

# REHNQUIST’S FOURTH AMENDMENT: BE REASONABLE

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## INTRODUCTION

In a 1985 interview with the *New York Times*, (then) Justice Rehnquist described one of the achievements of the Burger Court, of which he had been a member for thirteen years, as “call[ing] a halt to a number of the sweeping rulings . . . of the Warren Court” in “the area of constitutional rights of accused criminal defendants.”<sup>1</sup> While Rehnquist was pleased with the overall trend of the Burger Court’s criminal procedure decisions up to that point, the Court had not gone nearly as far as Rehnquist would have liked.

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<sup>1</sup> John A. Jenkins, *The Partisan*, N.Y. TIMES MAG., Mar. 3, 1985, at 28.

But in the latter years of his tenure as Chief Justice, the Court steered an even more moderate course. It was not until Justice O'Connor's retirement—and her replacement by Justice Alito, which corresponded with Rehnquist's death in 2005 (and his replacement by fellow conservative and former law clerk John Roberts)—that a strong conservative majority was able to make further significant inroads into defendants' rights in criminal procedure. But that is another story.

From the time of Justice Breyer's arrival, in 1994, through 2005, the Court decided roughly equal numbers of cases involving police procedures for and against criminal defendants.<sup>2</sup> But if the Court overall was rather moderate, Chief Justice Rehnquist, with very rare exceptions, consistently called for further limiting the rights of individuals vis-à-vis the state. This Article examines the techniques employed by him and others to achieve this goal in that area of constitutional law in which, year in and year out, the Court has been the most active: the Fourth Amendment.<sup>3</sup> The 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.<sup>4</sup>

In a series of cases decided during the 1960s, the Warren Court greatly expanded the ability of criminal defendants to challenge their convictions on the ground that evidence used against them had been obtained in violation of the Fourth Amendment. By far the most significant decision was *Mapp v. Ohio*,<sup>5</sup> decided in 1961. While the Supreme Court made the states subject to the Fourth Amendment in 1949, they had

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<sup>2</sup> See Craig Bradley, *The Middle Class Fourth Amendment*, 6 BUFF. CRIM. L. REV. 1123, 1132 (2003).

<sup>3</sup> For example, between 1979 and 1984 the Court decided thirty-five Fourth Amendment cases. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

<sup>4</sup> U.S. CONST. amend. IV.

<sup>5</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

specifically refused to apply the exclusionary rule to the states,<sup>6</sup> even though it had been applied to federal prosecutions since 1914.<sup>7</sup>

Thus, unless a state had adopted its own exclusionary rule, evidence obtained by police in violation of the Fourth Amendment could nevertheless be used in the defendant's trial. This meant that police were basically free to disregard the Fourth Amendment, such as the requirement that a warrant must be obtained to search someone's home, because there was no effective remedy for violation of the rules.

Recognizing this, the Supreme Court, in *Mapp*, declared that, without the exclusionary remedy to back it up, the Fourth Amendment would be "a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties."<sup>8</sup> Accordingly, the Court held that evidence seized in violation of the Fourth Amendment could not be used in state criminal prosecutions.<sup>9</sup> Further, the appointment of more liberal federal judges by the Kennedy and Johnson administrations, from 1961 through 1968, as well as an expansion of the ability of federal courts to overturn state convictions occasioned by the 1963 case of *Fay v. Noia*,<sup>10</sup> meant that if the state courts did not follow the Fourth Amendment and exclude evidence for its violation the federal courts would force them to do so.

But what were the requirements of the Fourth Amendment? There was, and is, no code of police procedures at the federal level, as most countries have, that could simply be applied to the states. Furthermore, the Court's decisions on the subject prior to 1961 had been spotty and often contradictory.<sup>11</sup> Accordingly, it fell to the Warren Court, and to subsequent Courts, to follow up on *Mapp* with an extended series of cases delineating the scope of Fourth Amendment (as well as Fifth

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<sup>6</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>7</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>8</sup> *Mapp*, 367 U.S. at 655.

<sup>9</sup> *Id.* at 657-60.

<sup>10</sup> 372 U.S. 391 (1963).

<sup>11</sup> *See, e.g.*, *Chimel v. California*, 395 U.S. 752, 755-63 (1969) (explaining the convoluted history of the search incident to arrest doctrine).

and Sixth Amendment) rights that the states were expected to enforce.

One principle of Fourth Amendment law was already in place: The Fourth Amendment ordinarily requires a warrant as a precondition of a reasonable search.<sup>12</sup> The origins of the so-called warrant requirement are murky since it is not contained in the Fourth Amendment itself, which requires only that searches be “reasonable” and then states the preconditions that a warrant must meet if it is used.<sup>13</sup> Nevertheless, the “warrant requirement” was an established rule by 1961, albeit subject to many exceptions.<sup>14</sup>

In expounding the nature of the warrant requirement, the Warren Court defined those areas for which a warrant must be used to include apartments, hotel rooms, and business premises.<sup>15</sup> It struck down search warrants for not adequately setting forth “probable cause.”<sup>16</sup> It ruled that the “fruit[s]” of Fourth Amendment violations, such as a confession obtained from someone during an illegal search or arrest, must also be excluded from evidence.<sup>17</sup> It required a search warrant to bug a phone booth and other places in which a defendant might have an expectation of privacy.<sup>18</sup> And it limited the scope of searches incident to arrest of someone at home to areas within the “immediate control” of the arrestee, rather than his whole house or apartment.<sup>19</sup>

At the same time, the Warren Court was also expanding and defining defendants’ rights in other areas of criminal procedure, most notably requiring that counsel be appointed for

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<sup>12</sup> *E.g.*, *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

<sup>13</sup> *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (discussing the disconnect between the language of the Fourth Amendment and the Supreme Court’s interpretation of it).

