveling on the street, but did not “pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence.” *Id.* at 394 n.3.<sup>149</sup> This

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<sup>146</sup> See Bradley, *supra* note 46, at 171. A possible, limited, exception is Italy, where searches of the “crime scene” must be performed pursuant to a warrant unless “a person is caught *in flagrante delicto*,” “a fugitive is evading police officers,” or “when an arrest warrant has been issued for a suspected criminal.” *Id.* at 217. It is not clear whether “crime scene” is limited to structures or would also include, for example, an automobile suspected of containing contraband. In any event, if a weapon is suspected, even a home may be searched without a warrant. *Id.*

<sup>147</sup> For example, in Canada, warrantless entries of buildings to arrest and/or to search for weapons are allowed, *id.* at 197, although the latter are not allowed as to domiciles. *Id.* at 217 n.310. In England, a warrant is not required to enter a house to arrest for the most serious offenses, or to search incident to that arrest. *Id.* at 180. Moreover, a warrantless search incident may take place even if the arrest is outside, but only on what amounts to probable cause. *Id.* France has no real search warrant requirement. *Id.* at 203. Germany has recently adopted a *de facto* warrant requirement for searches of homes only. *Id.* at 207. Australia has no national rule, but state rules generally require a warrant to search homes, but apparently not to conduct other searches. *Id.* at 192-93.

<sup>148</sup> This section by section analysis of the statutory scheme is written in the form of “drafter’s notes” with supplementary material in the footnotes.

<sup>149</sup> The Court continued:

definition does not, however, turn on the “residence” aspect, but on mobility since that would seem, under current law, to be the key factor in determining whether something is subject to the warrant requirement or not.

The definition is also consistent with *Oliver v. United States*, 466 U.S. 170 (1984), which distinguished between a fenced, posted field, which did not require a warrant to search, and a residence or curtilage, which did. It also answers in the affirmative a question left open by *Oliver*—whether outbuildings are subject to the warrant requirement.<sup>150</sup> However, a packing crate in a field (mobile), a cave in which a person lived (not built by man), and a phone booth attached to the wall of a public place (no roof) are not “structures” and intrusion upon them, whether physical or electronic, is not a search. Surveillance of car phones, while a “search,” would be subject to a probable cause, but not to a warrant requirement under the Fourth Amendment. However, wiretaps of telephones without a warrant are forbidden by federal statute.<sup>151</sup> Given the general intention and ability of Congress to regulate use and misuse of the airwaves, including car phones, and other mobile communications equipment, it is appropriate to leave such regulation out of the Fourth Amendment.

¶ A § 2. This section codifies the Court’s holdings in *United States v. Dunn*, 480 U.S. 294 (1987) and *Oliver v. United States*, that the curtilage is “the area around the home to which the activity of home life extends.” *Oliver*, 466 U.S. at 182 n.12. It makes it clear that only residential structures have a curtilage.<sup>152</sup> To what extent certain multi-family dwellings may have a curtilage will depend on the nature of the use accorded such property, as does the issue of

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Among the factors that might be relevant in determining whether a warrant might be required in such a circumstance is [the vehicle’s] location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.

*Id.*

<sup>150</sup> In *United States v. Dunn*, 480 U.S. 294 (1987), the Court assumed, for the sake of argument, that a barn was protected by the warrant requirement. *Id.* at 303.

<sup>151</sup> Of course, the bus station or basketball stadium in which such a telephone is located is a “structure,” and if it were closed to the public, entry by police into such a building might infringe on the owner’s rights.

As previously discussed, searches of the mails would no longer be subject to a Fourth Amendment warrant requirement but should receive that protection by federal statute. *See supra* note 77.

