Spring 1973

Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering

Roger B. Dworkin
Indiana University School of Law, dworkin@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons, and the Courts Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol48/iss3/1
FACT STYLE ADJUDICATION AND THE FOURTH AMENDMENT: THE LIMITS OF LAWYERING

ROGER B. DWORINK†

The fourth amendment cases are a mess! When the Supreme Court can seldom muster a majority on any important fourth amendment issue; when Justice White in an opinion joined by the Chief Justice charges that the Court has ceased even "to strive for clarity and consistency of analysis;"¹ and when in the same case Justice Stewart, for once speaking for five members of the Court, responds that "[t]he time is long past when men believed that development of the law must always proceed by the smooth incorporation of new situations into a single coherent analytical framework,"² and rejects in one sentence "clarity," "certainty" and "facile consistency,"³ the time has arrived to ask what has gone wrong.

The obvious scapegoat is the exclusionary rule which, by forcing the states into a federal model of search and seizure administration,⁴ compels state courts to grapple with complex problems of federal constitutional law while supposedly forcing the Supreme Court to water down federal constitutional protections to make state compliance feasible.⁵ This process of simultaneous supervision and watering down might well be thought to explain the development of a complex and increasingly incomprehensible body of law and the staggering state and federal search and seizure case loads. Since the exclusionary rule is criticized on its merits, abolition to provide a fresh start has an initial appeal. If the criticisms on the merits fail, though, other less obvious causes of the chaos must be sought before making the easy assumption that rejecting the exclusionary rule will solve the problems of fourth amendment jurisprudence. In my view, the criticisms on the merits do fail. More importantly, they are misfocused

† Associate Professor of Law, Indiana University School of Law.
2. 403 U.S. at 483.
3. Id.
and obscure perception of the reasons for the failure of the exclusionary rule, if it is a failure, and for the confused state of fourth amendment law.

The exclusionary rule is attacked on several grounds:6 (1) It aids the guilty, allowing criminals to go free "because the constable has blundered;"7 (2) it fails to aid innocent victims of governmental misconduct; (3) it fails to achieve its purpose, which is to deter the police from unreasonable searches and seizures; (4) to the extent it is not based on a policy of deterrence, it represents a "sporting contest" theory of litigation which is inappropriate in matters as important as balancing the individual's right to be secure from governmental intrusion against society's right to be secure from crime; (5) it is a drastic and inflexible sanction which leaves no room for case by case response to trivial or unintentional invasions of fourth amendment rights; (6) although designed to punish police officers, instead it punishes society generally; and (7) it also punishes prosecutors who lose their cases because of the rule's application.

These criticisms can be answered. Mapp v. Ohio8 extended the federal exclusionary rule to the states for two purposes: To deter unlawful police conduct9 and to preserve and foster the principle of judicial integrity, the notion that the law and courts must not sanction official lawlessness and use that lawlessness as part of the process of "correcting" lawbreakers.10 Thus, the criminal goes free, but as Mr. Justice Clark aptly stated, "it is the law that sets him free."11 Those who see the exclusionary rule as representing the wrong choice in the battle between criminals and the police misconceive the basic issue. The choice is not between criminals on the one hand and police on the other, but rather between two different kinds of lawbreakers. Why the lawbreaking police should prevail in a choice between evils is not at all clear. Indeed, in terms of societal danger a police officer who violates constitutional rights poses a greater threat than almost any "criminal" imaginable.

By focusing on societal danger, one exposes the second major misconception of critics of the exclusionary rule. The critics forget that neither the rule nor the fourth amendment exists to protect the criminal in whose case the rule is applied. Both exist to protect society—all those citizens who never break laws more serious than those prohibiting over-

9. Id. at 651-53, 656.
10. Id. at 659-60.
11. Id. at 659.
time parking. One critical fact to remember about fourth amendment cases is that criminals are the only tools available to protect everyone else's fourth amendment rights. The inadequacy of remedies other than the exclusionary rule is widely recognized, and the rule itself requires criminals for its application. Narrowly viewed, the exclusionary rule is very unattractive, because in the vast majority of cases in which it is applied the immediate result is to free an obviously guilty person. But the guilty defendant is freed to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions. Thus to suggest that the exclusionary rule fails to aid the innocent or that society rather than the policeman suffers for the policeman's transgression is nonsense. The innocent and society are the principal beneficiaries of the exclusionary rule.

Is the rule unjust, though, because it punishes the prosecutor by making him lose his case because of someone else's transgression? Obviously not! Losing a client's lawsuit can hardly be called "punishment" in any meaningful sense. Indeed one would prefer to think that prosecutors view themselves as servants of the law, who are pleased to see our institutions vindicated, than to assume they are vainglorious principals seeking to turn every case into an ego trip. However, even if losing a case can be viewed as punishment, the prosecutor has the power to avoid the punishment and put it back onto the police who deserve it by exercising his discretion not to prosecute, discretion which the hypothetical glory seeker could exercise to achieve almost a 100 per cent conviction record. Moreover, at least some prosecutors could (and all could try to) influence police behavior in the direction of obedience to the fourth amendment. To the extent they fail to do so, they deserve the punishment they receive. Finally, losing cases because of applications of the exclusionary rule may be a political benefit to a prosecutor looking either for an excuse or a campaign issue. The exclusionary rule does not provide a basis for legitimate sympathy for prosecutors.

Conceding all my arguments thus far, one might still point to the inflexibility of the exclusionary rule as an evil since it applies the same penalty to unintentional and trivial violations of the Constitution as to intentional and serious ones. However, no violation of the fourth amendment can properly be considered trivial. The decision that police conduct violated the fourth amendment, whatever the remedy, is a determination

12. This inadequacy was recognized in Mapp, 367 U.S. at 651, citing People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955), where the California court found that other remedies had "completely failed" to protect fourth amendment rights. Even Chief Justice Burger has recognized that the inadequacy noted in Mapp and Cahan still exists and has proposed a new solution to the problem. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411, 415 (1971) (dissenting opinion).
that the police have made more than a trivial illegitimate invasion of interests important enough to be constitutionally protected.

Unintentional invasions, of course, are possible, especially when fourth amendment law is unintelligible to everyone, presumably including the police. "Punishing" someone for an unintentional transgression is harsh. But deterrence is a harsh rationale for imposing sanctions. If the exclusionary rule is to deter unlawful police conduct, then it must be harsh enough to make policemen notice and fear it and inflexible and certain enough in its application to preclude the possibility of avoiding the sanction and hence the temptation to try. Just as a criminal law truly based on deterrence would execute every person who did a prohibited act the day after its commission without the possibility of escape through showings of the absence of mens rea, defenses like insanity, or procedural devices like the exclusionary rule, so also a rule which really seeks to deter the police must be swiftly, surely, and uniformly applied. To argue that the exclusionary rule exists to deter the police, and that it is bad because it is harsh and inflexible is to argue that it is bad because it is well suited to achieve its purpose. To then add that it does not work anyway is to compound the contradiction by refuting the inflexibility argument. As long as no one is willing to argue that deterring police lawlessness is bad policy, critics of the exclusionary rule cannot fairly attack it as being both too effective and not effective enough.

What then of the argument that the exclusionary rule is inefficacious as a deterrent? In approaching this argument one must be careful to make sure that the rules of argument are fair. First, Chief Justice Burger is wrong when he suggests that deterrence is the sole basis for the exclusionary rule. The judicial integrity basis may be important enough to support the rule in the absence of any deterrent efficacy at all. Thus a demonstration that the rule does not deter does not without more make a convincing case for rejecting it.

Second, Chief Justice Burger states that we lack sufficient evidence to determine the deterrent effect of the exclusionary rule, which, of course, is true. The very existence of the rule prevents making a controlled study to provide the evidence. The Chief Justice then places the burden of demonstrating the deterrent efficacy of the rule on its proponents. Obviously, the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome deter-

---

14. Id. at 416.
15. Id.
THE LIMITS OF LAWYERING

minative.16 The Chief Justice's assignment of the burden is merely a way of announcing a predetermined conclusion. So, of course, would be the opposite choice—imposition of the burden on opponents of exclusion. Fortunately, the burden need not be allocated at all. Allocation of burdens of proof is merely a blind for disguising substantive policy decisions17 and is no aid to decision making.18 The deterrent efficacy of the exclusionary rule can be evaluated without resort to the notion of burdens of proof. If all laws which are justified wholly or partly on the ground that they deter undesirable conduct had to be justified by showing that they actually do deter, very little of the criminal law, at least, could meet the test. Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred; whether in a state of ignorance the possibility of deterrence is worth the costs of a hopefully deterrent sanction, and how best to maximize the likelihood of deterrence. We simply cannot afford the luxury of temporarily abandoning deterrence for the intellectual satisfaction of conducting a controlled experiment.

In the search and seizure-exclusionary rule context, then, the retention or abolition of the exclusionary rule should turn on an evaluation of its costs and potential benefits assuming that the law permits the rule to work as well as possible. The point I wish to pursue is that the law does not permit the rule to work as well as possible. I shall attempt to demonstrate why that is so and to suggest a new style of fourth amendment decision making to alleviate the problem. Once fourth amendment law permits the exclusionary rule to work as well as can be expected of a deterrent sanction, evaluation of the rule itself will be appropriate. Meanwhile, if the Court abolishes the exclusionary rule, I believe the style of analysis I recommend will remain useful as long as any sanctions are used to attempt to enforce the fourth amendment. The central point is that any sanction, any remedy, is only as good as the substantive law it enforces. The problem with the search and seizure cases lies with the substance, not the remedy.

In order to deter conduct the prohibition against it must be clear, unambiguous, not susceptible to quibbles or easy avoidance, and easily understandable by the persons sought to be deterred.19 Fourth amend-

17. See generally Dworkin, supra note 16, at 1167-78.
18. Id. at 1164-67.
ment law is so uncertain, incomprehensible, quibble ridden, and ever changing that it deprives any sanction of a meaningful chance to control conduct.