<sup>14</sup> As of 1985, I counted more than twenty exceptions to the search-warrant requirement. Bradley, *supra* note 3, at 1473.

<sup>15</sup> *See* cases cited in WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 3.2, at 133 (3d ed. 2000).

<sup>16</sup> *E.g.*, *Aguilar v. Texas*, 378 U.S. 108, 115 (1964).

<sup>17</sup> *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (internal quotation marks omitted).

<sup>18</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>19</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969) (internal quotation marks omitted).

indigent defendants who wanted one at all felony trials,<sup>20</sup> and that arrested suspects be given the famous *Miranda* warnings before they could be interrogated by police officers.<sup>21</sup>

Meanwhile, over at the Justice Department, Assistant Attorney General Rehnquist—who came in with the Nixon administration in 1969—along with his fellow conservatives, was stewing about this liberal court that, as Rehnquist was later to declare at his confirmation hearings, had swung the pendulum “too far toward the accused not by virtue of a fair reading of the Constitution” but rather “the personal philosophy of one or more of the Justices.”<sup>22</sup>

Rehnquist was acutely aware of the issue because one of his jobs as head of the Office of Legal Counsel was to choose Justices for the Supreme Court who would reverse the trend, which Richard Nixon had complained of in his campaign, toward “weaken[ing] the peace forces as against the criminal forces in this country.”<sup>23</sup> As it turned out, Nixon got to appoint four Justices, giving the Court a Republican majority by 1972 for the first time since the mid-1930s. First, there were Burger and Blackmun. Then, Nixon planned to appoint a southerner—an Arkansas bond lawyer named Hershel Friday—and a woman—Mildred Lillie, a California appellate court judge. These plans foundered on the rocks of American Bar Association disapproval, and another potential candidate, Senator Howard Baker, could not make up his mind.<sup>24</sup> So, much to his surprise, the forty-seven-year-old Rehnquist, along

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<sup>20</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). This was extended to misdemeanor trials by the Burger Court in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), but not to those trials that could not result in imprisonment. See *Scott v. Illinois*, 440 U.S. 367, 369 (1979).

<sup>21</sup> *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). For a brief history of the “criminal procedure revolution” see CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* ch. 2 (1993).

<sup>22</sup> *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong., 1st Sess. 26-27 (1971) (statement of William H. Rehnquist, Nominee to be Assoc. Justice of the Supreme Court of the United States).

<sup>23</sup> See BRADLEY, *supra* note 21, at 30 (internal quotation marks omitted).

<sup>24</sup> The story of Rehnquist’s appointment is described in detail in JOHN DEAN, *THE REHNQUIST CHOICE* (2001).

with Lewis Powell of Virginia, found himself on the Supreme Court.<sup>25</sup>

Rehnquist was undoubtedly committed to reversing *Mapp v. Ohio* from the moment he joined the Court, but he did not express this position in an opinion until 1979 in *California v. Minjares*, dissenting from the denial of a stay.<sup>26</sup> As discussed above,<sup>27</sup> *Mapp* is the keystone to Fourth Amendment rights. If *Mapp* could be eliminated, the entire structure of federally protected rights against unreasonable searches would collapse because police would no longer have an incentive to follow the rules.<sup>28</sup>

There was nothing radical in Rehnquist's argument, which only Chief Justice Burger joined.<sup>29</sup> He essentially repeated the points made by the *Mapp* dissenters—Justice Harlan, joined by Justices Frankfurter, Whittaker, and, in part, Stewart.<sup>30</sup> That is, he said that it made no sense to give the defendant a windfall by excluding relevant and competent evidence from his case especially when, as in *Minjares*, the “violation” of his rights was in good faith or, arguably, not a violation at all.<sup>31</sup>

Rehnquist further argued that the 1976 case of *Stone v. Powell*, by declaring that the exclusionary rule “is a judicially created remedy rather than a personal constitutional right,”<sup>32</sup> had removed the constitutional underpinnings of the

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<sup>25</sup> *Id.*

<sup>26</sup> *California v. Minjares*, 443 U.S. 916, 922-23 (1979) (Rehnquist, J., dissenting from denial of stay).

<sup>27</sup> *See supra* notes 5-14 and accompanying text.

<sup>28</sup> My experience as a prosecutor in Washington, D.C., confirmed my belief that the exclusionary rule is necessary for police compliance with Supreme Court criminal procedure rules.

<sup>29</sup> *Minjares*, 443 U.S. at 916 (Rehnquist, J., dissenting from denial of stay).

