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The Middle Class Fourth Amendment

Craig Bradley†

During October Term 2000 the Supreme Court decided five major Fourth Amendment cases. In chronological order they are: *Indianapolis v. Edmond*¹ (the drug roadblock case), *Illinois v. McArthur*² (involving search warrant execution), *Ferguson v. City of Charleston*³ (the maternity drug testing case), *Atwater v. City of Lago Vista*⁴ (the soccer mom seatbelt arrest case), and *Kyllo v. United States*⁵ (the thermal imaging case). In October Term 2001, the Court decided five more, somewhat less significant, cases: *United States v. Arvizu*⁶ (reasonable suspicion for a stop), *United States v. Knights*⁷ (warrantless search of probationer's house), *United States v. Drayton*⁸ (consent search), *Kirk v. Louisiana*⁹ (exigent circumstances exception to the warrant requirement), and *Board of Education v. Earls*.¹⁰ Because of the unusual voting lineups in some of these cases, it may be thought that the Court was simply deciding each case as it came along, according to the predilections of an ever-shifting majority, rather than adhering to any larger theme.

This article will argue that there is actually a strikingly consistent theme to the Court's decisions in

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1. 531 U.S. 32 (2000).

2. 531 U.S. 326 (2001).

3. 532 U.S. 67 (2001).

4. 532 U.S. 318 (2001).

5. 533 U.S. 27 (2001). A sixth case, *Arkansas v. Sullivan*, 536 U.S. 769 (2001) was a *per curiam* opinion reaffirming that pretext stops don't violate the Fourth Amendment as *Whren v. United States*, 517 U.S. 806 (1996) had previously held.

6. 534 U.S. 266 (2002).

7. 534 U.S. 112 (2001).

8. 536 U.S. 194 (2002).

9. 536 U.S. 635 (2002).

10. 536 U.S. 822 (2002).

criminal procedure over the last several Terms. Recognition of this theme can explain what types of cases the Court is taking, what the outcome of those cases has been and what the outcome of future cases might be. I will further contend that the Court's choice of cases, as well as its results, represent a distinctive character of the Court from the mid-1990s, when the current makeup of the Court was established with the retirement of Justices White (the last remaining Warren Court Justice) and Blackmun, and the arrival of Justices Ginsburg and Breyer.¹¹ This differentiates it from both the activist Warren Court of the sixties and the "reactivist"¹² Burger/Rehnquist Court of the seventies, eighties and early nineties. Finally I will question whether the Court's approach is the best way to resolve Fourth Amendment cases.

The theme, followed with surprising consistency, albeit by shifting majorities of the Court, is this: The Court is resistant to new exercises of the power of criminal law enforcement (in contrast to various civil enforcement schemes),¹³ but is very reluctant to interfere with police when they are acting with probable cause.¹⁴ Thus, in the five October Term 2000 cases cited in the first paragraph, the Court struck down the Indianapolis drug roadblock, the Charleston maternity drug testing program and the warrantless use of a thermal imaging machine on the ground that these were impermissible expansions of the scope of criminal law enforcement. By contrast, in *Atwater*,

11. I do not, however, claim that it was the arrival of these two particular Justices that necessarily turned the tide.

12. The term "reactivist" should not be confused with "reactionary" because, while the driving force of the Burger Court was to "react" to Warren Court opinions, and not to extend them, it also did not overrule them, as a "reactionary" Court would have done.

13. See discussion, *supra* text accompanying notes 140-42, of "suspicionless searches where the program was designed to serve 'special needs beyond the normal need for law enforcement,'" in *Edmond*, 531 U.S. at 451-52, including school drug tests, traffic control roadblocks, etc.

14. When the police are acting with reasonable suspicion rather than probable cause, the Court has scrutinized their behavior rather carefully to ensure that a "stop" has not been turned into an "arrest." E.g., *Florida v. Royer*, 460 U.S. 491 (1983).

they upheld the custodial arrest of a woman in Texas for failing to wear her seatbelt, despite heavily criticizing the policeman in the individual case, on the ground that, since the arrest was based on probable cause, there was no cause for “finicking” over the specifics. Likewise, in *McArthur*, the Court refused to condemn the exclusion of the defendant from his home while the police sought a search warrant. As will be seen, cases from the last several Terms have followed this same pattern.¹⁵ The effect of this theme has been that the Court has created a “middle class” Fourth Amendment: one that protects the average citizen from interference by police as he goes about his daily business, but does little to protect the rights of criminal suspects once they fall into police clutches.¹⁶

Any consideration of Supreme Court doctrine must recognize that the Republicans have held a majority on the Court since the arrival of Justice Powell in 1972.¹⁷ However, it must also be noted that the nature of current society has an important impact on the Court’s opinions, because “the times” affect both which party is in power, and hence who is nominated to the Supreme Court, as well as how individual Justices perceive the issues before them.

In particular, there are two aspects, or one aspect with two parts, that distinguish the present day from the days of the “criminal procedure revolution” of the 1960s Warren Court. The first of these is that *legal* discrimination

15. In focusing on these cases, and deciding them the way it has, the Court could be said to be emphasizing the general “reasonableness” requirement of the Fourth Amendment, rather than its more specific provisions, as Professor Amar has suggested they do. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 32-37 (1997). However, Atwater, saying essentially, “even unreasonable arrests are okay on probable cause,” certainly does not seem to adopt Professor Amar’s suggestion.

16. There are, of course, a few exceptions to this trend, such as *Richards v. Wisconsin*, 520 U.S. 385 (1997), in which the Court imposed a general “knock and announce” requirement on the execution of search warrants. As will be discussed however, other cases, such as the “consent search” case, *United States v. Drayton*, 536 U.S. 194 (2002), discussed *infra* text accompanying notes 151-56, which may appear to be exceptions, are not.

17. In that year, Powell replaced the Democrat Hugo Black. William Rehnquist’s replacement of the Republican John Harlan in the same year did not affect the political balance.

against minorities has, essentially, disappeared. This is not to say that *de facto* discrimination never occurs—the recent racial profiling controversy in New Jersey illustrates how police may discriminate against minorities either individually, or as a matter of unwritten departmental policy. But statutes and written policies no longer allow such discrimination. Of course, criminal procedure law itself was never directly discriminatory. But the Warren Court recognized that the absence of adequate standards governing arrests, searches, and interrogations had the effect of subjecting criminal suspects, particularly members of minority groups, to arbitrary and unfair treatment at the hands of the criminal justice system. When this was combined with laws that explicitly established second class status for various minority groups, there was little check on police abuses. This has been greatly reduced by the “code of criminal procedure” introduced by the Warren Court.¹⁸

The second, and closely related, aspect of current society is the political power of minorities, especially blacks. While illegal immigrants may make up a “discrete and insular” minority that lacks political power in the United States, black and Hispanic citizens do not. Black political power in particular is regularly exercised, for example, to get states to enact the Martin Luther King holiday, to delete the Confederate symbol from their flags, etc. Likewise, President Bush’s July 2001 proposal that illegal (primarily Mexican) immigrants be granted “guest worker” status was said to be an effort to attract Hispanic voters to the Republican party.¹⁹

Perhaps even more important than voting power is the fact that, unlike the 1960s, blacks today are represented in every phase of the political, and criminal justice, structure.

18. The existence and shortcomings of this informal “code,” as well as the concerns for racial injustice that animated the Warren Court are the subject of Craig M. Bradley, *The Failure of the Criminal Procedure Revolution* (1993) [hereinafter Bradley, *Failure*]. See also, Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48 (2000).

19. ABC News (ABC television broadcast, July 16, 2001).

There are so many black police, police chiefs, prosecutors, judges, mayors, legislators, and congressmen that the sort of blatant discrimination by state officials that inspired such Supreme Court decisions as *Heart of Atlanta Motel v. United States*²⁰ and *Klopper v. North Carolina*²¹ is impossible, if not unthinkable. The public/political outcry when apparently discriminatory conduct by police does occur, such as the Rodney King and Amidou Diallo cases, further illustrates that Supreme Court action is neither needed, nor likely to be very helpful. That is, a change in criminal procedure *doctrine*, which the Supreme Court does, is not as efficacious in dealing with such police behavior as is reorganizing the police department, increasing training, punishing and prosecuting the officers involved, etc.

This fundamental societal shift should have an effect on Supreme Court opinions and it has no doubt influenced both the Court's thinking and its makeup. It contributed to the Court's refusal, beginning in the 1970s, to extend, though not to overrule, the "criminal procedure revolution" of the Warren Court. However, until their retirements in 1990 and 1991, respectively, Justices William Brennan and Thurgood Marshall steadfastly maintained the deep distrust of state and local police officials that led them to virtually never vote for the government in police procedure cases.²² During that same period, the conservative Justices Burger and Rehnquist were almost as likely to be obdurate

20. 379 U.S. 241 (1964) (unanimously rejecting claim of hotel that it should be free to forbid black guests because the public accommodations section of the Civil Rights Act of 1964 was unconstitutional).