What has brought us to this sorry pass? The answer, I believe, lies in the style of adjudication the Supreme Court has adopted in fourth amendment cases, in the way it approaches search, seizure, and arrest questions. The Court has attempted to resolve the most difficult constitutional questions by resort to a style of decision making which may work for resolving mundane and unavoidable problems like who is to be responsible for injuries suffered in an automobile accident, but which fails completely when the question is the graver one of what techniques the state may pursue in its efforts to police the citizenry. The Court has attempted to resolve these problems by what I call fact style decision making. That is, it has regularly posed fourth amendment issues the way courts usually pose questions for juries. So framed, the issues require the Court to decide facts and attempt to fit them into legal molds broad enough to permit free form decision making, but narrow enough to prevent the most extreme outrages. An examination of the cases shows that this approach, which assumes that fourth amendment law can develop meaningfully on a case by case basis, and which finds great significance in differing factual situations, is an abysmal failure.

Because the substantive law of the fourth amendment is the special province of the courts, that is where legal reform must begin. Once the courts, especially the Supreme Court, develop a useable body of fourth amendment law, it will be time enough to worry about remedies, administration, and the actual training of the police to comply with the law.

Obviously, the most basic question in search and seizure law is whether any search or seizure has occurred at all. If there has been no search or seizure, the fourth amendment does not apply and the Court need never reach the question of whether the (nonexistent) search was reasonable. In *Katz v. United States*, decided in 1967, the Court re-

---


jected old notions and held that a search subject to the dictates of the fourth amendment occurs whenever the government invades the privacy upon which a citizen justifiably relied. While a few problems, such as the status of privacy invasions by off duty policemen,22 inhere in the requirement of government involvement, the heart of the controversy opened by Katz is the question of what constitutes a justifiable expectation of privacy.

Although Katz specifically held that a search may occur without a "trespass"23 or an invasion of a "constitutionally protected area,"24 thus expanding the previously recognized range of the fourth amendment, it is important to note that the justifiable expectations test is still a severe restriction on the scope of fourth amendment protection. Certainly a layman would be surprised to learn that what constitutes a search turns not upon the conduct of the searcher, but rather on the justifiability of the expectations of the person subjected to the search. The conduct of the searcher would in normal parlance define a search. By limiting the relevance of that conduct to the question of whether a search was reasonable assuming that a search had been made, the Court effectively isolated from scrutiny a broad range of police conduct.25

The lay understanding, of course, makes a good deal more sense than the Katz test. Katz left open the possibility of highly intrusive conduct being totally outside the fourth amendment, thereby opening an area of hope to a policeman bent on questionable practices. No matter how offensive his conduct might be, in the absence of a finding that the subject had a justifiable expectation of privacy, the conduct would be immunized from the exclusionary rule or any other fourth amendment sanction.26 Moreover, a policeman preparing to look for evidence is asked under Katz to determine whether another person expects privacy and whether that expectation is justifiable. Even assuming the officer wishes to observe constitutional guidelines, he is hardly in a position to make such determinations. Thus, the Katz test is wholly inappropriate as a test directed at the police.

Most troublesome, of course, is the word "justifiable." The Court nowhere explained what it meant by a justifiable expectation of privacy, but it did point to factors that made Mr. Katz's expectation justifiable:

22. See, e.g., United States v. Clark, 451 F.2d 584 (5th Cir. 1971); United States v. Payne, 429 F.2d 169 (9th Cir. 1970); People v. Wolder, 4 Cal. App. 3d 984, 84 Cal. Rptr. 788 (1970).
23. 389 U.S. at 353.
24. Id. at 350-52.
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.  

By focusing on Katz's actions designed to assure privacy (occupying a booth, shutting a door, paying to make a call) the Court seemed to equate justifiability with reasonableness. Indeed, characterizing the quoted language as "[t]he critical fact in this case," Mr. Justice Harlan, concurring, understood the Katz test to be one of "reasonable" expectations of privacy.  

Justifiability in the sense of reasonableness is a fact style inquiry. One can easily imagine a jury being asked to decide whether the reasonable man expects privacy when he occupies a phone booth, closes the door, and pays for his call. And if the question were submitted to a jury, the answer would likely turn on how sophisticated and suspicious the jurors were, how pervasive bugging was or was thought to be at the time, and what attributes of the person overheard the jury was allowed to attribute to the reasonable man. If the reactions of second and third year law students are any guide, the temptation to consider the subject's criminal activities in determining reasonableness would be almost irresistible. Of course, since the fourth amendment exists to protect non-criminals, and since criminals are indispensable to the protection of non-criminals' fourth amendment rights, any consideration of criminality on the question of reasonableness or justifiability seriously weakens the fourth amendment. Nonetheless, that sort of weakening is invited when the Court focuses on the wrong thing and then asks a fact style question about it. Fact style questions are not dangerous when their answers are unlikely to become rigidified into rules of law and when nonconstitutional values are at stake. Quite the contrary is the case, though, when the Supreme Court is engaged in constitutional adjudication.

In 1971, in United States v. White, a plurality of the Court took fact style decision making to its almost irresistible extreme by considering criminality on the question of justifiability. At the same time, though, the plurality backed away from fact style adjudication by redefining justifiability. Defendant White was convicted for narcotics violations, partly on the basis of testimony from government agents of incriminating conversations between defendant and one Jackson, an informant who carried

---

27. 389 U.S. at 352.
28. Id. at 361 (concurring opinion).
29. Id. at 360-62.
30. See text accompanying note 12 supra.
a concealed radio transmitter which permitted the agents to overhear the conversations. The conversations occurred in White's home, Jackson's home, Jackson's car, and a restaurant. Jackson did not testify at trial.

Reversing the Seventh Circuit, the Supreme Court upheld the government's actions and reinstated defendant's conviction. Justice White, writing for a four man plurality of the Court, which included Justice Stewart, the author of the Court's opinion in Katz, thought that, "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police." One reading of this language, perhaps the one which appealed to Justice Stewart, would be that any reasonable criminal would be aware of the risks of betrayal and therefore would have no reasonable expectation of privacy for his conversations. Such a reading makes White the extreme example of fact style adjudication; begs the central question by using a later determination of criminality to justify the government's earlier activity which made the determination possible; and puts the Supreme Court in the uncomfortable position of hypothesizing about the expectations of reasonable criminals.

There is a more plausible reading of White. Never using the concept of reasonableness, the plurality states that the problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.

Read in the context of that language and of the plurality's portentous assertion that "[n]or should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable," the statement that a criminal "must" risk betrayal becomes not an assumption about what criminals surely do expect, but an imposition of a required expectation on them. Any actual expectations of privacy a criminal might have had are no longer to be "constitutionally 'justifiable,'" because he is a criminal. In other words, the question of justifiability is no longer a question of reasonableness; it is now a question of moral justification. Bad people are not morally justified in expecting privacy.

While the moral justifiability reading begs the same question as the reasonableness reading, and while either reading leads to the same conclusion in the White context, in other contexts the moral justifiability view is much more destructive than even the extreme version of the

32. United States v. White, 405 F.2d 838 (7th Cir. 1969) (en banc).
33. 401 U.S. at 752.
34. Id.
35. Id. at 753.
reasonableness view. At least in some contexts a court might hypothesize that even a criminal might reasonably expect privacy. However, no criminal would be morally justified in that expectation; thus, any intrusive conduct is permissible as to criminals, at least in fourth amendment terms, since their conduct takes the government’s conduct out of the fourth amendment. Such a reading highlights the erroneous focus of Katz and destroys the fourth amendment.

Fortunately, White never commanded majority support on the search and seizure issue. Moreover, since White it has become clear that at least one member of the plurality did not mean what the opinion appeared to say. In Coolidge v. New Hampshire, decided only two and one half months after White, Justice Stewart’s plurality opinion backed away from both Katz and White.

Coolidge involved the murder of a fourteen-year-old girl. After questioning, defendant agreed to take a lie detector test. While he was out of the house being tested, two policemen obtained his guns and some of his clothing from his wife, after telling her that her husband was in “serious trouble.” Later, believing they had enough evidence to justify arresting defendant and searching his house and cars, the police obtained arrest and search warrants from the state’s Attorney General acting as a justice of the peace and proceeded to arrest defendant and impound his cars, which were plainly visible from the street and defendant’s house. At trial, the state introduced one of the guns and the clothing as well as vacuum sweepings from defendant’s car, which were offered to prove that the victim had been in the car. Defendant was convicted of first degree murder. The New Hampshire Supreme Court affirmed, and the United States Supreme Court granted certiorari to consider defendant’s arguments that his motions to suppress the gun and particles should have been granted. The Supreme Court reversed.

After deciding that the warrant could not justify the search since the

36. Of course the due process clauses of the fifth and fourteenth amendments provide some protection against especially aggravated invasions. See, e.g., Rochin v. California, 342 U.S. 165 (1952).
THE LIMITS OF LAWYERING

Attorney General was not a neutral and detached magistrate, the Court considered the state's arguments that its activities were justified even without a warrant. For present purposes the contentions that the car was lawfully seized because it was in plain view and that the receipt of the guns and clothing from the wife was lawful are of primary importance.

Before Katz the police could seize an item they had probable cause to believe was contraband or a fruit, instrumentality, or evidence of crime if the item was in plain view from a place the police had a lawful right to be. Since, at least before the police arrived, a person might reasonably expect such an item to be private, Katz could have been read as destroying the plain view rule by making the discovery of the item a search subject to the warrant requirement or one of its exceptions. Under a broad reading of White, of course, the plain view rule would survive as long as the person subjected to intrusive governmental conduct turned out to be a criminal.

Coolidge addressed the plain view question in a part of the opinion joined by only four justices. Justice Stewart, writing for the plurality, first characterized the plain view rule as an exception to the warrant requirement, rather than as a rule exempting conduct from the fourth amendment because the conduct was not a search. Treating the intrusion which led to the plain view as the search, Stewart said that plain view does not occur until a search is in progress. Thus he backed away from the strict logic of Katz by looking at what the police were doing rather than the suspect's expectations to define a search. Next the plurality approved the plain view rule as consistent with the policies underlying the warrant requirement—eliminating searches not based on probable cause and limiting searches as narrowly as possible. Then, however, the plurality stated that the plain view rule is limited in two unrelated ways: (1) "[P]lain view alone is never enough to justify the warrantless seizure of evidence," and (2) "[T]he discovery of evidence in plain view must be inadvertent."