<sup>152</sup> While the question of whether a business can have a curtilage was left open in *Dow Chem. Co. v. United States*, 476 U.S. 227, 237-39 & n.7 (1986), the Court’s other discussions of curtilage have assumed that it was limited to the home. *See, e.g., Dunn*, 480 U.S. at 294. This section makes that assumption explicit.

whether certain land near a home is to be included.<sup>153</sup>

¶ A § 3. This section does not attempt to improve on the current, vague definition of “search” used by the Court. It does make it clear that certain intrusions into areas that are otherwise protected will nevertheless not require a warrant because the intrusions are not “searches.” Thus, police viewing, smelling or hearing illegal activity in a home or curtilage is not itself a search, as long as the police were in an area and/or were using equipment to which the public reasonably had access. In such a case, the suspect would not have a reasonable expectation of privacy. By the same token, the user of a phone booth only has a reasonable expectation that his call will not be electronically monitored. He has no such expectation that the police will not enter to arrest him or search his person. Consequently, such entry is not a “search” (though the subsequent arrest and/or search are a “seizure” and a “search,” respectively.)

This section thus codifies such “plain view” cases as *United States v. Lee*, 274 U.S. 559 (1927) (use of flashlight not a “search”); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986); and *Florida v. Riley*, 488 U.S. 445 (1989), all of which found that various kinds of low-tech surveillance are not searches because they do not interfere with the suspect’s reasonable expectations of privacy. This section also recognizes that certain high-tech intrusions might be searches in that they violate the individual’s reasonable expectations of privacy. See, e.g., *United States v. Karo* 486 U.S. 705 (1984). In *United States v. White*, 401 U.S. 745, 753 (1971), the Court held that merely using electronics to record what a police informer was prepared to tell the police anyway did not violate the suspect’s reasonable expectations of privacy, since the suspect was already aware that he might be betrayed by the informer. Significantly, the Court upheld this intrusion despite the fact that the conversation recorded occurred inside a private home. Something that is not a “search” under current law, remains outside the scope of the Fourth Amendment under this code.

¶ B. This paragraph requires a search warrant for any intrusion into or within a structure, barring apparent consent or exigent cir-

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<sup>153</sup> In *Dunn*, the Court spelled out factors to consider in determining “whether the area in question harbors those intimate activities associated with domestic life and the privacies of the home.” *Dunn*, 480 U.S. 301 n.4. Factors included:

the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

*Id.*

cumstances. It thus limits the routine search incident to arrest to a full body search,<sup>154</sup> but not a search of the home. Protective sweeps are an exception, but only when justified by exigent circumstances.<sup>155</sup> This paragraph also requires a *search* warrant, rather than an arrest warrant, to enter and arrest an individual in his home, absent consent or exigent circumstances. Compare *Payton v. New York*, 445 U.S. 573 (1980) with *Steagald v. United States*, 451 U.S. 204 (1981). Since entry into the house to effect an arrest is, in effect, a "search" for the arrestee, a search warrant is appropriate.<sup>156</sup> The "arrest warrant" is thus abandoned.

In comparison to present law, this section substantially limits searches incident to arrest but adheres to the stated rationale of *Chimel v. California*, 395 U.S. 752 (1969), that "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *Id.* at 761. It is flatly inconsistent

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<sup>154</sup> See *Chimel v. California*, 345 U.S. 752 (1969). See *supra* notes 39-58 and accompanying text for a complete discussion of *Chimel*. Once the police have obtained a warrant to breach the door of the suspect's dwelling, there is no justification for narrowing the body search compared to the search police could perform outdoors. A custodial arrest is always an exigent circumstance that justifies a full body search for weapons, and any evidentiary material found may also be seized. It further extends to any containers in the possession of the arrestee, as held in *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>155</sup> This approach differs slightly from *Maryland v. Buie*, 494 U.S. 325 (1990). In *Buie*, the Court held that a cursory visual inspection of those places in which a person might be hiding is permissible in "spaces immediately adjoining the place of arrest from which an attack could be launched," with no showing of cause required. *Id.* at 334. A further protective sweep of other parts of the house could only be undertaken if the searching officer "possessed a reasonable belief based on specific and articulable facts . . . that the area [to be] swept harbor[s] an individual posing a danger to [those on the arrest scene]." *Id.*

*Buie* is essentially based on an exigent circumstances rationale—the majority felt that this rule was necessary to protect the officers' safety. *Id.* at 333-34. However, determining exigent circumstances in advance is exactly what got the Court into the "exceptions" morass in the first place. See Bradley, *supra* note 1, at 1481-83. The appropriate treatment of the protective sweep problem is to require the police to show a reasonable suspicion of danger before *any* sweep, including one of "places immediately adjoining the place of arrest." The more inherently dangerous the place, the easier this would be to demonstrate. Presumably the Court drew this unfortunate distinction because *Chimel* already permitted searches of such places incident to arrest. Thus, a modification of *Buie* would be consistent with the suggested modification of *Chimel*.