21. 386 U.S. 213 (1967) (In this case, police beat and arrested petitioner and others who had attempted to peacefully integrate a segregated restaurant. The prosecutor then repeatedly continued the case, rather than bringing it to trial. The Court held that the Sixth Amendment's Speedy Trial guarantee applied to the states, and had been violated here.).

22. For a detailed discussion of Brennan's and Marshall's voting record in police procedure cases (i.e., Fourth and Fifth Amendment, as opposed to Sixth Amendment cases which mainly affect the post-investigative process), see, Craig Bradley and Joseph Hoffmann, "Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure, 76 Ind. L.J. 889 (2001).

in the other direction, feeling that the Warren Court had gone too far in extending the rights of criminals *vis-à-vis* the societal need for effective law enforcement.

Since Brennan's and Marshall's retirements, and the subsequent arrival of the more moderate Democratic Justices Ginsburg and Breyer, Supreme Court criminal procedure law has itself become more moderate with both conservatives and liberals more willing to reach consensus.²³ In other words, the great theme of the Warren Court—that the criminal justice system had to be massively reformed to protect the constitutional rights of all citizens—no longer lies behind Supreme Court criminal procedure decisions, nor even behind the dissents. Similarly, the theme of the '70s and '80s—How much shall we accept or reverse the Warren Court?—also seems to have largely expired.²⁴ We don't see dissenters referring to Warren Court positions as if they were the received wisdom straight from the framers' mouths, or predicting the demise of civilization as we know it, if the majority view were adopted, as Brennan and Marshall were wont to do.²⁵

23. Professor Seidman agrees that this consensus exists, but characterizes it quite differently: "The recent 'liberal' Clinton appointees to the Supreme Court seem as unfriendly to criminal procedure liberalism as their conservative colleagues. . . ." Louis Michael Seidman, Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism, 107 Yale L.J. 2281, 2282 (1998).

24. Just as I am arguing that there are, in effect, "two" Rehnquist Courts in criminal procedure, so Professor Yale Kamisar argued, in 1983, that there were "two" Warren Courts, with the later years being more moderate, as exemplified by *Terry v. Ohio*, 392 U.S. 1 (1968), and "two" Burger Courts, again becoming more moderate as time went by (and as conservative outrage at the Warren Court faded). Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *The Burger Court: The Counter-revolution that Wasn't* 67-68 (Vincent Blasi ed., 1983).

25. E.g. in *California v. Greenwood*, 486 U.S. 35 (1988), holding that police could search a curbside trash can without a warrant, Brennan's dissent, joined by Marshall, declared that the "Court paints a grim picture of our society. It depicts a society in which local authorities may . . . monitor [citizens] arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects. . . ." *Id.* at 55-56. Likewise in *Florida v. Riley*, 488 U.S. 445 (1989), holding that a helicopter flying 400 feet over the defendant's house and viewing marijuana growing in a greenhouse was not a search, Brennan, dissenting (joined

Likewise, dissenters from the right don't generally insist that the police will be incapable of effective law enforcement as a result of the majority's opinion, though remnants of such thinking continue to appear on both sides. Finally, we see frequent votes contra to ideological type, suggesting that there is no particular ideological theme to which many individual Justices are devoted.

It is particularly striking that this trend is occurring in criminal procedure at the same time that the Court seems increasingly fragmented and disputatious as to other parts of its docket. As New York Times Supreme Court correspondent Linda Greenhouse observed,

[A]t the Supreme Court last [2000] term, "5 to 4" became a judicial way of life. From the presidential election . . . to workplace arbitration, to tobacco advertising to the ownership of land under an Idaho lake, the justices were deeply, irrevocably divided.

One-third of the term's 79 cases were decided by 5-4 votes . . . a higher proportion than [at] any time in memory.²⁶

Just why the Court is singing in relative harmony in criminal procedure is hard to say. As noted, civil rights concerns are simply not as intense as they once were. Another reason may be that decreasing crime rates, which have removed crime from the political front burner, have also cooled the justices' ardor. No one is concerned about

by Marshall and Stevens), balefully quoted George Orwell's 1984: "Big Brother is Watching You." *Id.* at 446.

26. Linda Greenhouse, *Ideas & Trends: Divided They Stand; The High Court and the Triumph of Discord*, N.Y. Times, July 15, 2001, § 4 (Week in Review), at 1. Three of the criminal procedure cases decided in October Term 2000 were by a 5-4 vote. *Kyllo v. United States*, 533 U.S. 27, was 5-4 but, as will be discussed, *infra* text accompanying notes 74-77, this did not represent any deep ideological split. *Atwater v. City of Lago Vista*, 532 U.S. 318, did generate some heat but it came from Justice O'Connor complaining about Justice Souter's pro-police decision. Finally, *Texas v. Cobb*, 532 U.S. 162, was a 5-4 decision along predictable ideological lines, but was on a rather technical aspect of criminal procedure law. Thus, while Ms. Greenhouse is correct that 5-4 decisions frequently are an indication of ideological tension on the Court, that does not seem to be true of the criminal procedure cases.

what a prospective justice's views on crime may be, and since none of the justices have been criminal lawyers, their views on criminal procedure issues are not likely to have solidified when they reached the Court.²⁷

Another reason may be that no bloc of justices has any particular ideological agenda as to these issues. In particular, Chief Justice Rehnquist, a vigorous opponent of Warren Court holdings, and steadfast supporter of police prerogatives when he joined the Court, has frequently joined and written pro-defendant decisions, including, most notably, authoring the 7-2 decision in *Dickerson v. United States*,²⁸ upholding the constitutional validity of *Miranda v. Arizona*. This likely reflects his view both that significant limits on the Warren Court initiatives have already been achieved²⁹ as well as his desire to "lead the Court" as Chief Justice.³⁰ On a different note, libertarian tendencies on the part of Justices Scalia and Thomas may cause them to be suspicious of claims of new government authority to intrude on the lives of individuals, as their votes against the government in the *Kyllo* (thermal imaging) case suggest.

27. By contrast, "Richard Nixon made the Supreme Court's criminal procedure doctrine the centerpiece of his presidential campaign, declaring that Court decisions "had weaken(ed) the peace forces as against the criminal forces in this country." Bradley, *Failure*, supra note 18, at 30 (quoting Fred P. Graham, *The Self-Inflicted Wound* 15 (1970)). Nixon then appointed Warren Burger, one of the Warren Court's most outspoken critics, especially as to the *Miranda* decision, as Chief Justice.

28. 530 U.S. 428 (2000).

29. Shortly before he became Chief Justice, Justice Rehnquist averred that, whereas he had come to the Court anxious to cut back on what he considered some of the Warren Court excesses in criminal procedure, he considered the then current law "more evenhanded now than when I came on the Court." John A. Jenkins, *The Partisan*, N.Y. Times, March 3, 1985, § 6 (Magazine) at 28.

In penning the opinion for a seven-two majority in *Dickerson*, Chief Justice Rehnquist reassured the legal community and the nation at large that this pillar of the Warren Court's criminal procedure [doctrine] would remain standing.

Michael C. Dorf and Barry Friedman, *Shared Constitutional Interpretation*, 2000 Sup. Ct. Rev. 61.

30. See Rehnquist, *Chief Justices I Never Knew*, 3 Hastings Const. L.Q. 637 (1976) on the role of the Chief Justice.

But if the perceived moral imperatives that animated the Warren and Burger Courts are missing, the question arises whether there is any theme that can explain current criminal procedure law. Is this a “minimalist” Court, as Professor Sunstein has argued, simply “settling the case before it” and “avoiding clear rules and final resolutions?”³¹

While every decision is to some extent based on its own facts, current doctrine certainly goes further than this. The Justices are well aware that they are creating rules for police to follow, not just deciding individual cases. The majority made this point with unusual frankness in upholding the custodial arrest of a woman for driving without a seatbelt in *Atwater v. City of Lago Vista*:

If we were to derive a rule exclusively to address the uncontested facts of this case, *Atwater* [the arrestee] might well prevail. . . . But we have traditionally recognized that a responsible Fourth Amendment [doctrine] is not well served by standards requiring sensitive case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.³²

Criminal procedure law is unique in constitutional doctrine. Supreme Court decisions about, for example, whether school prayer will be allowed, or whether a civic Christmas display is appropriate, are law for lawyers, not police. A city can consult its attorneys after a Supreme Court decision comes down to decide, at leisure, whether the city’s anticipated school activities or Christmas displays square with a recent Court decision. And, if the lawyers have guessed wrong, then a court may make the city alter its practices in some way, but no serious damage is done.