While the second limitation (inadvertence) is necessary to serve the

---

41. 403 U.S. at 449-53. The almost incredible fact that only five Justices could agree on even this seemingly self-evident point is some index of the confusion and divisions on search and seizure issues within the Court.
42. See, e.g., Ker v. California, 374 U.S. 23, 43 (1963) (opinion of Clark, J.).
43. But see Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam).
44. 403 U.S. at 464-73 (opinion of Stewart, J.).
45. Id. at 464.
46. Id. at 465-67.
47. Id. at 467.
48. Id. at 467-68.
49. Id. at 468 (emphasis in original).
50. Id. at 469.
policy of confining the scope of searches and to combat the threat of general warrants, the first destroys the plain view rule. As we have seen, the rule permits the seizing of items in plain view from a place where the police lawfully are. Prohibiting the seizure of items just because they are in plain view and requiring a warrant or exception to seize them destroys the rule. If the plurality opinion states the law, the modern plain view rule merely permits the police to use their inadvertent lawful plain view discovery of an item as evidence to obtain a warrant to seize the item or as part of the legitimation of an immediate seizure under one of the exceptions to the warrant requirement.

Justice Stewart accomplished this enormous restriction of the plain view rule first by focusing on the seizure aspect of plain view problems, having found a search by looking at police conduct rather than suspect expectations; and second by putting the problem into the context of the policies underlying the warrant requirement. Thus he blurred the distinction which had been clear in *Katz*51 between defining a search and evaluating one, and he quite properly began to focus on police conduct to answer the newly merged inquiry. Having done that, Stewart also moved away from fact style decision making. While inadvertence is a typical fact style question, Stewart will not let too much turn on it. Even if a discovery is inadvertent, seizure is still prohibited without a warrant or an exception. This is a clear, unmistakable, easily applied rule.

Except for three confusing features *Coolidge* would represent a large step in the direction of non-fact style fourth amendment decision making and hence toward useful clarification of substantive fourth amendment law. Unfortunately, though, substantial confusion remains. First, the plain view portion of the *Coolidge* opinion represents the views of only a plurality of the Court. One can only guess at the status of the plurality's opinion in the presently constituted Court. Second, the legitimacy of a warrantless plain view seizure now depends upon a finding of inadvertence and an exception to the warrant requirement. Inadvertence is a fact style inquiry, and as we shall see,52 the emphasis on exigent circumstances as the basis for most exceptions to the warrant requirement is perhaps the worst example of the evils of fact style adjudication. Thus, *Coolidge* may have solved one problem only to remit decision of actual cases to fact style analysis in a different context. Finally, the plurality opinion itself creates one inexplicable confusion. Justice Stewart refers to the fact that the seized automobile was not contraband, stolen goods, or dangerous in itself, and says that allowing the seizure of such an item in plain view with-

52. See notes 120-85 infra & text accompanying.
out a warrant or exception "would fly in the face" of the warrant require-
ment. Does Stewart mean to suggest that the old plain view rule lives
for stolen goods, contraband, and dangerous items and to create a new
dichotomy similar to the old distinction between mere evidence and con-
traband, fruits, and instrumentalities of crime? If so, his clear rule is
gone and we are returned to the profitless inquiry into, for example, what
objects are dangerous in themselves. Is a gun without a person to shoot
it more dangerous than Coolidge's driverless car? The reasons supporting
the plurality's approach to plain view apply equally whatever the item in
plain view is. The need for prior judicial determination of probable cause
and limitation of the scope of searches does not vary with the items to
be seized. If the old plain view rule lives for some types of objects, Cool-
idge accomplished very little indeed.

These confusions aside, though, and reading Coolidge optimistically,
it is a step away from the Katz-White style of adjudication. The result
in Coolidge is the one compelled by the logic of Katz. The way of reach-
ing the result, though, is a good deal more sound. In terms of impact on
other cases the Coolidge plurality approach will prevent both debacles
like White and excessive and unrealistic controls on the police. If Katz
controlled, the police could not even use their observations during a law-
ful search to justify later getting a warrant for an object observed in
plain view since seeing the object would constitute a search (official in-
vasion of a reasonable expectation of privacy) without a warrant or an
exception to justify it. Such a result would be ridiculous and truly would
ignore the realities of law enforcement. The Coolidge approach, by per-
mitting evidentiary use of knowledge obtained when police see items in
plain view, avoids this unnecessary restriction on the police while protect-
ing individuals from the vagaries of fact style adjudication. In other
words, the abandonment of the fact style inquiry permits a court to draw
the oft mentioned balance between individual rights and law enforcement
needs.

Justice Stewart's handling of the consent search problem in Coolidge
is consistent with my analysis of his approach to plain view and provides
some grounds for optimism. On the question of consent searches, Justice
Stewart spoke for a six man majority of the Court. The question was
the admissibility into evidence of the items Mrs. Coolidge delivered to
the police. The Court held the evidence was admissible, not because the

53. 403 U.S. at 471-72.
54. See Warden v. Hayden, 387 U.S. 294, 300-10 (1967), rejecting the distinction
and the so called "mere evidence" rule.
55. 403 U.S. at 484-90; id. at 491 (opinion of Harlan, J., concurring); id. at 493
(opinion of Burger, C.J., dissenting in part and concurring in part).
search and seizure of the items was proper, but because the police engaged in no search and seizure at all.\textsuperscript{56} The Court examined the conduct and motives of the police and of Mrs. Coolidge to reach the decision that there had been no search: When the police went to the Coolidge home to talk to Mrs. Coolidge, they were not motivated by a desire to find the murder weapon. They behaved "with perfect courtesy." They did not try to coerce or dominate her or to direct her actions by "more subtle techniques of suggestion. . . ." As for Mrs. Coolidge, the Court said that surely if she had voluntarily taken the guns and clothes to the police station, they would have been admissible. Now when she produced them for inspection "it was not incumbent on the police to stop her or avert their eyes." Further, Mrs. Coolidge's motive in presenting the items was to aid her husband, so that no difficult problem of whether she was an agent of the police could arise. The purpose of the exclusionary rule is to deter official misconduct, and none occurred here. There was no search and seizure. The fourth amendment does not apply.

The death of the Katz approach is apparent. In Coolidge we see the Court looking at what the police did, not what the subject expected, to find a search. The police did not go looking for the murder weapon. The person who gave it to them was not trying to help them. If she had given it to them elsewhere, the absence of searching conduct would be clear. Therefore, the police did not search. The focus seems finally to have returned to the relevant place, the conduct of the police.

Further examining police conduct, the Court noted the officers' impeccable behavior and the absence of any conduct that should be deterred. Thus, the questions of what constitutes a search and when a search is lawful continue to merge. The implication of this merger for the law of third party consent searches is substantial. If the Court decides the question of whether the police have searched by evaluating police conduct and motivation and the motives and possible agency status of the consenting party, the decision that there was a search is equivalent to the decision that it was unconstitutional. That is, the Court will only find a search if the conduct of the police was offensive in some way, and offensive police conduct requires suppression of the evidence it unearths. Put another way, the Court has rejected the third party consent exception to the warrant requirement. If the police searched in a third party consent context, they needed a warrant. Thus, the Court has backed away from the fiction filled fact style analysis of Stoner v. California\textsuperscript{57} and Frazier v. Cupp,\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{56} Id. at 487-90.
\item \textsuperscript{57} 376 U.S. 483 (1964) (search of defendant's hotel room with hotel clerk's, but not defendant's, consent unconstitutional).
\item \textsuperscript{58} 394 U.S. 731, 740 (1969) (joint user of defendant's duffel bag may consent to its search).
\end{itemize}
where inquiry was made with conflicting results into such questions as apparent authority and what a suspect "must be taken to have assumed."[69]

Once again, though, as in the case of plain view searches, the retreat from fact style analysis is only partial. The inquiry into whether any search occurred still raises fact style questions, albeit some of them are very easy to resolve. Nonetheless, in terms of providing clarification of search and seizure law, the plain view and consent portions of *Coolidge* do seem to represent the beginning of a useful new approach to determining what is a search and to limiting the number of areas in which fact style adjudication prevails.

Unfortunately, any movement away from fact style decision making in *Coolidge* is not matched in other areas of search and seizure law. While the majority view still seems to be that except in a few situations a search warrant is required to justify a search,[60] the law is almost as confused and fact oriented as if the opposing view that all "reasonable" searches are constitutional[61] prevailed.

Next to the question of what constitutes a search or seizure, the most pervasive problem in fourth amendment law is determining the meaning of probable cause and whether it exists in a given case. Probable cause to believe an item is in a specific place and is connected with criminal activity is necessary to obtain a search warrant.[62] In the absence of such a warrant, the same kind of probable cause is required to support most exceptions to the search warrant requirement.[63] One major exception which requires no showing of probable cause to search is that a search may be performed incident to a lawful arrest.[64] However, since probable cause to believe the subject committed a crime is necessary to make an arrest lawful,[65] the meaning of probable cause is once again determinative. How does the Supreme Court go about deciding the meaning and existence or nonexistence of probable cause?

In *Draper v. United States*,[66] a search incident to arrest case, the Court defined probable cause. Quoting from *Carroll v. United States*[67] the Court said,

59. *Id.* at 740.
61. *See*, e.g., *Chimel v. California*, 395 U.S. 752, 770 (dissenting opinion). On the competition between the warrant preference view and the reasonableness view see notes 120-24 infra & text accompanying.
66. *Id.*
Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.88

Any test which turns on the reasonable man's perceptions of anything is, of course, an archetypal example of a fact style approach to a legal problem. Indeed the Draper Court was particularly forthright in adopting fact style analysis. The Court quoted Brinegar v. United States69 for the proposition that

In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."89

This view of the role of probable cause utterly misconceives the purpose of the concept and its relation to the fourth amendment. Admittedly "probable cause" sounds like the name of a changing and flexible concept, but no more so than the term "unreasonable" in the first clause of the fourth amendment; and surely the label's impact on the ear ought no more to control the one situation than the other. Probable cause is a constitutional term, whose meaning the Supreme Court must elucidate. Of course it is a technical concept, one designed to control the conduct of reasonable and prudent men as well as unreasonable and imprudent ones, and not to be defined by them. The fourth amendment exists to control the government. It is folly to let the controlled dictate the terms by which they will be regulated. A definition of probable cause which turns on the perceptions of reasonable police officers is no standard at all and cannot be expected to contribute to the evolution of rules to deter undesirable police conduct.