<sup>30</sup> *Mapp*, 367 U.S. at 672 (Harlan, J., dissenting). In *Minjares* the officer, with probable cause to search a car, also searched a bag in the car without a warrant. *Minjares*, 443 U.S. at 917-918 (Rehnquist, J., dissenting from denial of stay). The California Supreme Court had concluded that the bag search was a Fourth Amendment violation, and certiorari was denied. However, the Supreme Court, in a later case, concluded that such a search was legitimate. *Id.* at 918.

<sup>31</sup> *Minjares*, 443 U.S. at 916 (Rehnquist, J., dissenting from denial of stay); *see also Mapp*, 367 U.S. at 672 (Harlan, J., dissenting).

<sup>32</sup> *Stone v. Powell*, 428 U.S. 465, 494 n.37 (1976).

exclusionary rule, making it ripe for overruling.<sup>33</sup> (He took a similar position about *Miranda* in a majority opinion in *Michigan v. Tucker* in 1974,<sup>34</sup> trying to set the stage for *Miranda* to be overruled as well.) Finally, he pointed out that civil suits, which might not have been an ineffective remedy for constitutional violations at the time of *Mapp*, had been beefed up by more recent Supreme Court decisions such that they would adequately deter police misconduct.<sup>35</sup>

Since Rehnquist's death, however, the Court has made further inroads into the exclusionary rule, declaring it not applicable if the police violation is in good faith in *Herring v. United States*,<sup>36</sup> and even if the police are negligent in *Davis v. United States*,<sup>37</sup> going beyond Rehnquist's objection to the rule in *Minjares*.

Rehnquist's view of the exclusionary rule is shared, to an extent, by all of the countries of Western Europe and Canada. The United States is unique in having a mandatory exclusionary rule for Fourth Amendment violations, though most countries do exclude evidence on a discretionary basis more often than Rehnquist would have liked.<sup>38</sup> In any case, the majority of the Republican Court never came around to his view, being comfortable with cabining the exclusionary rule in various ways rather than overruling it. This forced Rehnquist to conduct a sort of career-long guerrilla campaign against the exclusionary rule, and Fourth Amendment rights in general, seeking at every opportunity to limit them as much as possible—sometimes winning and sometimes losing, but obdurately slogging on. In the process, he and his fellow conservatives have developed what might be considered a manual of techniques for limiting Fourth Amendment rights—or for “returning the Fourth Amendment to its true meaning,”

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<sup>33</sup> See *Minjares*, 443 U.S. at 923-24, 927-28 (Rehnquist, J., dissenting from denial of stay).

<sup>34</sup> *Michigan v. Tucker*, 417 U.S. 433 (1974).

<sup>35</sup> *Id.* at 925-26 (citing *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)).

<sup>36</sup> 555 U.S. 135, 147-48 (2009).

<sup>37</sup> 131 S. Ct. 2419, 2434 (2011).

<sup>38</sup> CRAIG BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 405 (1999).

as they might put it. There follows a discussion of how these various techniques were employed.

### I. LIMIT THE DEFINITION OF "SEARCH"

As noted, the Supreme Court did not begin in earnest the process of developing a body of Fourth Amendment rules to which the exclusionary rule would apply until after *Mapp* was decided in 1961. At the rate of between five and eight cases a year, there were still many unanswered questions left to be taken up after Burger took over as Chief Justice in 1970. In particular, the question of whether various police activities constituted a "search," and hence qualified for Fourth Amendment protection, was a significant part of the Court's jurisprudence throughout the 1970s and 1980s. Although Rehnquist was not called upon to write any majority opinions in this area, he consistently joined Court majorities that limited the scope of the Fourth Amendment.

Thus, the Court has held that searches of open fields,<sup>39</sup> searches of trash left at the curb,<sup>40</sup> and helicopter<sup>41</sup> and airplane surveillance<sup>42</sup> were not "searches" as far as the Fourth Amendment was concerned, because they did not violate the "reasonable expectations of privacy."<sup>43</sup> Consequently, they need not be justified by probable cause, much less a warrant. Likewise, use of a "pen register" to ascertain the telephone numbers dialed by a suspect was not a search.<sup>44</sup> The Court reaffirmed an old rule that searches by private parties were not covered by the Fourth Amendment and held further that police reopening a package previously opened by a private party did not amount to a Fourth Amendment search either.<sup>45</sup> Moreover, taking paint scrapings from the outside of an automobile,<sup>46</sup> or entering the automobile and removing papers from the

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<sup>39</sup> *Oliver v. United States*, 466 U.S. 170, 179-81 (1984). This repeated an old position first taken in *Hester v. United States*, 265 U.S. 57, 59 (1924).

<sup>40</sup> *California v. Greenwood*, 486 U.S. 35, 37 (1988).

<sup>41</sup> *Florida v. Riley*, 488 U.S. 445, 450-52 (1989).

<sup>42</sup> *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986).

<sup>43</sup> *See Katz v. United States*, 389 U.S. 347 (1967).

<sup>44</sup> *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979).

<sup>45</sup> *United States v. Jacobsen*, 466 U.S. 109, 113, 120-21 (1984).

<sup>46</sup> *Cardwell v. Lewis*, 417 U.S. 583, 591-92 (1974).



dashboard to view the Vehicle Identification Number,<sup>47</sup> were not deemed searches.