When the Supreme Court decides a criminal procedure case, by contrast, within the next month, a thousand

31. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, at ix (1999).

32. 532 U.S. at 346-47.

criminal cases may arise that pose variations on the issue just decided. The police must deal with these issues on the street, without the benefit of legal advice. If the police apply the law incorrectly, then many of those criminals may have to be released. Consequently, we would hope that the Court would try to declare "clear rules" in criminal procedure cases, rather than simply indulging their power to right a wrong in an individual case.³³

Still, a conviction that clear rules are required in criminal procedure cases so that the police will know what to do, is not a theory that is of much help in predicting how the Court may decide the next case, unlike the guiding egalitarian principles of the Warren Court. Nor does it suggest what areas the Court might be likely to emphasize, which the reactive theme of the Burger Court did to an extent.³⁴

This article will consider the criminal procedure cases for the last eight years, during which time we have had a stable Court, Justice Breyer having replaced Justice Blackmun beginning in October Term 1994.³⁵ In the current climate, one would expect to find no particular trend toward either defendants or the government. In fact, decisions over this period involving police procedures have been almost equally divided.³⁶ Likewise, unanimous

33. It is the Supreme Court's (or any court's) inherent inability to create clear rules that was the principal theme of *The Failure of the Criminal Procedure Revolution*, *supra* note 18.

34. The most anticipated decision of the Burger Court was certainly whether *Miranda v. Arizona*, 384 U.S. 436 (1966), would be overruled and, if not, how much it would be limited or extended. The Burger Court devoted a great deal of its time to cases raising these issues, even though it left the final declaration of whether *Miranda* would remain good law to the Rehnquist Court in *Dickerson*, 530 U.S. 428. Likewise, the extent to which the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), would be applied in various situations (e.g., to impeachment evidence, to grand jury proceedings, to searches where police had a warrant, etc.) was another, predictable, area of emphasis. Finally, carving out substantial areas of police investigative activity that were "not searches," and hence not subject to any Court-imposed limitations, was a recurring theme of the Burger Court.

35. Justice Breyer was commissioned on September 30, 1994. 512 U.S. 1270 (1994).

36. For the government: *United States v. Drayton*, 536 U.S. 194 (2002);

opinions going either way are not unusual.³⁷ And, while there is a more conservative and a more liberal bloc, individual Justices frequently vote counter to their apparent ideological leanings based on the issue before them, even as shifting majorities tend to sound the theme that is the subject of this article.

Thus, Justice Souter, usually a member of the "liberal bloc," authored the 5-4 opinion in *Atwater*, while the generally more conservative Justice O'Connor dissented.³⁸ In *Dickerson v. United States*,³⁹ the Chief Justice wrote for a 7-2 majority striking down a federal statute that

Arvizu, 534 U.S. 266 (2002); *Knights*, 534 U.S. 112 (2001); *Atwater*, 532 U.S. 318 (2001); *McArthur*, 531 U.S. 326 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Texas v. Cobb*, 532 U.S. 162 (2001); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Maryland v. Dyson*, 527 U.S. 465 (1999); *Florida v. White*, 526 U.S. 559 (1999); *United States v. Ramirez*, 523 U.S. 65 (1998); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998); *Richards v. Wisconsin* 520 U.S. 385 (1997); *Whren v. United States*, 517 U.S. 806 (1996); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995).

For the defendant: *Kirk v. Louisiana*, 536 U.S. 635 (2002); *Kyllo v. United States* 533 U.S. 27 (2001); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Dickerson v. United States*, 530 U.S. 428 (2000); *Florida v. J.L.*, 529 U.S. 266. (2000); *Bond v. United States*, 529 U.S. 334 (2000); *Indianapolis v. Edmond*, 531 U.S. 32 (2000); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Wilson v. Layne*, 526 U.S. 603 (1999); *Flippo v. West Virginia*, 528 U.S. 11 (1999); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

Minnesota v. Carter, 525 U.S. 83 (1998), holding that a business visitor lacked standing to raise a Fourth Amendment claim, is not counted because standing does not involve approval or disapproval of police procedures. *Ornelas v. United States*, 517 U.S. 690 (1996), involving reasonable suspicion for auto stops was not counted because it involved the deference to be given to state court determinations in federal habeas as did *Thompson v. Keohane*, 516 U.S. 99 (1995). Likewise, *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) and *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) approving school policies of testing certain students for drug use were not counted. They are Fourth Amendment cases, but don't involve police procedures as the results were not given to the police, unlike *Ferguson* above.

37. *Ramirez* and *Whren*, for the government and *Kirk*, *J.L.*, *Knowles*, *Wilson v. Layne*, *Wilson v. Arkansas*, and *Richards* for the defendant, were unanimous. In *Dyson*, a per curiam opinion, Justice Breyer, for two dissenters, agreed with the majority's view of the law and dissented only because the respondents counsel did not file a brief (because "counsel is not a member of this Court's bar and did not wish to become one. . .") 527 U.S. at 468.

38. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

39. 530 U.S. 428 (2000).

purported to overrule *Miranda v. Arizona*,⁴⁰ deserting his conservative allies, Justices Scalia and Thomas, who dissented. In *Bond v. United States*,⁴¹ the Chief Justice again wrote for a 7-2 majority, holding that the squeezing of luggage by police on a bus was a "search" subject to Fourth Amendment protection. The two dissenters were the ideological odd couple of Justices Breyer and Scalia. Most striking of all is the 5-4 decision in *Kyllo v. United States*⁴² where the majority, disapproving warrantless use of a thermal imager to detect marijuana grow lights inside a house, consisted of Justices Scalia, Souter, Thomas, Ginsburg and Breyer, with Justices Stevens, O'Connor, Kennedy and Chief Justice Rehnquist in dissent.

Beyond the notion that part of the Court's job in criminal procedure is to declare rules for police to follow in future cases, is there any other guiding principle that can be discerned in the Court's recent cases? In the last eight years, the Court has, with the exception of the *Dickerson* case, largely ignored interrogation law.⁴³ Likewise, the requisites for a search warrant or other probable cause searches have not been emphasized.⁴⁴ Instead, most of the cases can be divided into two groups: Those in which defendants sought to limit the way police behaved when they were acting with probable cause, which defendants rather consistently lost, and those in which police sought to expand their investigative powers, which defendants consistently won.

40. 384 U.S. 436 (1966).

41. 529 U.S. 334 (2000).

42. 533 U.S. 27 (2001).

43. One other case involved interrogation issues. *Texas v. Cobb*, 532 U.S. 162, refused, by a 5-4 vote, to extend the right to counsel during interrogation to an uncharged offense that was factually intertwined with a charged offense for which the defendant already had counsel.

44. *Dyson*, 527 U.S. 465, *White*, 526 U.S. 559, and *Labron*, 518 U.S. 938, involved the requisites for a probable cause auto search., *Ramirez*, 523 U.S. 65, *Richards*, 520 U.S. 385, and *Wilson v. Arkansas*, 514 U.S. 927, involved "no-knock" execution of search warrants. *McArthur*, 531 U.S. 326, and *Wilson v. Layne*, 526 U.S. 603, decided other issues relating to execution of search warrants.

As noted, October Term 2000 was particularly rich in Fourth Amendment cases. All five of these results could have been predicted by the above analysis. The first case, chronologically, was *City of Indianapolis v. Edmond*.⁴⁵ In *Edmond*, the Court, by a 6-3 vote along “predictable” ideological lines⁴⁶ struck down a narcotics roadblock which subjected motorists stopped to a brief inspection by police and sniff of the car’s exterior by a drug-sniffing dog. The Court disapproved of this roadblock as being for “law enforcement” purposes, as opposed to roadblocks for impaired or unlicensed drivers which were for “traffic control” purposes. Thus, the ability of police to interfere with people as to whom they had no evidence of criminal wrongdoing, and no additional regulatory reason for approaching, such as traffic law enforcement, was limited:

We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.⁴⁷

Edmond called a halt to a series of Burger Court cases that had approved of roadblocks to apprehend illegal aliens⁴⁸ and drunk drivers⁴⁹ and suggested that roadblocks to check driver’s licenses would also be okay.⁵⁰ Those cases all involved roadblocks advancing the “imperative of highway safety”⁵¹ rather than “detect[ing] evidence of ordinary criminal wrongdoing.”⁵² The majority’s willingness to limit Burger Court precedent despite the fact that, as the Chief Justice pointed out in dissent, the burden on the motorist was the same in all of these roadblock

45. 531 U.S. 32.

46. That is, the three dissenters were Rehnquist, Scalia and Thomas.

47. 531 U.S. at 44.

48. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

49. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

50. *Delaware v. Prouse*, 440 U.S. 648, 656-57 (1979).