<sup>156</sup> While *Payton* purported only to require an arrest warrant to arrest an individual in his home, the court concluded that "for Fourth Amendment purposes an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within.*" *Payton*, 445 U.S. at 603 (emphasis added). This provision thus requires that the "reason to believe the suspect is within" be spelled out in the warrant, as is already required by *Steagald* when the police want to search for the suspect in a non-suspect's home. In the ordinary case, where the suspect is a more or less permanent resident of the place in question, such a warrant will not suffer from staleness problems and thus will pose no significant burden on police beyond that already imposed by *Payton*.

with the warrant requirement to allow police to conduct a warrantless (and, under current law, no-probable-cause) search for evidence in a person's house, even limited to the "area within his immediate control," when the police have no reason to believe that evidence or weapons will be found or that exigent circumstances require an immediate search.<sup>157</sup>

However, in the unusual case where the most reasonable police behavior was to open a drawer or a closet before the suspect or one of his henchmen could get to it to grab a weapon, the exigent circumstances exception will apply to allow any evidence found in plain view in such a place to be used at trial. This exigent circumstance exception would also apply if the suspect or his henchmen were about to destroy evidence. However, the government would face the additional burden at trial of explaining not only why the police reasonably believed that warrantless action was necessary, but also why that evidence was not mentioned in the search warrant. Thus, the ordinary "search incident to arrest" would be limited to a full body search of the arrestee—the same as would be permissible had he been arrested outdoors. Further searching is only justified by a warrant, exigent circumstances or consent.

As noted above, a reasonable police belief that a protective sweep was necessary could lead to a limited warrantless search and to the finding of admissible evidence in plain view. Similarly, though "hot pursuit" alone will not justify searching a house for a fleeing suspect, a warrantless search would be allowable if the police can show that it was not feasible to guard the exits while awaiting a warrant. In short, the government must establish exigent circumstances in each case. This is what a warrant "requirement" means.

Searches inside structures without a warrant are never permitted unless the government can establish consent or exigent circumstances in the individual case.<sup>158</sup> Of course, now that police are required to obtain a search warrant in order to arrest a suspect at home, they will, no doubt, also obtain authorization to search for

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<sup>157</sup> *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969). See *supra* part I.

<sup>158</sup> See *Arizona v. Hicks*, 480 U.S. 321 (1987), in which the Court held that the fact that the police were inside a house legitimately, did not give them the right to conduct a further search, even one so limited as lifting up stereo equipment to check the serial numbers against a list of stolen property. Compare *Michigan v. Clifford*, 464 U.S. 287 (1984) (requiring a warrant to enter a house to investigate arson six hours after the fire had been extinguished) with *Michigan v. Tyler*, 436 U.S. 499 (1978) (finding that exigent circumstances permitted warrantless entry before the fire was extinguished). Under the formulation proposed here, exigent circumstances would have to be established in the individual case contrary to *Tyler*.

evidence that they have probable cause to believe is present. However, such a warrant may suffer from staleness problems in a way that a warrant to search for a resident of a house may not.

The meaning of "consent" is spelled out in another section of this code.<sup>159</sup> This paragraph adopts the "reasonable police belief in consent" approach of *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990), rather than requiring that the consenter had actual authority to and/or actually did, consent. This paragraph is limited to searches for evidence by police and thus does not apply to various kinds of administrative searches, which are dealt with elsewhere.

¶ C. This paragraph establishes the absence of a warrant requirement for all other searches for criminal evidence by police. The other requisites for frisks, automobile searches, searches incident to arrest in public, etc., are spelled out in other sections. However, although certain searches, such as frisks, may require less than probable cause, the result of this section is that upon probable cause police may fully search any individual, vehicle or other container not found in a "structure" or curtilage without a warrant, unless a warrant is otherwise required by law.