Finally, the “plain view doctrine,” which had long held that police simply viewing, hearing, or smelling something that any member of the public could sense was not a “search,”<sup>48</sup> was expanded in *Dow Chemical Co. v. United States* to include the use of a high-resolution camera by EPA officials to photograph the petitioner’s industrial plant, though the Court noted that the result might be different if a residence were involved.<sup>49</sup> It was further applied to determine that use of a drug-detecting dog to sniff luggage at an airport, or of a car stopped for a traffic violation, was not a “search.”<sup>50</sup>

None of these decisions were directly inconsistent with Warren Court holdings nor inherently unreasonable. But the consistent holding that various police activities, which could only be termed “searches” in common parlance, were not “searches” for the purposes of the Fourth Amendment caused many to wonder whether Fourth Amendment protections would eventually be whittled away to nothing.<sup>51</sup> For example, the “trash” case, *California v. Greenwood*,<sup>52</sup> led Justice Brennan in dissent to bemoan, “[T]he Court paints a grim picture of our society. It depicts a society in which local authorities may . . . monitor [citizens] arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual’s expectation of privacy in the most private of personal effects . . . .”<sup>53</sup>

However, these fears proved to be unfounded as this trend petered out in the 1990s, with no additional holdings that put police investigative activities outside the restrictions of the

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<sup>47</sup> *New York v. Class*, 475 U.S. 106, 114 (1986).

<sup>48</sup> See *LAFAYETTE ET AL.*, *supra* note 15, at 135. The plain view doctrine also includes the concept that the police may *seize* objects found in plain view of a policeman who has a right to be where he obtains that view. *Id.*

<sup>49</sup> *Dow Chemical Co. v. United States*, 476 U.S. 227, 229, 239 (1986).

<sup>50</sup> *United States v. Place*, 462 U.S. 696, 707 (1983); accord *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (suspicionless dog sniff of car during traffic stop approved).

<sup>51</sup> See, e.g., Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 261 (1984).

<sup>52</sup> 486 U.S. 35 (1988).

<sup>53</sup> *Id.* at 55-56 (1988) (Brennan, J., dissenting).

Fourth Amendment.<sup>54</sup> The trend was reversed by two important decisions in the 2000s, one of which, surprisingly, was authored by Rehnquist himself. In studying all of the Fourth Amendment cases decided during his thirty-odd years on the Court, this is the *only* non-unanimous case that I have found in which Rehnquist voted for the defendant on a Fourth Amendment issue.<sup>55</sup> On the other side of the bench, I could find only two occasions when Justices Brennan and Marshall voted for the government in Fourth Amendment cases—including unanimous decisions—from 1972 until their retirements in the early 1990s.<sup>56</sup>

In *Bond v. United States*, the petitioner was riding on a bus that stopped at a permanent immigration checkpoint in Texas so that the immigration status of the passengers could be checked.<sup>57</sup> However, the zealous border patrol agent also decided to see if he could discover any drugs.<sup>58</sup> He walked down the aisle squeezing the soft-sided luggage in the overhead storage space.<sup>59</sup> When he got to Bond's bag, he felt a "brick-like" object.<sup>60</sup> He opened the bag with Bond's consent and found a "brick" of marijuana.<sup>61</sup>

The issue was whether or not the initial manipulation of the bag was a "search."<sup>62</sup> Rehnquist, writing for a seven-Justice majority, concluded that it was.<sup>63</sup> The Court applied the standard test, derived from the Warren Court's *Katz* decision.<sup>64</sup> It concluded that even though the defendant realized that "his

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<sup>54</sup> Except for the recent extension of the dog-sniff case in *Caballes* in 2005. *Caballes*, 543 U.S. at 410.

<sup>55</sup> For a discussion of some of the unanimous decisions favoring defendants that Rehnquist joined, and why some of his dissents against defendant's rights were not "hard core," see Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquistion Begun?* 62 IND. L.J. 273, 287-90 (1987).

<sup>56</sup> Craig M. Bradley & Joseph L. Hoffmann, "Be Careful What You Ask for": *The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889, 929 (2001).

<sup>57</sup> *Bond v. United States*, 529 U.S. 334, 335 (2000).

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

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

<sup>60</sup> *Id.* at 336 (internal quotation marks omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 335.

<sup>63</sup> *Id.* at 336.

<sup>64</sup> *Id.* at 338.

bag may be handled” by passengers or bus personnel, he had a reasonable expectation that his bag would not be manipulated in an “exploratory manner” by police.<sup>65</sup>

As surprising as Rehnquist’s being in the majority was that Breyer—joined by Scalia—wrote the dissent, citing newspaper articles about how people’s bags are manhandled by fellow passengers all the time and arguing that the agent’s intent did not affect the defendant’s expectation of privacy.<sup>66</sup> This was certainly not an unreasonable position, and one that Rehnquist would ordinarily have been expected to join.

One may speculate as to why Rehnquist abandoned his virtually invariable stance in this case. As a frequent traveler, he may not have liked the idea of the authorities being free to investigate one’s bags. But since Supreme Court Justices usually travel by plane, where luggage inspections are routine, that does not seem a very satisfactory explanation. It may also be that, with a clear majority already lined up behind the defendant, he, as Chief Justice, diplomatically joined up.