Unfortunately, the history of the probable cause concept has been one of an abortive attempt to move away from a Draper fact style analysis followed by a return to fact style adjudication and chaos. Draper itself involved a defendant charged with knowingly concealing and transporting narcotic drugs. One Hereford, a paid informer of the Bureau of Narcotics, who had previously provided reliable information, told an agent that Draper was "peddling narcotics" in Denver, that he had gone to Chicago by train on September 6, and would return by train with three

68. 358 U.S. at 313.
70. 358 U.S. at 313.
ounces of heroin on the morning of September 8 or 9. He described Draper and his clothing with some particularity and said that Draper would be carrying a tan zipper bag, and that he always walked very fast. On the morning of September 9, agents saw a person who matched Hereford's description of Draper depart from an incoming Chicago train and walk fast toward the station exit, carrying a tan zipper bag. The agents arrested Draper, searched him, and found heroin in his possession. Draper sought reversal of his conviction on the ground that the heroin should have been suppressed because the search which uncovered it was not incident to a lawful arrest. The police, he argued, lacked probable cause to arrest him. Applying the test set out above, the Court found that the agents did have probable cause and that therefore the arrest and incidental search were lawful.

The Court noted that Hereford's information to the agent, while hearsay, took on an air of credibility because of Hereford's past reliability.\(^7\) When, pursuing Hereford's tip, agents saw a man matching Draper's description doing what Hereford said Draper would do where and when he said Draper would do it, they had reasonable grounds to believe the critical part of Hereford's information since all the nonincriminating part had been personally verified.\(^8\) Dissenting, Justice Douglas read the facts differently.\(^9\) He pointed out that the police had only an informer's tip to support the notion that Draper was committing a crime. All the conduct described by Hereford and witnessed by the agents was perfectly innocent and added nothing to the informer's tip, of whose basis the agents were entirely ignorant.

Both the majority and the dissenting opinions are right. Draper's appearance and visible conduct were entirely innocent and capable of being known by persons with no knowledge of his criminal activities. Permitting this arrest and search raises the specter of a society controlled by informers where the citizen is at the mercy of an acquaintance who wishes him ill. On the other hand, though, common sense, if not logic, does suggest that when a previously reliable informer demonstrates a fair degree of familiarity with a third person's mannerisms, and tells the police the third person will arrive from Chicago with heroin on a certain date, the police ought to actively suspect heroin possession when the third party arrives as predicted.

The facts, in other words, are ones on which reasonable men may differ—which is precisely why a given judge's or group of judges' opinion about them ought not to control matters as grave as fourth amendment

---

\(^7\) Id.
\(^8\) Id.
\(^9\) Id. at 314-25 (dissenting opinion).
Draper unfairly suggested to the police that they could rely on very little evidence to constitute probable cause, while later cases refused to permit arrests or searches in similar circumstances. A conscientious police officer after Draper almost had to arrest or search on the basis of evidence which later turned out to be insufficient. When a policeman cannot distinguish cases in which he is rebuked for acting from those in which the Court says he "would have been derelict in his duties" had he not acted, it is small wonder that the police disobey the dictates of the fourth amendment and disrespect the Court.

In 1964 the Court moved to correct the intolerable situation left by Draper. In Aguilar v. Texas, another informer case, the Court established two requisites for the sufficiency of an informer's tip to establish probable cause to obtain a search warrant. The affidavit supporting the warrant application must show: (1) some of the underlying circumstances on which the informant based his conclusions, and (2) some of the underlying circumstances which led the police to believe him. Translated to the warrantless arrest context of Draper, the police would presumably have to testify at a suppression hearing as to the information on which the informer had based his tip and why they believed their informer. Measured by those standards the Draper evidence would have to have been suppressed because, as Justice Douglas pointed out, the agents lacked "any of the facts which the informer may have had."

Aguilar represented a salutary movement away from fact style adjudication and toward specific rules to govern police conduct. The approach was sound as the Court began telling the police what to do. Naturally, Aguilar left open many questions: How many circumstances must be related? Can a large number of highly persuasive circumstances on one of the two Aguilar "prongs" make up for a deficiency on the other? To what extent can evidence insufficient to provide probable cause corroborate an insufficient tip to add up to an adequate showing? Unfortunately, the Court in working out answers to some of these questions has retreated from the Aguilar approach with the result that the law of probable cause is chaos once again.

Spinelli v. United States presented the question of the corroboration of an insufficient tip by independently insufficient evidence, in many ways the same question with which the Court had grappled in Draper.

Thus, \textit{Spinelli} provided an opportunity to strengthen the \textit{Aguilar} approach and abandon \textit{Draper} explicitly as \textit{Aguilar} had appeared to do implicitly. Justice Harlan's opinion for the Court was not so clear.

The F.B.I., suspecting William Spinelli of interstate gambling activities, obtained a search warrant for a St. Louis apartment based on an affidavit which alleged that: (1) On four of five days during which the F.B.I. had Spinelli under surveillance, Spinelli was seen crossing a bridge from Illinois to St. Louis between 11:00 a.m. and 12:15 p.m. and parking his car in a specific apartment house's parking lot between 3:30 and 4:45 p.m. Once he was seen to enter a particular apartment in the building; (2) The apartment contained two telephones, listed in the name of Grace P. Hagen, with numbers WY4-0029 and WY4-0136; (3) Spinelli was known to affiant and federal and local law enforcement agents as a bookmaker, gambler, and associate of bookmakers and gamblers; and (4) The F.B.I. had been informed by "a confidential reliable informant" that Spinelli was operating a handbook, accepting wagers and disseminating wagering information by means of telephones WY4-0029 and WY4-0136. The government's search pursuant to the warrant uncovered evidence necessary for Spinelli's conviction.

The Court recognized, of course, that the tip referred to in the fourth allegation was by itself insufficient under \textit{Aguilar} to permit a finding of probable cause.\footnote{Id. at 416.} The affidavit provided neither support for the conclusion that the informer was reliable nor a statement of the circumstances upon which the informer himself had relied. Having rejected the possibility of finding probable cause on the basis of the informer's tip, the Court considered the corroborating allegations.\footnote{Id. at 416-19.} In order to provide probable cause, the Court said, the corroborated tip must be "as trustworthy as a tip which would pass \textit{Aguilar}'s tests without independent corroboration."\footnote{Id. at 415.} This tip, even when corroborated, fell short.

In determining the sufficiency of the corroboration, the Court said \textit{Draper} "provides a suitable benchmark."\footnote{Id. at 416. See also id. at 417 ("Draper provides a relevant comparison.").} While a magistrate confronted with the details of the informer's report in \textit{Draper} "could reasonably infer that the informant had gained his information in a reliable way . . . this meager report [the tip in \textit{Spinelli}] could easily have been obtained from an offhand remark heard at a neighborhood bar."\footnote{Id. at 417.} Furthermore, the F.B.I.'s independent investigation showed, at most, that Spinelli could have used the identified phones for some purpose.
the independent evidence in *Draper* which "corroborated much more than one small detail"\(^{84}\) and showed that the informer's tip was not fabricated and was "of the sort which in common experience may be recognized as having been obtained in a reliable way,"\(^{85}\) this evidence fails to satisfy the *Aguilar* requirements. Finally, the statement that Spinelli was known to be a gambler was entitled to no weight.\(^{86}\) The affidavit failed to show probable cause, the warrant was improperly issued, and the evidence should have been suppressed.

The *Spinelli* opinion, while probably reaching the right result, made no sense. The Court purported to "explicate"\(^{87}\) the principles of *Aguilar* by using *Draper* as an example of a case that would meet *Aguilar*'s requirements. While *Draper* may have been decided correctly, it is hard to justify in terms of *Aguilar*'s two prong test. Having revived *Draper*, the Court then refused to apply it to *Spinelli*, a case whose facts were arguably as strong or stronger for the prosecution than *Draper*'s, thus leading Justice White to complain that "The majority . . . while seemingly embracing *Draper*, confines that case to its own facts."\(^{88}\) One reading *Spinelli* might well ask whether the Court had followed *Draper*, distinguished it (and if so, upon what basis), or overruled it.

*Spinelli* is a classic example of letting the tail (of rules about informers' tips) wag the dog (of probable cause). Probable cause is a concept independent of rules about informers, and may exist without any informer being involved. The informer cases merely exemplify one method by which probable cause may be obtained. *Aguilar* provided a rule for measuring the sufficiency of the informer's tip to provide probable cause when the police relied entirely on the tip. Nothing in the *Aguilar* opinion bears on the question of what constitutes probable cause in a non-informer case. *Spinelli* involved an inadequate tip, and could, therefore, have been viewed the same as a case involving no tip at all. However, the non-tip evidence alone also failed to provide probable cause. Thus, the question presented was whether the tip and non-tip evidence combined to provide probable cause. The ultimate inquiry always remained probable cause, not the adequate of the tip. Thus, the Court should have asked whether a tip which does not meet *Aguilar*'s standards may nonetheless be used to corroborate other evidence of probable cause, and, if so, which insufficient tips may be so used and how much weight they may be accorded. Instead the Court asked the opposite question: To what ex-

---

84. Id.
85. Id. at 417-18.
86. Id. at 418-19.
87. Id. at 412.
88. Id. at 428-29 (concurring opinion).
tent may non-tip evidence be used to corroborate an inadequate tip? Evidence gained through an independent F.B.I. investigation of a suspect can no more show the basis for an informer's tip than investigation of apples can tell one anything about an orange. But the information on which the informer based his tip is irrelevant anyway, since the tip is not in issue. The question is whether the tip contributes materially to a finding of probable cause. The tip's basis may be worth examining on that question, but not by proving that it must have had a basis since it seemed to accord with reality independently revealed. An independent revelation is not strengthened by the assertion that an anonymous tipster said something consistent with it. The revelation stands or falls by itself. It fell in Spinelli because it indicated nothing bad about the defendant. Why did it not fall in Draper?