51. 531 U.S. at 39.

52. *Id.* at 41.

cases,⁵³ illustrates the different emphasis of the current Court compared to that of the recent past.

The second case decided in 2001 was *Illinois v. McArthur*,⁵⁴ an 8-1 decision authored by Justice Breyer.⁵⁵ In *McArthur*, the police were present to help a woman remove her possessions from the marital home without interference from her husband. As a *coup de grace* to the failed marriage, the woman told the police that the husband had a marijuana stash inside. The police knocked on the door and asked permission to search, which was refused. One policeman left to get a search warrant. The second remained. Since the husband/defendant had by now exited the trailer,⁵⁶ the policeman kept him from reentering unless accompanied by the policeman. The Court held that while the trailer was "seized" by the police, a "temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant," was permissible.⁵⁷ Since *McArthur* was a person already subject to a search warrant, he was not the sort of "reasonable person" whom the Court is interested in protecting. The notion that the Court was simply going along with the police's exercise of established authority, rather than increasing police powers, was bolstered by the citation of numerous earlier cases approving of temporary seizures to allow further investigation⁵⁸ and the Court's observation that "a perimeter stakeout to prevent anyone from entering... and destroying evidence" had previously been approved in dictum in the 1984 case of *Segura v. United States*.⁵⁹

53. *Id.* at 48-52 (Rehnquist, C.J., dissenting).

54. 531 U.S. 326 (2001).

55. Only Justice Stevens dissented, 531 U.S. at 338.

56. It is unclear whether he exited at the direction of the police or on his own. *People v. McArthur*, 713 N.E.2d 93, 94 (Ill. App. Ct., 1999).

57. 531 U.S. at 334.

58. E.g., *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of luggage for a dog sniff, based on reasonable suspicion, approved).

59. 531 U.S. at 333 (quoting *Segura*, 468 U.S. 796, 814 (1984)). I have previously argued that the Court in *McArthur* ignored the more important issue of whether the occupants of a home could be *removed* pending arrival of the search warrant, rather than kept out if they were already outside. Craig M.

The third case, decided by a 5-1-3 vote, was *Ferguson v. City of Charleston*.⁶⁰ In *Ferguson*, maternity patients who met a hospital profile for suspected drug use were subjected, without being told, to urine tests for cocaine. If the tests were positive, the results were turned over to the police, and the patients were threatened with arrest if they did not agree to participate in a drug treatment program.⁶¹ The court below had approved this testing because “special needs” had been recognized by the Supreme Court as justifying “suspicionless” (i.e. a lack of probable cause) drug tests, despite the fact that they qualified as searches.⁶²

Although *Ferguson* involved a completely different line of cases than *Edmond*, and a particularly compelling societal goal—the protection of fetuses from harmful drugs—the Court concluded, as in *Edmond*, that, notwithstanding the desirable non-criminal goal of the program, the primary effect of this program was crime control.⁶³ Consequently, the taking of the urine samples was an unconsented “search” without probable cause, in violation of the Fourth Amendment:

The critical difference between [cases approving no-probable-cause drug tests] and this one . . . lies in the nature of the “special need” asserted as justification for the warrantless searches. In each of those earlier cases, the “special need” . . . was one divorced from the State’s general interest in law enforcement.⁶⁴

Bradley, Preserving Evidence Pending a Search Warrant, Trial Mag., June 1, 2001, at 70.

60. 532 U.S. 67 (2001). Justice Kennedy concurred in the result. The three dissenters here were again Rehnquist, Scalia and Thomas.

61. *Id.* at 72-73.

62. *Id.* at 74-75 (citing *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir., 1999)). The court below had relied on *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989); and *Nat’l Treasury Employees v. Van Raab*, 489 U.S. 656 (1989); all of which allowed suspicionless drug tests due to various “special needs” other than criminal law enforcement.

63. 532 U.S. 67, 81.

64. *Id.* at 79.

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to meet that goal.⁶⁵

The fourth case, and second to be decided for the government, was *Atwater v. City of Lago Vista*, a 5-4 decision authored by Justice Souter.⁶⁶ In *Atwater*, a woman was legitimately stopped by the police for driving without her, or her children's, seatbelts being fastened. State law allowed a custodial arrest for this offense, despite the fact that incarceration was not a possible penalty. The policeman did arrest her, whereupon she was handcuffed, her car was impounded, she was taken to the police station, had a "mug shot" taken and was incarcerated for an hour. She could also have been subjected to searches of her person⁶⁷ and her car⁶⁸ "incident to the arrest," though the police did not do this.

The majority's primary argument was that the police need clear rules to follow and that any rule other than "police can arrest whenever state law allows" would be too fuzzy.⁶⁹ Specifically, Souter rejected the dissent's proposal that arrest should follow the commission of a "fine-only" offense, only if "the officer is 'able to point to specific and articulable facts which . . . reasonably warrant . . . ' a full custody arrest.'"⁷⁰ This test, in the majority's view, was fraught with complexity, since the policeman may not know whether the circumstances justifying a full custody arrest are present.

65. Id. at 82-83 (emphasis the court's).

66. 532 U.S. 318.

67. See *United States v. Robinson*, 414 U.S. 218 (1973).

68. See *New York v. Belton*, 453 U.S. 454 (1981).

69. Thus the Court continued its insistence that Fourth Amendment law, i.e., the reasonableness of a given search or seizure, does not depend on the nature or seriousness of the crime being investigated. For a thoughtful critique of this approach, see William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842 (2001).

70. 532 U.S. 318, 366 (O'Connor, J., dissenting (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968))).

Since the dissent's test was drawn from *Terry v. Ohio*⁷¹, the Warren Court's famous "stop and frisk" case, which requires the police to make a similar, sometimes difficult, judgment, the difficulty of the test cannot be the full answer. The Court's distinction of *Terry* is significant:

Terry . . . is not to the contrary. *Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of an arrest) provides; but . . . there is no comparable cause for finicking when police act with such justification.⁷²

Thus, since in *Atwater*, as in *McArthur*, probable cause that the defendant had committed a crime had already been established, the Court was unwilling to impose a further set of restrictions on how the police might treat her, even though it admitted that "the physical incidents of [her] arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment."⁷³

The final Fourth Amendment case of the 2000 Term is *Kyllo v. United States*.⁷⁴ In *Kyllo*, the police used a thermal imaging machine to examine the outside of petitioner's house and, finding that excessive heat was being released, concluded that Kyllo was growing marijuana inside. They used the information to obtain a warrant, searched the house and, finding marijuana, arrested Kyllo.

71. 392 U.S. 1 (1968).

72. *Atwater*, 532 U.S. at 347 n.16. The Court was also influenced by their belief that the police would not abuse this power, because they have not done so in the past, a position with which I strongly disagreed in Craig M. Bradley, Minor-Offense Arrests Get Green Light in Seat Belt Case, *Trial Mag.*, August 1, 2001, at 66. For detailed and insightful criticism of *Atwater*, see Thomas Davies, The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in *Atwater v. Lago Vista*, 37 *Wake Forest L. Rev.* 239 (2002); Richard Frase, What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. Lago Vista*, 71 *Fordham L. Rev.* 379 (2002).

73. *Id.* at 346-47.

74. 533 U.S. 27 (2001).

A very strange majority of Scalia, Souter, Thomas, Ginsburg, and Breyer struck down this search on the ground that obtaining *any* information from the interior of the house through the means of a technical device violated the Fourth Amendment. This was consistent with an earlier case, *United States v. Karo*⁷⁵ where the Court had held that using an electronic beeper to ascertain that a drum of chemicals was in a house was a Fourth Amendment violation, despite the fact that the beeper conveyed no further information than its presence in the house. Again, although the police obviously had suspicions about Kyllo, these suspicions were not advanced to justify the use of the machine. Rather, the government argued that use of the machine was "not a search" under the Fourth Amendment.⁷⁶ If it were not a "search" the machine could be used outside anybody's house, even a Supreme Court Justice's. The Court, consistently with its reluctance to allow police to interfere in new ways with innocent civilians, struck it down.

All nine Justices agreed that the use of a machine that disclosed what people were actually doing in the house would have violated the Fourth Amendment.⁷⁷ The only dispute was whether this crude machine, which simply showed that a lot of heat was being released from the house, was enough to violate the Constitution. The majority concluded that it was. The unanimous view of the Court, that machines cannot be used to spy on what goes

75. 468 U.S. 705 (1984).

76. An alternative argument for the government, that this was a limited search, which could have been justified by reasonable suspicion like a Terry frisk, might have carried the day, given that the machine disclosed very little of what was going on in the house.

77. There is . . . a distinction of constitutional magnitude between through-the-wall surveillance that gives the observer or listener direct access to a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. . . . [The] observations [in this case] were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy.