Searches that require intrusions into the body, such as the surgery disapproved in *Winston v. Lee*, 470 U.S. 753 (1985) or the drug testing approved in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), are addressed in other sections of this code or are subject to the reasonableness requirement. This is consistent with the Court's current approach.

#### IV. CONCLUSION

The above formulation does lead to some rather arbitrary distinctions. For example, a trailer, parked in a trailer park for the night, or for a month is not protected by the warrant requirement, but a trailer up on blocks in the next space is protected. A person calling from a phone booth in a bus station is protected, but a person calling from a wall phone is not, (except by statute), despite the fact that each has similar expectations of privacy as to electronic eavesdropping. The drawing of clear lines always yields difficult cases near the boundaries. Still, since the trailer up on blocks is considerably less mobile, and since the phone in the booth is gener-

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<sup>159</sup> A similar two model scheme would be appropriate for consent searches, with outdoor consents (assuming probable cause is lacking) following current law by not requiring police to inform suspects of their right to refuse consent. By contrast, a consent to search a structure must be fully informed and, possibly, in writing, and only allowable if the police have probable cause. Of course, if the police have probable cause to conduct an outdoor search under the new approach, no consent will ever be necessary.



ally shielded better from public viewing and overhearing (and thus increases the caller's overall expectation of privacy), these distinctions, while fine, are not irrational.

There are also questions that are unanswered in this formulation—questions also unanswered in current law. For example, just what sorts of technological intrusions will constitute a “search” and what exigent circumstances will justify dispensing with the search warrant requirement? Both of these questions, in my view, should be answered case by case.

The most important issue, from the point of view of police and civil libertarians alike, is whether a particular formulation provides sufficiently clear guidance to the police so that inadvertent errors, with their concomitant evidentiary exclusions, are better avoided than in the present arrangement. As one prosecutor put it, “if the Chief Justice of the United States sat in the back of a police car in Manhattan [he could not] counsel the officer, within a degree of legal certainty, on the constitutionality of a police action.”<sup>160</sup> The Supreme Court itself admits that “our Fourth Amendment jurisprudence has confused the courts.”<sup>161</sup>

As I argue at length in *The Failure of the Criminal Procedure Revolution*, and as I hope the above formulation illustrates, a code, with its capacity to anticipate problems in advance and to present rules in concise form, would be the best approach. A code does not need to account for precedent, and answers to questions can be obtained quickly, rather than by poring over a series of long and often inconsistent cases, written by different Justices and different Courts over a span of years.<sup>162</sup> Still, even without a code, if the Court would

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<sup>160</sup> Harvey Levinson, *Judges Can't Agree About Illegal Evidence* N.Y. TIMES, Feb. 2, 1990, at A14.

<sup>161</sup> *California v. Acevedo*, 111 S. Ct. 1982, 1990 (1991).

<sup>162</sup> As further discussed in *The Failure of the Criminal Procedure Revolution*, clear, concise rules are particularly important in criminal procedure law:

The day after a Supreme Court decision on searches incident to arrest, for example, a thousand arrestees around the country are searched by police who have not even heard of the Supreme Court opinion, much less received legal advice on how to implement it. The next day, a thousand more arrestees are searched. . . . [E]ven if the police department has a legal adviser who circulates a memo explaining the case, the chance that the police in the field will be able to understand and internalize this latest nuance of the law of searches incident to arrest is nil. But, because all criminal defendants receive counsel, even if they cannot afford to pay, most of these searches that produce evidence will be litigated in a motion to suppress the evidence that was found.

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It is thus apparent that in the area of criminal procedure, unlike any other field of Supreme Court endeavor, the doctrine must be clear, it must be complete, and it must be stable. It is in these respects that criminal procedure law has failed.

forthrightly adopt this two model approach to the Fourth Amendment, as it largely has done sub silentio, and then enforce it consistently, a surprisingly large number of Fourth Amendment problems would evaporate.