Unlike the tip in Spinelli, the one in Draper satisfied one of Aguilar's two requirements. It did provide a basis for believing the informer. Thus, the tip in Draper was arguably not worthless on the issue of probable cause. At least it came from a source whose credibility was established. Moreover, the independently revealed evidence in Draper was different from that in Spinelli. The Spinelli informer reported an existing fact, which many people could have known. The Draper informer predicted the future in detail. It is true that there was nothing incriminating about Draper's conduct, but all his conduct was precisely predicted by a person known to be reliable who also predicted incriminating conduct. Thus, there was reason to believe Hereford, the informer, knew what he was talking about. The tip's basis was established not because the tip was shown to accord with reality, but because it predicted future reality. Thus, Draper involved a tip whose basis in reality was shown and which came from a reliable source. It satisfied the substance, if not the form of Aguilar.

The trouble, of course, is that the very essence of Aguilar was quite properly an insistence on form. Justice Harlan in Spinelli tried to comply with the form by insisting that the non-tip evidence tend to establish the two Aguilar requisites for a tip. He should have saved Aguilar for pure tip cases and proceeded to an independent evaluation of the existence of probable cause in the case before the Court. Doing so, it is clear that absent any reason to believe the tip, innocent conduct plus a tipster's accurate assertion of one public fact provide no grounds to search. Stated simply, without the tip, the Spinelli evidence failed to show probable cause; the tip added nothing; therefore, no probable cause was shown.

The result of refocusing the inquiry as I have suggested would have been to leave Aguilar's non fact style approach intact in a limited area while leaving the broader area of probable cause open for such develop-
ment as seemed appropriate. The Court could have used Spinelli to announce a non-fact style rule for determining probable cause or waited for a different case as it chose. Instead, it clouded the one non-fact style rule it had already developed in the area.

The Spinelli Court did lay down one new rule, though: A bald assertion that a suspect is known to be a criminal of some sort is entitled to no weight on the question of probable cause. Unfortunately, even that rule is in jeopardy as, since Spinelli, the Court has added to the confusion of the probable cause cases.

United States v. Harris involved a search performed pursuant to a warrant issued on the following affidavit:

Roosevelt Harris has had a reputation with me for over four years as being a trafficker of nontaxed distilled spirits, and over this period I have received numerous information from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal information of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past two weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known and utilized as the "dance-hall," and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain whiskey for this person and other persons.

The Court, reversing the Court of Appeals reinstated Harris' conviction based on evidence obtained by the search. Chief Justice Burger announced the judgment for the badly divided Court: After emphasizing the importance of giving a liberal, common sense interpretation to applica-
tions for search warrants, the Chief Justice (here joined only by Justices Black and Blackmun) adopted as the test of an affidavit’s sufficiency language from Jones v. United States to the effect that an affidavit relying in part on an informant’s tip is sufficient if there was a “substantial basis” for crediting the hearsay. He found such a basis in Harris in the affidavit’s recitation of the informant’s personal observations, and in affiant’s knowledge of Constable Johnson’s earlier seizure. He rejected the necessity of an allegation that the informant had previously given correct information, and he considered as probative the allegation of affiant’s knowledge of Harris’ reputation, specifically refusing to follow Spinelli’s prohibition against considering such a statement. Finally, with Justice White now joining the plurality, the Chief Justice found an additional reason to credit the informant’s testimony in the fact that it contained statements against his penal interest. Significantly, Justices Black and Blackmun, who joined Chief Justice Burger’s whole opinion, also urged that Spinelli be overruled. Justice Stewart agreed with the liberal reading dicta and concurred in the judgment. Justice White, considering the affidavit as a whole, also concurred in the judgment.

Justice Harlan, joined by Justices Douglas, Brennan and Marshall dissented. He said that in informant cases a magistrate may find probable cause only if he concludes that (1) the knowledge attributed to the informant would support a finding of probable cause, if true; (2) the affiant is truthfully reporting the informant’s information; and (3) “it is reasonably likely” that the informant’s report was correct. Harris raised the question of the correctness of the informant’s report, which Harlan said can be decided only by looking to the two Aguilar requirements. Here Justice Harlan found a sufficient showing of the circumstances on which the informant based his tip but not a sufficient showing of the informant’s reliability.

95. 403 U.S. at 580-81.
96. Id. at 581.
97. Id. at 581-82.
98. Id. at 582-83.
99. Id. at 583-84.
100. Id. at 585 (concurring opinion of Black, J.); id. at 585-86 (concurring opinion of Blackmun, J.).
101. Id. at 585.
102. Id.
103. Id. at 586 (dissenting opinion).
104. Id. at 587.
105. Id. at 587-88.
106. Id. at 589.
107. Id. at 590-93.
Even assuming that the allegation that the informer was "prudent" meant that he was "credible" or "reliable," the allegation was insufficient because a magistrate, not a policeman filing an affidavit, is supposed to make the determination of reliability. The underlying circumstances necessary to permit the magistrate to make that judgment are missing here. The informant's claim to be speaking from personal knowledge will not suffice since that goes to the reliability of the information if true and not to the likelihood of its being true. Furthermore, Constable Johnson's four-year-old seizure is too remote to permit present inferences to be drawn from it; the reports of "all types of persons" about defendant's activities merely amount to another assertion that his reputation is bad; and the declaration against interest argument is absurd, especially in view of the favorable treatment the government gives informers. In short, Justice Harlan found the Chief Justice's analysis totally unpersuasive, indicating "more a firm hostility to Aguilar, Nathanson, and Spinelli than a careful judgment as to the principles those cases reflect." A fair reading of the Chief Justice's opinion and the expressed views of Justices Black and Blackmun suggests that Justice Harlan's perception of hostility was correct. Where that leaves us is unclear. Even trying to avoid speculation on the effect of the substitution of Justices Powell and Rehnquist for Black and Harlan, murkiness is the order of the day. The four Harris dissenters obviously take seriously the rule approach of Aguilar, read Spinelli as carrying that approach forward, and prefer that style of decision making to the vague fact style approach of the three plurality Justices' substantial basis test. The views of Justices Stewart and White are largely unexpressed, and I think it is fair to say on the basis of Justice White's strange separate opinion in Spinelli, and virtual silence in Harris, that the Justice himself is unsure about these matters.

Surely the result in Harris is inconsistent with Aguilar and Spinelli. Harris upholds a finding of probable cause based on a tip corroborated

108. Id. at 591 & n.4.
109. Id. at 590-91.
110. Id. at 591.
111. Id. at 591-93.
112. Id. at 596.
113. Id. at 596-98.
114. Id. at 594-96.
116. 403 U.S. at 601.
117. The majority, however, while seemingly embracing Draper, confines that case to its own facts. Pending full scale reconsideration of that case, on the one hand, or of the Nathanson-Aguilar cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court.
only by reputation evidence and one four-year-old event. That is a far cry from the independent detail held insufficient in Spinelli and accepted in Draper. Factually, Harris is almost on all fours with Aguilar; yet the Court reached the opposite result. What we know after Harris is that a majority of the Court prefers a fact style approach on the question of probable cause to the rules of Aguilar, and, that, as a consequence, predicting results of cases is impossible. A policeman or a magistrate could not possibly know what is required of him after Harris. Here, as elsewhere, fact style adjudication prevents a deterrent sanction from having any chance to succeed. Moreover, a pervasive fact style approach prevents a policeman or magistrate even from knowing the few rules which probably do exist. Four Justices oppose using reputation evidence to show probable cause; three do not; two others join the three in result because (1) affidavits should be liberally construed, and (2) "the affidavit, considered as a whole, was sufficient to support issuance of the warrant." What is a magistrate to do?

Assuming that the government has performed a search or seizure governed by the fourth amendment and that the probable cause issue in whatever context it presents itself can be resolved, the next major issue is whether the police needed a warrant to search or seize. The fourth amendment provides,

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

For years the conjunction of the amendment's two clauses caused substantial confusion as to whether searches pursuant to warrant were the norm or merely one acceptable form of search with warrantless searches being equally acceptable as long as they were not "unreasonable." In 1967, Katz v. United States made clear the Court's preference for searches with warrants, and the warrant preference view still prevails although its position is precarious at best. For purposes of

119. Id. (opinion of White, J.).
120. U.S. Const. amend. IV.
avoiding a fact style approach to fourth amendment problems, the warrant preference view is obviously the more desirable. Unfortunately, though, the working out of the exceptions to the warrant requirement has created a situation very close to that which would prevail if the law insisted only that searches be reasonable. Once again fact style decision making is the norm, and chaos is the result.

For years most searches were performed without a warrant under the rule permitting warrantless searches incident to a lawful arrest.\textsuperscript{125} Since felony arrests may be made with or without arrest warrants\textsuperscript{126} anywhere the police happen to find their suspect, and since the right to search follows automatically from the lawful arrest,\textsuperscript{127} the search incident to lawful arrest exception permitted a search of a place of the police's choosing without any requirement of the existence, much less a showing, of probable cause to search, and without even requiring a prior showing of probable cause to arrest. The warrant avoidance possibilities of such an exception are enormous, and if any significant scope is permitted the police engaged in a search incident to lawful arrest, the need for search warrants will be slight indeed.

Before 1969 the proper scope of searches incident to lawful arrests was a matter of frequent litigation in the Supreme Court, and the results were spotty and unpredictable at best.\textsuperscript{128} However, after the clear 1967 announcement of the warrant preference, conditions were obviously ripe for a substantial restriction of the search incident exception to close this gaping loophole in the requirement that the police search only pursuant to search warrants. That restriction came in the 1969 case of \textit{Chimel v. California}.\textsuperscript{129}

In \textit{Chimel} three police officers went to defendant's home to arrest him for the burglary of a coin shop. They waited ten or fifteen minutes with defendant's wife till defendant arrived home, arrested him, and asked his permission to search. He refused to consent, but the officers, who had no search warrant, searched the entire three bedroom house, attic, garage, and workshop anyway, and seized numerous items. Over objection, these items were admitted into evidence against defendant at his burglary trial. The Supreme Court reversed defendant's conviction.