Kyllo, 533 U.S. at 41 (Stevens, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ.).

on in people's houses without a warrant, is more significant than the disagreement over whether this particular machine provided enough information to constitute a "search." Thus the peculiar voting lineup may be considered at least as much technological as it is ideological.

When the burden on the individual in these five cases is considered, Atwater suffered the most. Being arrested is clearly worse than being briefly stopped at a roadblock (*Edmond*), having your urine examined for cocaine without your knowledge (*Ferguson*), having the "heat profile" of your house measured by a machine (*Kyllo*), or being excluded from your house pending the arrival of a search warrant (*McArthur*). As noted, the potential burden on Atwater was even greater since both she and her car could have been searched.⁷⁸

But the Court upheld Atwater's arrest, as well as McArthur's exclusion, consistently with the theory advanced here, while the government lost the other three cases. Atwater was not an innocent person subjected to police investigation. Rather, she was legitimately under police control. The only issue was whether the Court should create a new rule for police to follow governing her subsequent treatment, i.e. limiting police power to perform custodial arrests. The majority treated this case the same as *United States v. Robinson*,⁷⁹ where the Court allowed a full search incident to arrest for a traffic violation, with the Court refusing to interfere with police exercise of discretion.⁸⁰ Likewise, McArthur's trailer was already subject to being searched with a warrant. The only issue was police treatment of him pending its arrival. Thus,

78. Of course, had drugs actually been found in any of these cases, the suspects would have been subject to arrest. But I'm referring to the burden imposed by the search or seizure itself, not what might have happened had the police actually discovered contraband.

79. 414 U.S. 218 (1973).

80. "[A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." 532 U.S. 318, 347 (citing *Robinson*, 414 U.S. at 234-235).

while the Court is consistently suspicious of police justifications for intruding on privacy in new ways, as they sought to do in *Kyllo*, *Edmond*, and *Ferguson*, it is willing to support police discretion in deciding how people legitimately stopped, arrested, or subject to search, should be treated.

Another pair of recent cases further illustrate this trend: *Whren v. United States*⁸¹ and *City of Chicago v. Morales*.⁸² In *Morales*, the Court, by a 6-3 vote,⁸³ struck down the Chicago Gang Congregation Ordinance. This ordinance prohibited "loitering" in a public place by two or more people, at least one of whom was a "criminal street gang member." Loitering was defined as "remain[ing] in any one place with no apparent purpose." The crime occurred when such people disobeyed a police officer's order to disperse.⁸⁴

Morales is of particular interest, because it shows the difference in approach between the current Court and a famous Warren Court case. The Chicago ordinance was similar to an ordinance declared unconstitutional in *Papachristou v. Jacksonville* in 1972 by a unanimous Court in which the two recently appointed Republican Justices Rehnquist and Powell did not participate. Thus this was essentially the last case decided by the Democratic majority (Douglas, Brennan, Marshall and White, as well as Republican Stewart) that had, along with (by then retired) Warren, Fortas, and Black,⁸⁵ driven the Warren Court.⁸⁶

81. 517 U.S. 806 (1996).

82. 527 U.S. 41 (1999). For a fuller discussion of *Morales*, see Craig M. Bradley, *The Changing Face of Criminal Procedure*, *Trial Mag.*, October 1, 1999, at 84.

83. Rehnquist, C.J., Scalia and Thomas, JJ., dissenting.

84. 527 U.S. at 47.

85. By the time of *Papachristou*, 405 U.S. 156 (1972), Burger, Blackmun, Powell and Rehnquist had replaced Warren, Fortas, Black and Harlan, respectively.

86. There is a potentially significant difference in the Chicago and Jacksonville ordinances, but the plurality, in striking down the Chicago ordinance, didn't make much of it. That is that, whereas "vagrancy" was itself a crime in Jacksonville, the Chicago ordinance only criminalized "loiterers" who

The Jacksonville ordinance declared a long list of types of people to be “vagrants” and thus subject to criminal punishment by virtue of that “vagrancy.” The list included, in addition to various criminal types, “common night walkers,” “persons wandering or strolling around from place to place without any lawful purpose,” and “habitual loafers.”⁸⁷ The Court, per Justice Douglas, in a paean to such wanderers as Walt Whitman and Vachel Lindsay, declared the right to wander around aimlessly to be a part of the concept of “liberty” protected by the Constitution.⁸⁸ However, in addition to this particular right, the Court also sounded a theme generally applicable to its criminal law and procedure decisions of the 1960s: that the ordinance “furnishes a convenient tool for ‘harsh and discriminatory law enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.’”⁸⁹ Thus *Papachristou* was one of a long line of cases in which the Court sought to protect minorities and the poor from police and prosecutorial abuse: “The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”⁹⁰

The ordinance in *Morales*, by contrast, was enacted at the behest of inner city residents to protect them against gang members who “establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . avoid arrest by committing no offense punishable under existing laws when they know the police are present.”⁹¹ It was designed to protect, not to oppress, minorities as well as majorities; the poor as well as the rich. And far from a unanimous opinion extolling the right to loaf and hang around on

failed to disperse after being ordered to do so by a policeman, as Justice Thomas emphasized in dissent. 527 U.S. at 106.

87. 405 U.S. at 158 n.1.

88. 405 U.S. at 164.

89. *Id.* at 170 (citation omitted).

90. *Id.* at 171.

91. 527 U.S. at 46 (quoting the city council's findings).

street corners free from police harassment, *Morales* gave rise to six separate opinions with a majority agreeing as to only a limited holding that this particular ordinance was vague, while expressing sympathy with the city's plight and offering helpful suggestions to better achieve the city's goals.

In Part V of the decision, the only significant part to which a majority subscribed,⁹² the Court found that the ordinance did not "establish minimal guidelines to govern law enforcement."⁹³ In particular, the Court denounced the "no apparent purpose" language of the statute, accepting the finding of the Illinois Supreme Court that this "provides absolute discretion to police officers to decide what activities constitute loitering."⁹⁴

Indeed, the majority pointed out that, by its terms, the statute does *not* apply to those loiterers whom the city would most like to control: those who *do* have an apparent purpose either to "publicize the gang's dominance of certain territory" or to commit crimes.⁹⁵

Both the majority and Justice O'Connor's concurrence offered several suggestions to cities as to how to draft these ordinances better. The majority observed that an ordinance that "only applied to loitering [by or with gang members] that had an apparent harmful purpose or effect" would be okay,⁹⁶ as might an ordinance that was limited to loitering by gang members without the need to show any apparent purpose.⁹⁷

92. Justice Stevens' plurality opinion was fully joined only by Justices Souter and Ginsburg. Justices O'Connor, Kennedy and Breyer joined only Parts I and II, which set forth the facts and history of the case, and Part V. Each of these concurring Justices also wrote a separate opinion. Justice Thomas wrote a dissenting opinion joined by the Chief Justice and Justice Scalia. Justice Scalia also wrote a separate dissent.

93. 527 U.S. at 60.

94. *Id.* at 61 (citation omitted).

95. *Id.* at 63.

96. *Id.* at 62.

97. *Id.* The Court did not discuss the problem of identifying who is a "criminal street gang member," which is surely not always obvious. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Justice O'Connor stated her agreement with the dissent that "some degree of police discretion is necessary to allow police to 'perform their peacekeeping responsibilities satisfactorily,'" but felt that this ordinance permitted "policemen, prosecutors and juries to conduct 'a standardless sweep . . . to pursue their personal predilections.'"⁹⁸ She noted that "the ordinance here is unlike a law that directly prohibits the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on the public ways that intimidates residents."⁹⁹

It is apparent that none of the members of the Court believed that this was a law designed to oppress minorities, or non-conformists, like the ordinance struck down in *Papachristou*. Rather they were sympathetic to the goals of the law, recognized that it was designed to protect people living in "bad" neighborhoods from oppression by criminals rather than police, and indicated that a similar, but more carefully drawn law, would meet with their approval. At the same time, the Court, as it has proved in the other cases discussed herein, was leery of freewheeling exercise of discretion by police to hassle people as to whom the police lacked at least reasonable suspicion that they were violating the criminal law.

These two principles are at the heart of today's criminal procedure doctrine: First, that police are not automatically to be distrusted but second, that their ability to intrude in new ways on the privacy of otherwise innocent people must be carefully circumscribed. As the Court explained in *Terry v. Ohio*, these cases involve a balancing of the need for police to deal with citizens in a variety of non-arrest contexts against "a severe requirement of specific justification for any intrusion upon protected personal security. . . ."¹⁰⁰

In *Morales*, the Court struck down the statute because it imbued police with too much discretion, while going out

98. *Id.* at 65 (citation omitted).

99. *Id.* at 67 (O'Connor, J., concurring) (internal quotations omitted).