Rehnquist may have an overriding general philosophy of lack of sympathy toward defendants’ claims of constitutional protection, but he does not necessarily ask himself in each case how this case fits into that philosophy. He, in common with other judges, looks at the facts of the case and asks if the search seems reasonable or not under these facts—which, as Rehnquist has pointed out, is all that the Fourth Amendment requires.<sup>67</sup> To him, it almost invariably *does* seem reasonable, though in *Bond* it did not. Then he presents the legal reasoning to support his view. The way Supreme Court cases typically get written is that the Justice tells the law clerk how he voted, and, if the case is assigned to that justice to write, the law clerk then writes a first draft of the decision. The draft fits the holding in the case into the existing case law, attempting, in typical lawyer fashion, to explain how the case is consistent with previous cases—except in the rare instance that the Court has determined to overrule a previous decision.

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<sup>65</sup> *Id.* at 339.

<sup>66</sup> *Id.* at 340-41 (Breyer, J., dissenting).

<sup>67</sup> *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting).

The point is that each decision is much more fact-driven than generally recognized. A conclusion is reached based on the facts of the case, and the doctrine is then massaged to accommodate that result, rather than the decision being driven by previous doctrine, as the opinion claims, or by a desire to change the doctrine. Thus, when a Justice writes an opinion that has the effect of, for example, limiting Fourth Amendment rights by holding that helicopter over flights are not Fourth Amendment searches, it is not necessarily that he or she set out to constrict Fourth Amendment rights. Rather, on the facts of the case, usually granted because of a conflict in the lower courts on this point, not requiring a warrant or probable cause for such over flights seems like the best result. Fourth Amendment rights get constricted incidentally. Indeed, it would be essentially impossible to get a majority of the Justices to agree, when the decision is made to hear a case, how they would specifically resolve it after argument, even though they may have a general sense of what the outcome will be at the time certiorari is granted.

The fact-specific nature of decisions is illustrated by how often, at least in the Fourth Amendment area, Justices, excluding Rehnquist, vote contrary to type. Thus, the generally liberal Breyer dissented from Rehnquist's decision in *Bond*. In *Kyllo v. United States*, discussed below,<sup>68</sup> Scalia wrote an opinion for the defendant with the Court's most consistent liberal, Stevens, voting for the government. And, in *Atwater v. City of Lago Vista*, the usually liberal Justice Souter authored a five-to-four decision holding that a soccer mom could be subjected to custodial arrest for a seatbelt violation.<sup>69</sup>

Whatever Rehnquist's reasons, *Bond* is a significant case for holding that your knowing that *other* people could intrude on your privacy in some way does not necessarily mean that your expectation of privacy is lost with regard to the *police*. This could have important implications for apartment dwellers, for example, who might maintain an expectation of privacy vis-à-vis the police in the common areas of their building even

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<sup>68</sup> See *infra* notes 70-78 and accompanying text.

<sup>69</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

though the other residents, and their guests, frequent those areas. Likewise, just because neighbors may cut through your yard, it does not necessarily mean that the police are free to do so. However, since *Bond* itself involved a manipulation of the bag that *exceeded* what the public might be expected to do, the Court may not extend it this far.

In the other case calling a halt to the not-a-search trend, Rehnquist returned to his normal stance: voting against Fourth Amendment claims. In *Kyllo v. United States*, a federal agent beamed a thermal-imaging machine at the petitioner's house to ascertain if it was emitting excess heat.<sup>70</sup> The thermal image showed only how much heat was being emitted from a house relative to surrounding areas; nothing else about the activities inside.<sup>71</sup> The excess heat from Kyllo's house suggested that he was growing large quantities of marijuana using heat producing halide lamps.<sup>72</sup>

The Government argued that it was simply enhancing "plain view" by using the machine, much like the use of binoculars or a dog sniff.<sup>73</sup> Moreover, it was obtaining information only about the *exterior* of the house, that is, the heat profile that the machine detected.<sup>74</sup> Consequently, this was not a "search," and neither probable cause nor a warrant were required.<sup>75</sup> The Supreme Court disagreed in a five-to-four decision authored by Justice Scalia, whose libertarian tendencies occasionally trump his enthusiasm for tough law enforcement.<sup>76</sup> The Court held that the heat was emanating from the interior of the house and "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area,"<sup>77</sup> was

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<sup>70</sup> *Kyllo v. United States*, 533 U.S. 27, 29-30 (2001).

<sup>71</sup> *Id.* at 30.

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

<sup>73</sup> *Id.* at 35-38.

<sup>74</sup> *Id.* at 35.

<sup>75</sup> *Id.* at 35-37.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.* at 34.

a “search” and required a search warrant—at least as long as the device was not “in general public use.”<sup>78</sup>

## II. LIMIT THE WARRANT REQUIREMENT

The Supreme Court’s favorite, and oft-repeated, Fourth Amendment maxim is that “it is a cardinal principle that searches conducted outside the judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well delineated exceptions.”<sup>79</sup> In fact, as I observed in 1985, “these exceptions are neither few nor well-delineated,” as there were more than twenty at the time.<sup>80</sup> By 1991, as Justice Scalia noted, concurring in *California v. Acevedo*, at least two more had been added.<sup>81</sup>

Search warrants are a nuisance for the police, requiring them to commit their probable cause to writing and find a prosecutor to approve it and a judicial officer to sign it. This leaves them open to a good deal of second-guessing when the defense attorney examines these papers prior to the trial. Consequently, if the government cannot convince a court that a given investigatory technique is not a “search,” the next best technique is to exempt it from the warrant requirement.