Writing for the majority, Justice Stewart reviewed the history of the

\begin{footnotes}
\item 126. L. Hall, Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 270 (3d ed. 1969).
\item 129. 395 U.S. 752 (1969).
\end{footnotes}
search incident exception\textsuperscript{139} that culminated in the decision in \textit{United States v. Rabinowits},\textsuperscript{131} which "has come to stand for the proposition" that an incidental search could extend to the area in the possession or under the control of the arrested person.\textsuperscript{132} After noting that historically \textit{Rabinowits} was "hardly founded on an unimpeachable line of authority,"\textsuperscript{133} Justice Stewart examined the merits of the \textit{Rabinowits} rule. He looked to the reason for the search incident exception, which exists to permit officers to protect themselves from armed arrestees and to prevent the destruction of evidence, and found that \textit{Rabinowits} provided more latitude for the police than the reason for the rule would support.\textsuperscript{134} Searches beyond the area from within which the arrestee can obtain a weapon or destructible evidence are not necessary to protect the police or to prevent the defendant from destroying evidence. Therefore, the Court overruled\textsuperscript{135} \textit{Rabinowits} and its precursor \textit{Harris v. United States}\textsuperscript{136} and limited the permissible scope of searches incident to lawful arrest to the area within the arrestee's "immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."\textsuperscript{137}

Like all legal rules the \textit{Chimel} rule left some questions open and some room for interpretation, but it was about as specific as one can reasonably expect a rule to be. It was clear and easy to understand, and while a policeman might not have liked the rule, he could at least obey it. Furthermore, one trying to divine the Court's attitude could deduce from \textit{Chimel} a continued adherence to the warrant preference which \textit{Katz} had so forcefully articulated, and could govern his conduct accordingly.

This condition of happy clarity did not last long. Justice White's dissent\textsuperscript{138} sowed the seeds of later developments. Starting from the rejected premise that reasonableness governs which searches are permissible,\textsuperscript{139} White concluded that the \textit{Chimel} search was reasonable because the police were confronted with "exigent circumstances" which excused them from obtaining a warrant.\textsuperscript{140} \textit{Chimel}'s wife was present and undoubtedly knew of the burglary. Had the police left to obtain a search warrant, Justice White thought Mrs. Chimel would "very likely" have removed the stolen...

\textsuperscript{130} \textit{Id.} at 755-60.
\textsuperscript{131} 339 U.S. 56 (1950).
\textsuperscript{132} 395 U.S. at 760.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 762-63.
\textsuperscript{135} \textit{Id.} at 768.
\textsuperscript{136} 331 U.S. 145 (1947).
\textsuperscript{137} 395 U.S. at 763.
\textsuperscript{138} \textit{Id.} at 770 (dissenting opinion).
\textsuperscript{139} \textit{Id.} at 772-73.
\textsuperscript{140} \textit{Id.} at 773-75.
coins. Therefore, since the police had probable cause to search for the coins, it was only reasonable for them to do so before the evidence disappeared.

Justice White conceded that since three police officers were present at the Chimel house, another possibility did exist. One officer could have remained with Mrs. Chimel while the others obtained the search warrant and took defendant to jail. However, said Justice White, this was not an acceptable alternative for two reasons: (1) the invasion of Mrs. Chimel's privacy would be "almost as great" as that of the search; and (2) if Mrs. Chimel summoned an accomplice, the lone policeman could not have watched them both.

Therefore, lacking any other acceptable way out of their exigent situation, Justice White concluded that the police could search without a warrant. The arrest, of course, created the exigency. Since the police had probable cause to search before the arrest, they could easily have avoided the difficult situation by obtaining a search warrant in advance. No exigency prevented that. Nonetheless, as long as the arrest was lawful, Justice White was willing to measure the exigency from the moment of arrest, thereby allowing the police to create their own exigency and willfully avoid the search warrant requirement.

Justice White's view of exigencies is rather extreme. The facts in Chimel were a far cry from those in the principal cases which gave rise to an exigency exception to the warrant requirement: Carroll v. United States, involving the search of a moving car on a highway; Schmerber v. California, involving the extraction of blood for testing before the alcohol believed to be in the blood dissipated; and Warden v. Hayden involving the hot pursuit of a fleeing felon. Those cases all differed from Chimel not only in the degree of emergency, but also because the police in Carroll, Schmerber, and Hayden did not create the exigency as the police did in Chimel.

Exigency or no exigency, though, what is important for our purposes is a comparison of the Stewart and White approaches to Chimel. Justice White focused explicitly on exigencies, obviously a focus not likely to produce agreement in a given case or consistency among cases. Justice Stewart, on the other hand, laid down an inflexible rule. Yet the two Justices' approaches were not as different as they might seem. Justice Stewart rooted his rule in the exigencies which almost inevitably ac-

141. Id. at 775 n.5.
142. Id.
143. 267 U.S. 132 (1925).
company an arrest—the danger than an arrestee might injure the arresting officer or escape, and the danger that he might destroy evidence. Thus, in a sense, the search incident to arrest exception as limited in *Chimel* is merely a special instance of the exigent circumstances rule.

Justice White’s approach is the same. Applying the reasonableness test to searches incident to arrest, Justice White says there are so few situations in which a search of the area necessary to protect the officer and prevent destruction of evidence is not justified, that the law will not inquire into the facts of a specific case to see whether the justification really exists. He looks to specifics, factual exigencies, only when the search exceeds that limited scope.\(^{146}\)

Justice Stewart also will permit exigent circumstances searches which extend beyond the area permitted by *Chimel*;\(^{147}\) and he and Justice White agree that probable cause to search is a requisite of such searches.\(^{148}\) Thus the two Justices agreed about much of the *Chimel* problem, but reached different conclusions because of different premises about the importance of warrants and conflicting interpretations of the facts. Stewart, committed to warrants, found no exigent circumstances. White disagreed, although the suggestion of exigencies on the *Chimel* facts seems sufficiently farfetched to suggest that a retreat from the strong warrant preference is really what White had in mind.

Both the majority approach articulated by Justice Stewart and the minority view of Justice White are internally inconsistent since a narrow search incident to arrest exception cannot easily coexist with a flexible exigency rule. Logically, White should always review the facts, while one committed to the *Chimel* limitations on incidental searches never should. The deviation from logic costs Justice White nothing. Since he is opposed to focusing on warrants and to broad fourth amendment protections, designating a specific legal area (searches incident to lawful arrest) where warrantless searches are always allowed serves his policy predispositions while leaving him free to characterize cases as involving a different problem (exigencies) when that seems desirable. Should he wish to strike down a search, of course, he can accomplish that by characterizing the search as within the problem area governed by the narrow rule and finding that the search did not meet the rule’s requirements. Thus, he has preserved maximum flexibility for himself.

Justice Stewart, on the other hand, conceded far too much. By emphasizing the exigent nature of incidental searches, he gave respectability to the exigency approach, an approach that is ultimately at war with both

\(^{146}\) 395 U.S. at 773 (dissenting opinion).

\(^{147}\) See 395 U.S. at 764 n.9.

\(^{148}\) Compare id. with id. at 773-74, 780-83 (dissenting opinion).
the warrant preference and the narrow *Chimel* rule. This concession to fact style decision making led him astray in *Chambers v. Maroney*,\(^{149}\) although he recovered somewhat in *Coolidge v. New Hampshire*.\(^{150}\)

*Chambers v. Maroney* was decided on June 22, 1970, the same day as *Vale v. Louisiana*\(^{151}\) and just one year after *Chimel*. *Vale* and *Chambers* are an incredible pair of cases, and the playing out in them of the views of Justices White and Stewart is fascinating. Justice Stewart wrote the Court’s opinion in *Vale*. In 1967, two years before *Chimel*, Donald Vale’s bond on a pending narcotics charge was increased. The police, armed with two arrest warrants growing out of the bond increase, set up a surveillance of Vale’s house. They observed a car drive up and blow its horn. Vale, whom an officer recognized, came out of the house, talked to the occupant of the car, looked up and down the street, and went inside. Soon he returned, looked up and down again, went to the passenger side of the car and leaned through the window. The officers, convinced a narcotics sale had taken place, drove toward Vale. He saw them and headed for the house, while the police foiled the car driver’s attempt to escape. They arrested Vale on his front steps. Simultaneously, the driver, a known addict, placed something in his mouth. He was arrested. The police told Vale they were going to search the house. Soon Vale’s mother and brother appeared and learned of the arrest and impending search. The police found narcotics in a rear bedroom.

The search obviously could not pass muster as a search incident to a lawful arrest under *Chimel*. However, since it occurred before *Chimel* was decided, the Court could not apply *Chimel* without deciding that *Chimel* was retroactive. The Court avoided the retroactivity issue by finding the search impermissible under pre-*Chimel* law.\(^{152}\) Even before *Chimel*, the Court said, a search of a house could only be upheld as incident to arrest if the arrest occurred inside the house. The Court emphasized its preference for warrants and the limited nature of the exceptions to the warrant requirement. Since the police were able to obtain two warrants for Vale’s arrest, the Court saw no reason to believe it was impractical for them to obtain a search warrant as well. The arrest on the street could not provide its own exigencies.

Justice White silently joined the majority in *Vale* even though on its facts *Vale* was a more appealing case for the state than *Chimel*. In *Chimel* the police created their own exigencies by failing to obtain a search warrant before they went to Chimel’s house. In *Vale* the police could not

---

150. 403 U.S. 443 (1971).
152. *Id.* at 33-36.
have obtained a search warrant in advance. As Justice Black pointed out,\textsuperscript{153} nothing in the bond increase, which made the arrest warrants lawful, gave probable cause to search Vale's house.\textsuperscript{154} The police observed an unexpected narcotics sale and acted quickly to arrest the culprits. Unless the police could reasonably be expected to have departed before Vale's mother and brother appeared,\textsuperscript{155} they were confronted with a situation where failure to search presented a real risk of loss of evidence. Not only is heroin easier to destroy than stolen coins, but also Vale's brother was a known narcotics violator,\textsuperscript{156} probably a good deal more likely to destroy evidence than the presumably innocent Mrs. Chimel.