100. *Terry*, 392 U.S. at 11.

of its way to indicate that a fair degree of police discretion was allowable. In *Whren v. United States*,¹⁰¹ a unanimous Court, per Justice Scalia, held that vice squad police, who stopped a car for a traffic violation as a pretext for investigating whether the car contained drugs¹⁰², did not violate the Fourth Amendment. The more liberal members of the Court apparently agreed with Justice Scalia that it would be unworkable to demand that the subjective intentions of police who, objectively, had probable cause, (albeit not of a criminal violation) be probed in each case to determine the true motive for an arrest or stop:

It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.¹⁰³

Had Justices Brennan and Marshall been on the Court, they would, no doubt, have strenuously objected to this holding and insisted that, at least where, as in *Whren*, local police regulations forbade plainclothes police from making traffic stops except for "grave" traffic violations, such pretext stops were unconstitutional.

Morales is arguably overprotective of constitutional rights. After all, the only burden on a citizen is to disperse when ordered to do so by a policeman—only failure to disperse is subject to arrest. *Whren* is arguably underprotective of constitutional rights. It encourages police to follow motorists, whom they lack cause to either arrest or stop, until they commit some trivial traffic violation at which time the police may pounce. The burden on the individual is surely greater in *Whren* than in *Morales*. But, as is characteristic of the recent cases, an

101. 517 U.S. 806 (1996).

102. The officers observed cocaine in plain view when they approached the car. *Id.* at 809.

103. *Id.* at 817.

evaluation of the burden imposed on the suspects will not explain the Court's decisions.

The distinction between *Whren* and *Morales* is better seen as based on the fact that the person affected in *Morales* was "innocent" as far as the police were concerned. That is, they lacked even reasonable suspicion to stop him for a crime.¹⁰⁴ By contrast, the suspect in *Whren* was legitimately subject to a stop by police due to the traffic infraction. Given this circumstance, the Court was unwilling to create *secondary* rules governing how the police must treat someone who is already subject their control.

Consider more of the recent cases. In *Ohio v. Robinette*,¹⁰⁵ the Court upheld, by an 8-1 vote,¹⁰⁶ a request of a highway patrolman for consent to search a car, stopped for a traffic violation, without informing the suspect that he was free to go. Since *Robinette* was already legitimately stopped by the police, the Court was not troubled by the fact that he was not informed that he was free to go before consent was sought. This is consistent with the Court's refusal to require any prerequisite to consent searches beyond the vague requirement that they be "voluntary."¹⁰⁷ It is also consistent with the Court's reluctance to impose secondary rules on police exercising established authority.

Likewise, in *Wyoming v. Houghton*¹⁰⁸ the Court upheld, 6-3,¹⁰⁹ the search of a car, on probable cause that the driver possessed drugs. During the search, the police opened the handbag of a woman passenger, finding drugs. While *Houghton* herself was "innocent" in the eyes of the police, the Court focused on the previously recognized authority of the police to search cars and any containers that might be found therein, on probable cause.¹¹⁰ Again, as long as the

104. They could have been "loiter[ing] near Wrigley Field . . . just to get a glimpse of Sammy Sosa" as the Court put it. 527 U.S. at 60.

105. 592 U.S. 33 (1996).

106. Justice Stevens dissenting.

107. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

108. 526 U.S. 295 (1999).

109. *Id.* at 309 (Stevens, J., joined by Souter and Ginsburg, JJ., dissenting).

110. *United States v. Ross*, 456 U.S. 798 (1982).

police were exercising this established authority, searching a car on probable cause, the Court was reluctant to limit how they should do it. A contrary ruling, averred the Court, would lead to a "bog of litigation" as to whether the police had reason to believe that a particular container belonged to a passenger or the driver.¹¹¹

By contrast, in *Bond v. United States*,¹¹² the Court struck down, by a 7-2 vote,¹¹³ a "luggage squeeze" by drug agents of luggage on a bus to see if it felt like it contained drugs. They felt a "brick-like object" that turned out to be a "brick" of methamphetamine.¹¹⁴ This was a "search" requiring probable cause ruled the Court. Bond, and his fellow bus passengers were "innocent," and could not be subjected to such intrusive police behavior.

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. . . . He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.¹¹⁵

Bond may be seen as limiting the 1983 decision in *United States v. Place*,¹¹⁶ in which the Court held that a dog sniff of luggage was not a "search," despite language in *Place* suggesting that the police behavior in *Bond* would not be considered a search either.¹¹⁷ As Justice Breyer pointed out in dissent,

111. Houghton, 526 U.S. at 305.

112. 529 U.S. 334 (2000).

113. *Id.* at 339 (Breyer and Scalia, JJ., dissenting).

114. *Id.* at 336.

115. *Id.* at 338-39.

116. 462 U.S. 696 (1983).

117. A canine sniff by a well-trained narcotics detection dog does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.

Id. at 707.

Surely it is less likely that nongovernmental strangers will sniff at another's bags (or more to the point, permit their dogs to do so) than it is that such actors will touch or squeeze another's personal belongings in the process of making room for their own.¹¹⁸

Bond was clearly vindicating the right of the reasonable, innocent person not to be subjected to intrusive police searches when he's minding his own business on a public conveyance.

Three other cases, *Florida v. J.L.*,¹¹⁹ *Illinois v. Wardlow*,¹²⁰ and *United States v. Arvizu*,¹²¹ involved the issue of whether or not the police had the "reasonable suspicion" necessary to conduct a stop. As such, these cases deal with the threshold meaning of the "reasonable suspicion" requirement rather than the issue of what police may do when they lack it.¹²² But these cases also show the "middle class" orientation of the Court.

In *Wardlow*, the issue was whether a man, who was found in a "high crime area"¹²³ created "reasonable suspicion" when he ran away upon seeing a caravan of police cars heading toward him. Since a reasonable middle class person would not do this, it is not surprising that the Court found that such flight justified a *Terry* stop.

In *Arvizu*, several factors prompted a border patrol agent to stop a van in a remote area thirty miles north of the Mexican border. A vehicle had triggered sensors indicating that it was driving around border patrol checkpoints on the highway. The officer spotted a minivan which "based on the timing he believed . . . was the one that had tripped the sensors."¹²⁴ As the officer approached the van, the occupants behaved strangely and it appeared

118. 529 U.S. at 341.

119. 529 U.S. 266 (2000).

120. 528 U.S. 119 (2000).

121. 534 U.S. 266 (2002).

122. See also *Alabama v. White*, 496 U.S. 325 (1990), and *United States v. Sokolow*, 490 U.S. 1 (1989), for earlier cases dealing with this issue.

123. 528 U.S. at 124.

124. 534 U.S. at 270.

that the knees of the children in the back "were unusually high, as if their feet were propped up on some cargo on the floor."¹²⁵ At the last turn before the next checkpoint, the van turned off onto a road normally used only by four wheel drive vehicles.¹²⁶ Finally the officer ascertained that the vehicle not local but was registered to an address four blocks from the border "in an area notorious for alien and narcotics smuggling."¹²⁷ The officer stopped the vehicle, asked consent to search, and found 128 pounds of marijuana.

The Court upheld this stop on the ground that all of the factors within the officer's knowledge added up to reasonable suspicion. As the Court demonstrates, no innocent explanation for defendant's behavior, such as going for a family picnic, is as consistent with the facts as the suspicion that the defendant was smuggling something.

The final case is *Florida v. J.L.* In contrast to *Arvizu* and *Wardlow*, the police had observed no suspicious behavior. Rather their stop of J.L. was based solely on an anonymous tip that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun."¹²⁸ The Court held that such a "bare bones tip" with no suspicious behavior observed by police to corroborate it, is insufficient to justify a stop and frisk. As Justice Kennedy observed, concurring, "The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable."¹²⁹

Thus, whereas *Arvizu* and *Wardlow* had engaged in suspicious behavior, inconsistent with that of a reasonable person, J.L. was just standing at a bus stop. The anonymous tip could have been a "prank" by someone who "harbored a grudge" against him, or even made up by the police as an excuse to frisk.¹³⁰ People (like you and me and

125. *Id.*

126. *Id.*

127. *Id.*

128. 529 U.S. at 268.

129. *Id.* at 275 (Kennedy, J., concurring).

130. As the dissenters argued in *Alabama v. White*, 496 U.S. 325, 333 (1990)

Supreme Court Justices and their families) standing at bus stops, ATM machines or taxi ranks, should not be hassled by police on the basis of anonymous tips alone.

It could be said that the Court gives "strict scrutiny" to police claims of new powers to interfere with otherwise innocent people. By contrast, the Court merely looks for a "rational basis" for police treatment of people who are already legally subject to police detainment on probable cause. But, unlike in Equal Protection law, the designation of a case to one of these categories should not be expected to predetermine the outcome.