In this exercise, the Burger and Rehnquist Courts were particularly helpful to the police, either creating or expanding many of the numerous exceptions mentioned above. Thus, though automobile searches had long been justified without a warrant,<sup>82</sup> Rehnquist significantly extended the automobile exception in 1973 in *Cady v. Dombrowski*.<sup>83</sup> Whereas previously the exception had been limited to cars “on the highway” based on their mobility,<sup>84</sup> *Cady* extended the exception to a wrecked car searched two and a half hours after it had been towed to a

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<sup>78</sup> *Id.*

<sup>79</sup> *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Mincey v. Arizona*, 437 U.S. 385 (1978)) (internal quotation marks omitted).

<sup>80</sup> Bradley, *supra* note 3, at 1473.

<sup>81</sup> *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment).

<sup>82</sup> *See Carroll v. United States*, 267 U.S. 132, 149 (1925).

<sup>83</sup> 413 U.S. 433 (1973).

<sup>84</sup> *See id.* at 451 (Brennan, J., dissenting).

garage.<sup>85</sup> The Court has further made it clear that this warrant exception extended to containers found in vehicles even though they could have been seized and held pending a warrant.<sup>86</sup> Likewise, recreational vehicles—which, as “residences” of a sort, could have fallen outside the exception—were nevertheless held to be searchable on probable cause, without a warrant, unless they were at least up on blocks at a trailer park.<sup>87</sup> This was so despite the fact that police could ordinarily detain such a vehicle pending arrival of a warrant. Finally, just putting a suitcase in a car would deprive it of the warrant protection that it had while outside the car.<sup>88</sup>

Searches incident to arrest had also long been recognized as an exception to both the warrant- and probable-cause requirements—given the probable cause for the arrest itself. They had been limited by the Warren Court, in *Chimel v. California*,<sup>89</sup> to the person of the suspect and the “area within his immediate control . . . from within which he might gain possession of a weapon or destructible evidence.”<sup>90</sup> The Burger Court, without changing the *Chimel* rule, expanded this exception to add to police power in *United States v. Robinson*, written by Rehnquist in 1973.<sup>91</sup>

Robinson was arrested in Washington, D.C., for driving with a revoked driver’s license.<sup>92</sup> Since he was to be taken into custody, the policeman thoroughly searched his person, disclosing a cigarette package in his coat pocket, which, upon opening, was found to contain fourteen gelatin capsules of heroin.<sup>93</sup> The Court of Appeals held that the heroin should be suppressed and that only a frisk of the individual for weapons was allowed for such a traffic offense, for which there was no evidence to be found.<sup>94</sup> In other words, the evidentiary search

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<sup>85</sup> *Id.* at 435-39, 447-50 (majority opinion).

<sup>86</sup> *United States v. Ross*, 456 U.S. 798, 824 (1982).

<sup>87</sup> *California v. Carney*, 471 U.S. 386, 392-93 (1985).

<sup>88</sup> *California v. Acevedo*, 500 U.S. 565, 580 (1991).

<sup>89</sup> 395 U.S. 752 (1969).

<sup>90</sup> *Id.* at 763 (internal quotation marks omitted).

<sup>91</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>92</sup> *Id.* at 220.

<sup>93</sup> *Id.* at 221-23.

<sup>94</sup> *Id.* at 220.

allowed in *Chimel* would not apply where there was not any evidence to be searched for, and no likelihood of a weapon.

The Supreme Court rejected this argument, concluding that the arrest alone justified a full search of the arrestee for both weapons and evidence, including opening the cigarette package or, presumably, any other containers found in his pocket.<sup>95</sup> Rehnquist noted that since an arrest is based on probable cause, it was reasonable to allow a fuller search than the more limited weapons frisk allowed on mere reasonable suspicion of criminal activity by *Terry v. Ohio*.<sup>96</sup> He rejected the dissent's position that the reasonableness of such a search should depend on the facts of each case, thus giving the police a clear and permissive rule to follow in every case.<sup>97</sup> In *Robinson*, Rehnquist was able to grant the police a significant victory and, in the process, slap down the ultraliberal D.C. Circuit, led by Chief Judge David Bazelon, Chief Justice Burger's old nemesis from his days on that court.

The Burger Court further expanded searches incident to arrest in *New York v. Belton*, in which it was held that a "search incident to arrest" of someone arrested from a car extended to the entire passenger compartment of the car, including closed containers in the back seat.<sup>98</sup> This was a significant expansion of *Chimel* since, once the person was removed from the car, the passenger compartment and containers found therein were clearly no longer the "area 'within his immediate control'" as *Chimel* had stipulated.<sup>99</sup> In 2004, Rehnquist authored *Thornton v. United States*, expanding *Belton* to allow such searches even though the defendant had exited the car before the police arrived.<sup>100</sup> However, after Rehnquist's departure, *Belton* was overruled by *Arizona v. Gant*,<sup>101</sup> which held that police could only search a car incident to arrest if they had reason to believe it contained evidence of the offense of arrest.

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<sup>95</sup> *Id.* at 236.

<sup>96</sup> 392 U.S. 1, 30 (1968).