Cool reflection may suggest that after seeing the sale the police should have left Vale's home, tailed his buyer, arrested him without Vale's knowledge, and obtained a search warrant. But that is a lot to expect from policemen who have just seen a narcotics sale take place, and who are under orders to arrest the seller. At a minimum, the police conduct here was less offensive and more "reasonable" than that in \textit{Chimel}. Yet Justice White who found exigencies in \textit{Chimel} found none here, suggesting that he does preserve the exigency analysis for searches he wants to uphold and the search incident analysis for searches he wants to strike down.

\textit{Chambers v. Maroney}\textsuperscript{157} involved the former kind of search. There, two men robbed a service station. Two teenagers noticed a blue compact station wagon speed from a nearby parking lot at about the time they learned of the robbery. They told the police that four men, one wearing a green sweater, occupied the car. The service station attendant said one robber wore a green sweater, the other a trench coat. Within an hour the

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.} at 40 (dissenting opinion).
  \item \textsuperscript{154} A police officer testified that the increased bond was the only reason the police were seeking defendant Vale, and that the arrest warrants had nothing to do with the items seized. Record at 78-79. The state argued that the police stalked out the Vale house because they wanted to be sure Vale was present before approaching the house. Brief for Appellee at 1-2, 6. \textit{But see Record at 67} ("If we moved before we knew he was there, we'd lose everything."). 82 ("[W]e had reason to believe there were narcotics in the house. . . .") suggesting the police's success may not have been wholly fortuitous.
  \item \textsuperscript{155} Mrs. Vale and defendant's brother James appeared three or four minutes after the police entered the house to look for other occupants, and before the police began their search for evidence. Record at 83. To argue that the police erred in entering the house before Vale's relatives arrived, but would not have erred had they stood outside for four minutes and then entered the house and begun the search, would truly exalt form over substance and prevent the police from ascertaining whether exigencies which will justify a search exist.
  \item \textsuperscript{156} James Vale was charged in the same proceeding as his brother Donald. Record \textit{passim}. The statement in the text that James was a "known" rather than newly discovered narcotics violator is an inference from evidence about the police's general familiarity with the Vales. \textit{Id. passim.} The record does not specifically state that James was a previously known offender.
  \item \textsuperscript{157} 399 U.S. 42 (1970).
\end{itemize}
police stopped a blue compact station wagon containing four men. Petitioner, one of the occupants, was wearing a green sweater. A trench coat was in the car. The police arrested the occupants and drove the car to the police station, where they searched it without a warrant and discovered damning evidence. The Court upheld the search and seizure.

Writing for the majority, Justice White recognized that the search could not be justified as incident to a lawful arrest since

the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house. 158

Nonetheless, the search was valid because supported by probable cause and performed in exigent circumstances. The teenagers' and service station attendant's reports, the style and color of the car, the number of its occupants, and the green sweater and trench coat provided probable cause to search. What were the exigent circumstances?

Justice White relied on Carroll v. United States 159 for the proposition that an automobile may be searched in circumstances when a home or office could not be "where it is not practicable to secure a warrant because the vehicle can be quickly moved . . ." 160 He recognized that Carroll and other cases do not always permit warrantless automobile searches on probable cause, but rather allow such searches only where

the opportunity to search is fleeting since a car is readily movable. . . . Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. 161

In Chambers the car was impounded at the police station, and all its occupants were under arrest. Thus, one might have thought that this was a case without exigencies if, as Justice White had already conceded, any automobile case could be. Yet Justice White found exigencies here even as he had in Chimel.

Considering the possibility that only the immobilization of the car should be permitted while the police obtained a warrant, Justice White could not decide whether immobilization or a warrantless search was the greater intrusion. 162

158. Id. at 47.
159. 267 U.S. 132, 153 (1925).
160. 399 U.S. at 48.
161. Id. at 51.
162. Id. at 51-52.
a car and searching it, he concluded that either course was reasonable. He noted that different consequences might attach in a case of "unforeseeable cause to search a house" (citing Vale), but reiterated the constitutional difference between houses and cars.

Justice White's opinion does not withstand analysis. Once the car was seized and its occupants arrested, the police had ample time to obtain a search warrant, and "the reasons which have been thought sufficient" to justify exigency vehicle searches had no greater applicability than those justifying searches incident to lawful arrests. Moreover, Justice Harlan undercut the majority's argument against allowing only the immobilization of the car by pointing out (1) that the majority, which could not decide whether immobilization or searching was the greater intrusion, allowed both; and (2) that seizure and immobilization will almost always be the lesser intrusion since the delay will not inconvenience incarcerated defendants, and persons who wish to avoid a search will prefer a magistrate's judgment to an immediate search. Those who prefer to avoid delay may do so by consenting to a search.

While Justice White's majority opinion in Chambers seems clearly wrong, its wrongness is not as important as its style and its implications for other cases. The opinion distinguishes car searches from building searches, but the distinction is meaningless in Chambers since the reason for the distinction (a car's mobility) was not present in the case. Whatever the other members of the majority thought, Justice White, himself, obviously would not allow the building-car distinction to control if the search of a house were involved. His opinion in Chambers is almost identical to his dissent in Chimel. In each case he noted the inapplicability of the search incident to lawful arrest exception; in each he stressed the reasonableness of police conduct rather than the preference for a search warrant; in each he found exigencies when none were present under any fair reading of the facts; and in each he postulated a nonexistent conflict between the constitutional right asserted and another right (Mrs. Chimel's in Chimel, the right not to have the car seized in Chambers), suggested the inevitability of sacrificing one right, and used the conflict and supposedly inevitable sacrifice to justify a warrantless search. Since the exigencies in Chambers were obviously no greater

163. *Id.* at 52.
164. *Id.*
165. *Id.*
166. *Id.* at 63 & n.8 (concurring and dissenting opinion).
167. *Id.* at 63-64.
169. Compare 399 U.S. at 51-52, with 395 U.S. at 772-75.
170. Compare 399 U.S. at 50-51, with 395 U.S. at 773-75.
171. Compare 399 U.S. at 51-52, with 395 U.S. at 775 n.5.
than in *Chimel*, the *Chambers* majority, if it meant to be taken seriously, sounded an early death knell for *Chimel* and reopened under a pseudonym the gaping loophole which had existed in the warrant requirement before the *Chimel* decision. Yet read with *Vale*, *Chambers* seems to have no such drastic implications. The Court’s reasoning in *Chambers* would apply equally well to a house search as a car search, but the majority did emphasize the car-building distinction and did cite *Vale* for the proposition that a different result would obtain in a house search case.\(^{172}\) Finally, despite the similarity of the majority opinion in *Chambers* and Justice White’s dissent in *Chimel*, Justice White did vote to uphold the *Chambers* car search but not the house search involved in *Vale*.

Justice Stewart did nothing in *Chambers* to clarify the situation. Rather than take issue with the majority’s apparent emasculation of *Chimel*, he restated his view that fourth amendment violations are not sufficient grounds for collateral attack, but, recognizing his obligation under existing law to decide the case on its merits, joined the opinion and judgment of the Court.\(^{178}\) Since *Chambers* appears to be at odds with Justice Stewart’s previously stated views and the Court’s prior decisions, Justice Stewart’s position is hard to understand. He partially explained his view in *Coolidge v. New Hampshire*.\(^{174}\)

In *Coolidge*, where the state’s search warrant was fatally defective, the state tried to justify the seizure and search of defendant’s car as incident to his arrest. Since the activities occurred before *Chimel*, which is not retroactive,\(^{176}\) pre-*Chimel* law governed. Justice Stewart found the search failed to meet even the *Rabinowitz*\(^{177}\) standard for searches incident to lawful arrests since it was neither substantially contemporaneous with nor confined to the immediate vicinity of the arrest.\(^{177}\) Furthermore, he held, the seizure and search could not be justified under the exigency-car search doctrine of *Carroll* and *Chambers*.\(^{178}\) Justice Stewart emphasized that the vehicle search exception was grounded in the exigency posed by an automobile’s mobility and the frequent impracticality of obtaining a warrant to search a car. He then made a factual analysis of the pending case to determine whether exigencies existed. He found that they did not: The police had long known of the car’s probable role in the murder; Coolidge was cooperative and gave no indication of intending flight; he had already had ample opportunity to destroy evidence if he meant to; the

\(^{172}\) 399 U.S. at 52.
\(^{173}\) *Id.* at 54-55 (concurring opinion).
\(^{174}\) 403 U.S. 443 (1971).
\(^{178}\) *Id.* at 458-64.
car was parked in his driveway, not being used for any illegal purpose and not containing stolen, contraband, or dangerous items; Coolidge was under arrest and had no opportunity to escape; the police drove Mrs. Coolidge, the only other adult present, to another town for the night and stayed with her there until after the car reached the station house; and two policemen guarded the Coolidge house all night. Since the facts disclosed no exigencies, Justice Stewart did not allow the search.

Yet *Chambers v. Maroney* also had not involved exigencies on any but the most strained reading of the facts, and there Justice Stewart had joined the Court in upholding the search. In *Coolidge* Stewart distinguished *Chambers* by noting that, applying *Carroll*, a warrantless search would have been permitted at the time of Chambers', but not Coolidge's arrest. Therefore, he said:

*Chambers* . . . held only that, where the police may stop and search an automobile under *Carroll*, they may also seize it and search it later at the police station.¹⁷⁹

The rationale of *Chambers* is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here we deal with the prior question of whether the initial intrusion is justified.¹⁸⁰

The author of the *Chambers* opinion, of course, did not agree with Justice Stewart about either the case's holding or its rationale. Justice White, who had struggled to find exigencies in *Chambers*, now took the position that searches of vehicles with probable cause, but without warrants, are reasonable regardless of the existence or nonexistence of exigent circumstances.¹⁸¹ Indeed, White stated that this is the principle "re-affirmed" in *Chambers*.¹⁸² Nothing in the *Carroll-Chambers* line of cases limits it to cases of cars in motion or about to move. The fact that a vehicle is movable will suffice.¹⁸³ White concludes that "in the interest of coherence and credibility" the Court should overrule *Chambers* and *Carroll* or automatically allow warrantless searches of vehicles on probable cause.¹⁸⁴ To do so would be in accordance with "the commonsense standard of reasonableness governing search and seizure cases."¹⁸⁵

The contrast in styles between Stewart and White is striking. Justice

---

¹⁷⁹. *Id.* at 463.
¹⁸⁰. *Id.* at 463 n.20 (emphasis in original).
¹⁸¹. *Id.* at 524 (concurring and dissenting opinion).
¹⁸². *Id.*
¹⁸³. *Id.* at 525.
¹⁸⁴. *Id.* at 527.
¹⁸⁵. *Id.*
Stewart continues to analyze the cases like a lawyer. He looks for the reason for a rule, studies the facts to see if the case is within the reason of the rule, and applies the rule or not according to his view of whether the facts and the reason for the rule fit. Justice White proceeds in an entirely different way. Beginning with a value premise, he defines fourth amendment questions as questions of reasonableness. That done, he evaluates each case to determine whether in his opinion the police action was reasonable. Given the total flexibility of the reasonableness concept, almost any search can be justified by finding nonexistent exigencies to support the police's conduct. Once Justice White succeeds in making exigency conclusive of reasonableness, he emasculates both concepts by finding groups of cases where exigencies are so often present that they need not be proved in specific cases. Thus, rather than see whether the reason for the rule applies as a guide to the rule's application, he substitutes the rule for its reason and creates a category of police conduct that will always be acceptable. Those, like Justice Stewart, who look for the principle in Justice White's position will not find it. To the policeman seeking guidance, though, the message is clear: in a given area proceed at will.