Consider *Knowles v. Iowa*.¹³¹ In *Knowles* a policeman stopped a speeder and then, though neither probable cause nor reasonable suspicion were present, searched him "incident to the arrest" for speeding, even though there were no plans to take him into custody (unless, of course, they found drugs). The Court, per Chief Justice Rehnquist, unanimously struck down this search. Since this case involved a person already legitimately in police custody due to the traffic stop, one might have expected the Court to uphold the search. But while the Court may have applied a "rational basis" approach here, the police's asserted "need" to search someone whom they have already concluded was not worth arresting arguably fails that test.¹³² Alternatively, *Knowles* could be considered "innocent" once the police had concluded the traffic stop, and, as such, protected by "strict scrutiny," but this would be inconsistent with *Robinette*.¹³³

(Stevens, J., dissenting), "[E]very citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed." *Id.*

131. 525 U.S. 113 (1998).

132. In any case, *Knowles* was not a significant defeat for the police given Atwater's subsequent holding that police can custodially arrest people for any offense for which such arrest is allowed under state law and conduct a full search of the person incident to that arrest under *United States v. Robinson*, 414 U.S. 218 (1973).

133. 519 U.S. 33 (1996). Although, as discussed *infra* text accompanying note 151, the Court does not consider asking for consent to search to be an event that has any Fourth Amendment significance.

The Court explained both its unwillingness to interfere with police acting on probable cause and the rare occasions when it has, in *Whren*:

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the “balancing” analysis involved searches conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests—such as, for example, seizures by means of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), unannounced entry into a home, see *Wilson v. Arkansas*, 514 U.S. 927 (1995), entry into a home without a warrant, see *Welsh v. Wisconsin*, 466 U.S. 740 (1984), or physical penetration of the body, see *Winston v. Lee*, 470 U.S. 753 (1985).¹³⁴

Likewise in *Kirk v. Louisiana*,¹³⁵ the police were acting with probable cause that the defendant was selling drugs from his apartment, but when they knocked on the door of the apartment, arrested him, and searched him incident to arrest, with no showing of exigent circumstances, that search was no good. Obviously probable cause, in situations where a warrant is also required, is not sufficient to insulate police from even “rational basis” scrutiny.

The theme of not interfering with standard police practices was a common one of the Burger Court. Some Burger Court decisions with which the current Court would likely agree are, *California v. Trombetta*,¹³⁶ in which the police lab had routinely destroyed breath samples used to determine blood alcohol levels, and *United States v. Valenzuela-Bernal*,¹³⁷ in which the government had routinely deported illegal aliens whom the defendant claimed could have testified in his favor.

134. 517 U.S. at 818. To this short list could be added *Wilson v. Layne*, 526 U.S. 603 (1999), where execution of an arrest warrant was found unreasonable because the police took along a newspaper reporter and photographer.

135. 536 U.S. 635 (2002) (per curiam).

136. 467 U.S. 479 (1984).

137. 458 U.S. 858 (1982).

We might expect the current Court to disagree with, or at least limit, some of the long line of Burger Court decisions holding that various investigative behaviors by police were not "searches" as far as the Fourth Amendment was concerned. For example, *Florida v. Riley*¹³⁸ held that helicopter overflight by police to examine a suspect's greenhouse in his backyard for marijuana growth was not a search. This view commanded only a plurality, with Justice O'Connor concurring in the result only because of the comparatively high altitude, while suggesting that she would reach a different result if the flight were lower. Any attempt to extend *Riley* to lower altitude overflights would likely meet the current Court's disapproval. Likewise, following *Kyllo*, the Court might be expected to further limit the use of technology to "snoop" on various aspects of human behavior, absent a showing of at least individualized suspicion by police, if not a warrant. Finally, as noted, *Bond*'s limitation of the "luggage squeeze" was somewhat inconsistent with *Place*'s approval of the dog sniff and *Edmond* ended a trend toward approving suspicionless stops at roadblocks.

However, this is still an overwhelmingly Republican Court, and appears likely to remain so indefinitely, so the overriding Burger Court positions that warrants are virtually never required for outdoor searches,¹³⁹ and that many police investigatory acts, including trash searches, trespasses onto open fields, etc. are not "searches" at all under the Fourth Amendment, are not likely to change.

Moreover, there is a potentially disturbing counter-trend to the Court's moderate Fourth Amendment tendencies. This is the so-called "special needs" exception to the warrant, probable cause, and even reasonable suspicion requirements when a search is not for the

138. 488 U.S. 445 (1989).

139. See Craig M. Bradley, The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!, 84 J. Crim. L. & Criminology 429 (1993) (pointing out the Court's consistent, with one minor exception, position of requiring warrants only for searches of structures. This is not, however, a position that has been explicitly adopted by the Court.).

purpose of criminal law enforcement, but is aimed at achieving some other societal goal. As noted above, the Court's disapproval of governmental tactics in both *Edmond* (the drug roadblock case) and *Ferguson* (the hospital drug testing case) hinged on the fact that the information obtained was used to detect ordinary criminal activity. The Court summarized these special needs cases in *Edmond*:

[W]e have upheld certain regimes of suspicionless searches where the program was designed to served "special needs, beyond the normal need for law enforcement." See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug tests for United States Customs Service employees seeking transfer or promotion to certain positions); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in train accidents or found to be in violation of particular safety regulations).¹⁴⁰

These various "special needs" have generally seemed to reflect legitimate societal concerns that would be unduly hindered by the traditional limitations on ordinary law enforcement work. Indeed, the Court's refusal to extend the "special needs" doctrine to the drug tests in *Ferguson*, despite the non-law enforcement interest in keeping fetuses drug-free, and to the roadblocks in *Edmond* despite the petitioner's attempt to assert "special needs" in that case,¹⁴¹ suggested that the Court was going to be relatively strict in

140. 531 U.S. at 37. (The Court also discusses the roadblocks approved in earlier cases and distinguished in *Edmond*, above.) For a detailed discussion of the civil liberties concerns raised by *Skinner* and *Von Raab* (and equally applicable to subsequent cases), see Stephen Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87. However, one of Professor Schulhofer's concerns, that the Court "wavers about whether the absence of a law enforcement objective justifies fewer restrictions of the power to search," *id.* at 89, has been definitively resolved by the Court: non-law enforcement searches can be much broader.

141. 531 U.S. at 41-44.

extending governmental claims of “special needs” to justify warrantless, non-probable-cause searches and seizures.¹⁴²

Thus it appears that the Supreme Court has finally shrugged the Warren Court albatross from its neck in criminal procedure and is striking out on its own, developing an area of the law, no-probable-cause encounters, that has previously not been emphasized or, when treated, had consistently produced rulings for the government. A decided trend in these cases has been described. The Court is extremely reluctant to allow police to interfere with people as to whom the police lack probable cause. It scrutinizes police claims of such authority strictly and generally disallows them. On the other hand, if the police already are justified in restricting an individual, due, as in most of the recent cases, to a traffic infraction, or some other violation, then the Court tends to defer to police claims that their discretion should not be curbed, as long as the Court is satisfied that there is a rational basis to their claim.

The question remains if this is a salutary policy. Whether the Supreme Court is requiring trial judges to evaluate police behavior case-by-case in order to determine reasonableness, or is deciding a “clear rule” to be applied by the police in all subsequent cases that present this issue, the bottom line of Fourth Amendment analysis is still the textual requirement of “reasonableness.”¹⁴³ This in turn depends upon a weighing of the needs of the police versus the privacy concerns of the individual. Constitutional issues can arise as to both individuals who are in, and those who are not in, legitimate police custody. And while the concerns of the police and the individual are strongly

142. The recent decision in *Board of Education v. Earls*, 536 U.S. 822 (2002), expanded the “special needs” rationale to allow school drug testing of all students who wished to participate in extra-curricular activities. However, this decision was based largely on the unique relationship between schools and the children they serve and is not likely to be extended into other areas. *Id.* at n.3. See *Chandler v. Miller*, 520 U.S. 305 (1997), where the Court struck down a Georgia requirement that candidates for public office submit to drug tests.

143. As the Court reiterated in *McArthur*: “[The Fourth Amendment’s] ‘central requirement’ is one of reasonableness.” 531 U.S. at 330.

affected by whether the police are acting with probable cause or not, this should not necessarily be the decisive factor.

As discussed above, the greatest burden on the individual in any of the recent cases is in *Atwater*—being arrested is a severe intrusion on privacy. Balanced against this must be the interest of the police in having a clear rule that they can arrest anyone who commits a crime for which state law allows an arrest (as opposed to the dissent's position that the police should have to show some reason to arrest people for a non-jailable offense). In my view, the police interest fails in the balance. The indignity of a custodial arrest and the likelihood that the police will use minor misdemeanors as a pretext for arresting people whom they want to investigate for other crimes suggests that this case should have come out for the defendant. To require a showing of "some reason" for arrest, as opposed to allowing police to arrest out of pique, or in hopes of obtaining evidence of a more serious crime, would not unduly restrict and confuse the police.