<sup>97</sup> *Robinson*, 414 U.S. at 235.

<sup>98</sup> *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

<sup>99</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

<sup>100</sup> *Thornton v. United States*, 541 U.S. 615, 617 (2004).

<sup>101</sup> 556 U.S. 332 (2009).



Another important exception to the warrant requirement is the “inventory search.” This is one of a large class of so-called “special needs” searches, which are supposedly undertaken for purposes other than criminal investigation and require neither warrants nor probable cause. Some of these, such as drunk-driving roadblocks,<sup>102</sup> or drug testing of high school athletes,<sup>103</sup> do not serve obvious societal needs beyond ordinary criminal law enforcement. Inventory searches of impounded vehicles and other possessions, by contrast, often seem more like a backdoor way to permit police to conduct searches for criminal evidence without probable cause.

Nevertheless, the Supreme Court has approved both inventory searches of cars, including opening any containers found in them, and of a backpack seized from an arrestee,<sup>104</sup> despite the possibility of simply seizing these cars or containers and holding them unopened pending either the arrival of a search warrant or the release of the property to its owner. (These cases were decided before the possibility of such containers holding explosives was a serious issue). Rehnquist wrote *Colorado v. Bertine*,<sup>105</sup> upholding inventory searches of cars as long as they were conducted according to “standardized criteria.”<sup>106</sup> Obviously, if the Court had been serious about a warrant requirement it would not have approved these searches.

Again, however, the 2000s have seen the Court calling a halt to the growth of these special-needs searches. In *City of Indianapolis v. Edmond*,<sup>107</sup> the Court struck down a drug-interdiction checkpoint because its primary purpose was to “uncover evidence of ordinary criminal wrongdoing,”<sup>108</sup> rather than promoting traffic safety or some other “special need[.]”<sup>109</sup> Chief Justice Rehnquist, joined by Scalia and Thomas,

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<sup>102</sup> See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>103</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>104</sup> *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983).

<sup>105</sup> 479 U.S. 367 (1987).

<sup>106</sup> *Id.* at 374 & n.6.

<sup>107</sup> 531 U.S. 32 (2000).

<sup>108</sup> *Id.* at 42.

<sup>109</sup> *Id.* at 37 (internal quotation marks omitted).

dissented.<sup>110</sup> Rehnquist pointed out that the intrusion on the motorist's privacy was exactly the same as that approved in other roadblock cases.<sup>111</sup>

In *Ferguson v. City of Charleston*, the Court rejected a plan by a public hospital to try to protect fetuses from drug-abusing mothers by testing the urine of pregnant women without their consent and, if they tested positive, turning the results over to law enforcement officials.<sup>112</sup> Even though the aim of the program was to protect babies, not to prosecute mothers, the Court felt that "the central . . . feature of the policy . . . was the use of law enforcement to coerce the patients into substance abuse treatment," and that was unacceptable without a warrant based on probable cause.<sup>113</sup> Rehnquist joined Scalia's dissent.<sup>114</sup>

The bottom line of the Supreme Court's opinions in the Burger and Rehnquist years has been to exempt from the warrant requirement virtually all outdoor searches and seizures.<sup>115</sup> If arrests, searches incident to arrest, and automobile searches, including containers found in automobiles, can all be performed without warrants, what is left? There are only two narrow categories of outdoor searches for which the warrant requirement is still in effect: searches of containers either not in transit or carried by hand by people whom police lack probable cause to arrest.<sup>116</sup> Thus, as to outdoor searches, Rehnquist's battle against the warrant requirement was largely won.

When it comes to indoor searches, however, the Court has consistently enforced the warrant requirement—not just as to homes but also as to businesses, hotel rooms, phone booths, and so on.<sup>117</sup> This is a trend that Rehnquist, alone among his fellow

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<sup>110</sup> See *id.* at 48 (Rehnquist, J., dissenting).

<sup>111</sup> See *id.* at 49-53.

<sup>112</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 69-70, 85-86 (2001).

<sup>113</sup> *Id.* at 80.

<sup>114</sup> See *id.* at 91 (Scalia, J., dissenting).

<sup>115</sup> See Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429 (1993) (discussing this trend).

<sup>116</sup> *United States v. Chadwick*, 433 U.S. 1, 14-16 (1977).

<sup>117</sup> See Bradley, *supra* note 115.

Justices, has never joined, instead holding to the textualist view that the Fourth Amendment does not include a warrant requirement at all.<sup>118</sup> The *Kyllo* case, involving the use of a heat detector beamed at a house, has already been discussed,<sup>119</sup> with Rehnquist's usual allies, Scalia and Thomas, voting for the defendant and requiring a warrant, while Rehnquist voted against the warrant requirement. In *United States v. Knotts*, the Court held that police did not need a warrant to follow a car by means of an electronic "beeper."<sup>120</sup> But in *United States v. Karo*, it concluded that to monitor such a beeper when it was inside a house, even though it disclosed no more than the presence in the house of the drum of chemicals in which the beeper was concealed, required a warrant.<sup>121</sup> Rehnquist disagreed—along with O'Connor—that such monitoring constituted a "search" and hence argued that a warrant was not required.<sup>122</sup>

Likewise, *United States v. Watson* had held that arrests outside the home could be made on probable cause without a warrant.<sup>123</sup> But when it came to arresting a suspect at his home, *Payton v. New York* required an arrest warrant plus "reason to believe the suspect is within."<sup>124</sup> White, Burger, and Rehnquist dissented.<sup>125</sup> *Steagald v. United States* held that searching another person's home for a suspect required a search warrant.<sup>126</sup> Rehnquist, joined by White, dissented, referring to the "Court's ivory tower misconception of the realities of the apprehension of fugitives from justice."<sup>127</sup> In a series of other cases, the Court has consistently upheld the warrant requirement for various intrusions into the home.<sup>128</sup>

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<sup>118</sup> *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting).