The similarity in the Court's handling of the questions of what constitutes a search, when does probable cause exist, and when may the police search without a warrant is striking. The cases are replete with efforts to apply flexible concepts like "reasonable expectations" and "exigent circumstances." Since such concepts do not solve real cases, the members of the Court seek categories and rules to apply. Some justices, however, continue to emphasize the flexible conceptual bases for the rules, and therefore never escape the flexibility dilemma. Others, most notably Justice White, exalt the categories over the reasons. Sometimes Justice White tries to explain his positions in terms of the flexible concepts; when he does so, his opinions seldom make sense. Other times, as in his Coolidge dissent, Justice White makes clear that the reasons for rules do not control and that categorization is controlling. When he does that, the reader may be pleased or displeased depending upon his policy predispositions, but he will almost always be relieved at being presented with an understandable, forthright rule. Substantial damage is done to orderly legal development, police respect for the Court, obedience to the dictates of the fourth amendment, and important civil rights by the unwillingness of justices who do not share Justice White's values to adopt his categorization style in a forthright manner without the duplicitous two step process employed, for example, in the movement from Chambers to the Coolidge dissent.

The typical American legal style of developing the law on a case by case basis, maintaining flexibility by resorting often to the rule of reason
and permitting facts to exert controlling importance, and seeking to apply rules in new factual situations only when the reasons that gave rise to the rules exist in the new context is one of the great strengths of our legal system. But like everything else, the utility of this style has limits. They are exceeded in the fourth amendment context.

Flexibility, of course, means unpredictability, and if it is a virtue it is purchased at a price. Consistency and predictability are virtues too, and they must be sacrificed to achieve flexibility. In an area where conduct control is a major policy, consistency seems preferable to flexibility, as one can hardly expect individuals to conform their conduct to unannounced, unpredictable norms. Similarly, trial court judges who accept the postulates of the crime control model of the criminal process are unlikely zealously to protect fourth amendment rights if the law is sufficiently unclear to make almost any decision plausible and the chance of avoiding reversal fairly high.

Flexibility is only part of the problem. Its adverse impact is increased when it exists side by side with clear and easily understandable inflexible rules. A police officer confronted on the one hand with the distinction between Coolidge and Chambers that Justice Stewart tried to draw for a minority of the Court, and on the other hand with Justice White's clear rule that automobiles may always be searched on probable cause without a warrant, will naturally prefer and follow the latter minority view rather than the former. Conversely, when a rigid rule restricts behavior, the officer is likely to follow it unless a flexible rule to govern the same situation also exists and holds out hope of achieving his desired purpose. Thus, the Chimel rule could have been effective had the exigency rule not developed contemporaneously with it. A police officer not knowing which rule will apply in any given case has no incentive to refrain from exceeding the bounds of Chimel. The coexistence of flexible and inflexible rules thus creates a situation in which the police are encouraged to perform questionable searches and seizures. This, of course, results in unnecessary invasions of individual rights and in litigation which could well have been avoided. The negative impact on police respect for the Court engendered by a system which encourages game playing, taking chances, and seeing how much one can get away with is easily predictable.

The exclusionary rule, or any deterrent sanction, must fail if the law it is designed to enforce is tentative, flexible, and self-consciously oriented to facts. To effectively deter police misconduct the Court must develop inflexible categories and clear rules. It must, in other words,

adopt for the law of search and seizure the technique which Justice Holmes long ago inappropriately suggested for the disposition of tort cases. First in *The Common Law* and later in *Baltimore & Ohio R.R. v. Goodman* (the famous stop, look, and listen case), Holmes advocated judicial determination of the question of negligence, the creation in advance of the standards of reasonable prudence. In *Pokora v. Wabash Ry.*, the Court, in an opinion by Justice Cardozo, rejected the Goodman approach, recognizing that the dictates of reasonableness can only be drawn from the stuff of everyday life. In the negligence context Cardozo was right, and his view has largely prevailed. But police search and seizure practices, unlike negligence, are not the stuff of everyday life for most citizens, and sensible rules to govern them are imperative if they are not to become everyday occurrences. To ask what is reasonable under the circumstances from the police point of view is to make a jury-like, fact style inquiry while permitting the regulated to set the rules of regulation. The question should be what searches are reasonable from the citizens' point of view. After all, the people are to be secure from unreasonable searches and seizures; the Constitution nowhere gives the police a right of their own to make searches, reasonable or otherwise. The relevant perspective must always be that of the citizen. The Court's job is to evaluate and enforce as well as it can the citizens' competing interests in security from the police and security from crime. The evaluation, though, must be expressed in language directed to the police and clear and precise enough for them to follow. Justice White was right when he said that the question is what citizen expectations are "constitutionally 'justifiable'—what expectations the Fourth Amendment will protect. . . ." If the rest of the Court would begin to address itself to that question in bold, broad, policy terms instead of asking what was reasonable under the circumstances or whether sufficient exigencies existed to permit the police to search someone's property, a more coherent body of fourth amendment law would begin to emerge.

Focusing on the broad question of how privacy compares to order, with an eye to the development of categories and rules as specific as possible to govern fourth amendment cases, could lead to rules like the majority rule in *Chimel* or like the auto search rule articulated by Justice White. Those who both prefer due process to crime control and subscribe to popular conceptions of judges' biases may fear the approach I

---

188. 275 U.S. 66 (1927).  
189. 292 U.S. 98 (1934).  
suggest is more likely to lead to rules like the latter than the former. Even if the prediction is justified, the fear is not. Almost any comprehensible rules should serve libertarian ends better than the present chaotic state of the law. Any rule developed under the fourth amendment is a limitation on the police's power to search. The absence of rules and the contempt it engenders are invitations to search. That may be even more true now than a few years ago since there is no reason to believe the police are more immune than others from making easy assumptions about the trend of judicial decisions. Moreover, if those who assume that such decisions represent biases are right, the style of the decisions will not affect results. Adopting forthright, inflexible rules, though, may avoid much useless, expensive, and frustrating litigation engendered by the current chaos, which appears to offer hope of escaping conviction to countless criminals much as it offers the police hope of successfully avoiding the rules.

I suggest, then, that the move away from flexible fact style adjudication in the fourth amendment context will be beneficial from the libertarian as well as the law enforcement and judicial administration perspectives. But is my proposal feasible? Can sufficiently precise rules be developed to permit a fair degree of predictability and provide grounds for some hope of deterrence, or is conduct so variable and the legal mind so fertile that the hope for certainty is vain? And if the rules can be formulated, does not our experience with the highly specific Miranda\textsuperscript{192} rules suggest the game is not worth the candle because no improvement in actual practice will result from highly specific rules?

I think the proposal is feasible. Everyone knows that absolute certainty is impossible and that a hard case can be put in which any rule will fail. What we too often forget, though, is that not all cases are hard ones. Most are readily classifiable instances of frequently recurring conduct. Sometimes, as in the fourth amendment cases, the peculiarity and unintelligibility of the law itself are largely responsible for making many easy cases hard ones. And some areas of the law in which stability and predictability are important do offer substantial certainty.\textsuperscript{193} Absolutely clear and inflexible rules cannot be achieved, but adoption of the style of decision making typified by the law of negligence, where predictability and stability are unusually weak policies, leads to far more confusion than is justified or necessary.

Fortunately, search and seizure law is one area in which we can have the best of both worlds. Adoption of an inflexible judicial search and seizure code need not foreclose remedying unanticipated police atrocities.

The due process clause provides an alternative route to punish governmental conduct so gross that it shocks the conscience of the court. The law of pre-trial identification includes both the specific Wade-Gilbert rules and the open ended due process approach of Simmons. Seeking precision and a system in which the police have notice of what questionable conduct is acceptable is perfectly consistent with maintenance of an unspecific tool to remedy abuses so offensive that they can hardly be classed as questionable. Sufficient precision to be useful is feasible, even in a system which retains its ability to react with horror to horrifying conduct.

Are nonfact oriented legal rules workable in the search and seizure context? What I am advocating here is a fourth amendment approach much like the Court's fifth amendment approach in Miranda. Empirical studies suggest Miranda has little impact on the number of confessions obtained or police techniques in obtaining them. Do these studies mean that inflexible fourth amendment rules also will have little or no impact? I think not.

The critical difference between confessions and searches and seizures is that suspects confess, but police search and seize. Miranda was based on psychological premises about suspects undergoing police interrogation which either were wrong or dictated a more extreme result than Miranda provided. Search and seizure rules, on the other hand, need rest on no assumptions about suspect psychology. They merely require lower courts willing to enforce them. Thus, evidence suggesting that rules about pre-confession waivers do not prevent confessions in no way suggests that rules about police conduct cannot control the police.

If the Court puts the substantive law of the fourth amendment in order by eliminating fact style analysis, the exclusionary rule will finally have a chance to work. At that point, it will be interesting to see how much the rule can do.

199. 384 U.S. at 448-58.