Likewise *Whren*, with its explicit approval of pretext arrests for minor offenses to investigate major ones trenches heavily on privacy interests while not, in my view, advancing very substantial, or legitimate, police goals.

By contrast the burden on the individual in *Morales* was particularly slight—simply being required to move on by a policeman and being arrested only if one refuses, does not seem especially onerous, even if the statute is vague about when police can do this. On the other hand, the law enforcement interest in dispersing gangs and diluting their control of neighborhoods seemed strong. Still, the vagueness concerns in *Morales* remove it from straightforward Fourth Amendment reasonableness analysis.

The thermal imager in *Kyllo*, while somewhat disturbing, revealed so little about what went on in the interior of the house that I would not have been surprised to see the Court uphold it. But they did not. Likewise, the roadblock in *Edmonds* represented a fairly limited

intrusion on individual autonomy while substantially contributing to the interdiction of illegal drugs. One would have expected a Republican Court to have decided these two cases against defendants before they decided *Atwater* and *Whren* against them.

Since the Court is not weighing the relative burdens on police and citizens in reaching their conclusions, what does explain the results? The answer, as noted, seems to be that the Court is reflecting the concerns of the middle class who, minding their own business, do not want to be randomly stopped at a drug roadblock, have their houses "scanned" by high tech equipment or their urine surreptitiously examined by hospitals acting in cahoots with the police. Certainly *Bond*, with its recognition that "[passengers] are particularly concerned [with] their carry-on luggage; they generally use it to [carry] personal items. . . ."¹⁴⁴ sounded like the Justices themselves saying, "Hey, we don't want anybody messing with our carry-on luggage when we fly." (*Bostick* and *Drayton*, by contrast, raising issues unique to bus, as opposed to plane travel, did not attract the sympathy of a majority for the defendants' plight.)

On the other hand, the innocent citizen has no personal concerns about search warrant execution and, though he could be taken into custody for a minor traffic violation under *Atwater*, the truth of the matter is that he would not be. (Recall that *Atwater*, though a "soccer mom," was also a recidivist seatbelt violator who was endangering her children and that the Court nevertheless criticized the policeman for making the arrest in that particular case.) Likewise, police would not use an arrest for a minor traffic violation as a pretext to investigate the "good citizen" for a more serious offense because she is not likely to be under suspicion for a more serious offense.

This middle class attitude toward Fourth Amendment protection is in stark contrast to the Warren Court which, in some of its most notable cases, limited searches incident

144. *Bond*, 529 U.S. at 337-38.

to arrest,¹⁴⁵ required warrants to search the homes of those suspected of crimes and backed up that requirement with the exclusionary rule,¹⁴⁶ and extended this warrant protection to a bookmaker making a call from a telephone booth.¹⁴⁷ The Warren Court similarly imposed the *Miranda* warning requirement on the interrogation of people arrested on probable cause and threw out numerous confessions by such arrestees on the ground that they were involuntary,¹⁴⁸ something neither the Burger nor the Rehnquist Court has ever done as to a stationhouse interrogation.¹⁴⁹ (Perhaps they believe that the *Miranda* warnings have caused all involuntary confessions to cease).¹⁵⁰

The Court's middle class orientation toward the Fourth Amendment can also be seen in its curiously reasoned consent search cases, most recently illustrated by the June 2002 case of *United States v. Drayton*.¹⁵¹ In *Drayton*, the defendant and a companion, Brown, were riding on a bus. At a scheduled stop, three police came on the bus in search of narcotics. The officers testified that people were free not to cooperate, but rarely refused, and were not informed of a right to refuse.¹⁵² Defendant and Brown were asked if the police could search their bags. They agreed and the search disclosed nothing. Brown was then asked if the police could search his person. He agreed

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

146. *Mapp v. Ohio*, 367 U.S. 643 (1961).

147. *Katz v. United States*, 389 U.S. 347 (1967).

148. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Reck v. Pate*, 367 U.S. 433 (1961); *Culombe v. Connecticut*, 367 U.S. 568 (1961).

149. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court excluded a confession taken in the intensive care ward after the suspect had invoked his right to counsel. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court excluded a confession made in prison to an informant who told the suspect that he would protect him from the other inmates only if he told the truth about the crime.

150. It's true that the Burger Court in particular devoted a large number of cases to discussing the scope of the *Miranda* rights of arrested individuals, but this was obviously in an effort to limit the broad impact of *Miranda*, not to extend additional protections to arrestees.

151. 536 U.S. 194 (2002).

152. *Id.* at 198.

and, when they patted his thighs, they felt “hard objects similar to drug packages detected on other occasions.”¹⁵³ Brown was arrested.

Drayton was then asked if he consented to a search of his person. He likewise agreed, and similar packages were found on him, leading to his arrest. The Court first found that Drayton was not “seized” when consent to search was sought, and then turned to the issue of whether his consent was voluntary. It is on this point that their middle class point of view shines through so clearly.

The Court points out that “[n]othing Officer Lang said indicated a command to consent to the search.”¹⁵⁴ They discuss how Lang “asked permission to check” their bags and “asked . . . if they objected” to a search of their person. Thus, if the police are polite and non-threatening, and if the person has not been found to be “seized,” then the consent is okay.

But obviously this consent was not “voluntary” in any ordinary sense of the word. Since a search of Drayton’s person would inevitably lead to discovery and arrest, Drayton fervently *did not* want the police to search him. The only possible explanation for his consent, and those of the thousands of other suspects who know that consent will lead to arrest, is that they feel they have no choice. If they refuse consent, the police will find a way to search them anyway, and may rough them up in the process. And there’s the slim hope (virtually nonexistent in *Drayton*, but more realistic in auto stop cases) that if they seem cooperative, the police will go away without bothering to search. These are not voluntary choices.¹⁵⁵

But from the point of view of the “good citizen,” they are. Since he has nothing to hide, he doesn’t mind if the police look in his bag to advance the greater good of drug interdiction (as some passengers in *Drayton* explicitly told

153. *Id.*

154. *Id.* at 206.

155. For a fuller discussion of the problems with consent search doctrine, see, Craig M. Bradley, The Court’s Curious Consent Doctrine, *Trial Mag.*, October, 1, 2002, at 72.

the police).¹⁵⁶ As the Court declared in *Florida v. Bostick*,¹⁵⁷ an earlier bus search case, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." "Reasonable person" means "innocent person."¹⁵⁸ But the "reasonable, innocent person" is not transporting drugs. Indeed, since he needn't fear arousing the suspicions of the police, he may feel more free to decline the request than the guilty person.¹⁵⁹ But why, the Court evidently reasons, need we be concerned with the rights of people who are transporting drugs, as long as the "reasonable person" doesn't feel misused by the police?

Drayton and the other consent cases may be thought to be inconsistent with the major theme of this article—that the Court will not allow the police to hassle apparently innocent people. *Drayton* was, after all, just minding his own business on a bus when the police came along. But this is not how the Court views these cases. When someone is stopped at a roadblock, has her urine examined, is forced to move on, or has his house scanned by a thermal imager, the police have engaged in a Fourth Amendment act—either a search or seizure. But the basis of the Court's result in *Drayton* was that there was no seizure. Had there been, the consent would have been invalid. Instead, the police activity in *Drayton* was viewed as "approaching [an individual] on the street or in other public places and putting questions to them if they are willing to listen."¹⁶⁰ That is not considered a seizure and, as the Court noted, is a police activity that the reasonable good citizen is generally happy to cooperate with. Such "voluntary cooperation" is not deemed to require Fourth Amendment scrutiny by the Court.

156. "In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel." *Id.* at 198.

157. 501 U.S. 429, 436 (1991).

158. *Id.* at 437-38.

159. "Lang could recall five to six instances in the previous year in which passengers declined to have their luggage searched." *Drayton*, 536 U.S. at 198.

160. *Id.* at 200.

In conclusion, the Court is to be applauded for its concern that police, if unchecked, will expand their powers to investigate crime in ways that are incompatible with a free society and would seriously interfere with the rights of law abiding citizens. Likewise, the Court's reluctance to micro-manage police treatment of suspects who are legitimately in custody is frequently wise. However, the Court must recognize that people in custody, or people who engage in activity that would justify custody, are also uniquely vulnerable, and police enthusiasm for trenching on their rights is especially keen. Accordingly, a certain amount of "finicking" about the rights of those people should still be on the Supreme Court's agenda. The status of the individual *vis-à-vis* the police should not be the deciding factor. The reasonableness of the search should be.