<sup>119</sup> See *supra* notes 70-78 and accompanying text.

<sup>120</sup> *United States v. Knotts*, 460 U.S. 276, 285 (1983).

<sup>121</sup> *United States v. Karo*, 468 U.S. 705, 720-21 (1984).

<sup>122</sup> *Id.* at 722 (O'Connor, J., concurring in part and concurring in the judgment).

<sup>123</sup> *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

<sup>124</sup> *Payton v. New York*, 445 U.S. 573, 603 (1980).

<sup>125</sup> See *id.* at 603 (White, J., dissenting).

<sup>126</sup> *Steagald v. United States*, 451 U.S. 204 (1981).

<sup>127</sup> *Id.* at 226 (Rehnquist, J., dissenting).

<sup>128</sup> See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 101 (1990) (Rehnquist, C.J. & Blackmun, J., dissenting) (exigent circumstances did not justify warrantless entry); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White & Rehnquist, JJ., dissenting)

Though Rehnquist was not the sole dissenter in any of these cases, he is the only Justice who dissented in all of them.

In *Mincey v. Arizona*, Rehnquist did join a unanimous opinion that there was no “homicide scene” exception to the search warrant requirement that allowed police unlimited access to the murder scene over a period of several days.<sup>129</sup> The proper course, the Court held, was to conduct a preliminary investigation at the time of the (warrantless) response to the homicide and then get a warrant if a more thorough subsequent search was required.<sup>130</sup> Since this would ordinarily be easy to do, this decision imposed no great burden on police. Rehnquist nevertheless wrote separately to minimize the effect of the Court’s holding by opining that much of the evidence used at trial had been properly seized during the initial warrantless entry.<sup>131</sup>

As illustrated by the fact the Rehnquist was never in sole dissent in these cases, none of the positions that he has taken are unreasonable. But his consistent rejection of claims of individual rights over more than thirty-three years shows much narrower concern for the property and privacy interests protected by the Fourth Amendment than was exhibited by the sixteen other Justices with whom he shared the Supreme Court bench.

### III. DILUTE THE CONTENT OF “PROBABLE CAUSE”

In general, once a police investigatory activity has been deemed a “search” it must be based on probable cause, whether or not a warrant is required. (“Special needs” searches, discussed above, and “frisks”—brief pat-downs for weapons—are exceptions). Arrests, likewise, are Fourth Amendment “seizures” requiring probable cause. Although one might

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(no exigent circumstances exception to the warrant requirement for minor offenses); *see also* *Arizona v. Hicks*, 480 U.S. 321, 330 (1987) (Powell & O’Connor, JJ., Rehnquist, C.J., dissenting) (picking up and examining stereo equipment in house during emergency entry is a “search” requiring probable cause, though not a warrant, since the police were already legitimately inside).

<sup>129</sup> *Mincey v. Arizona*, 437 U.S. 385 (1978); *see also id.* at 405 (Rehnquist, J., concurring in part and dissenting in part).

<sup>130</sup> *Id.* at 391-95 (majority opinion).

<sup>131</sup> *Id.* at 406 (Rehnquist, J., concurring in part and dissenting in part).

suppose that “probable cause” means “more probable than not,” the Supreme Court, led by Rehnquist, has held that this is not the case. In the 1983 case of *Illinois v. Gates*, the Court, per Rehnquist, dealt with the meaning of probable cause in the context of search warrants.<sup>132</sup>

The Warren-Court case of *Spinelli v. United States* established a two-pronged analysis of search warrants based on tips from confidential informants.<sup>133</sup> The police had to establish both the basis of knowledge (How does he know what he claims?) and the veracity (Why should we believe him?) of the informant.<sup>134</sup> Since the informant in *Gates* was an anonymous letter writer, completely unknown to the police, there was no way to establish his or her “veracity,” and the Illinois Supreme Court ruled that the search warrant was no good, based on *Spinelli*.<sup>135</sup> This despite the fact that the letter provided a lot of suspicious details, many of which were corroborated by the police, such that most people would have agreed that probable cause existed.<sup>136</sup>

While it is not at all clear that *Spinelli* required such a slavish adherence to its two-pronged analysis in a case such as this, the *Gates* Court overruled *Spinelli* and held that, while both factors were still relevant, the evaluation of the search warrant was to be more holistic—simply examining the totality of the circumstances to determine whether “there is a fair probability that . . . evidence of a crime will be found in a particular place.”<sup>137</sup> Moreover, “the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.”<sup>138</sup> A “substantial basis” for a “fair probability” sounds like a lot less than “more probable than not.”

*Gates*’s more expansive definition of probable cause was to be largely superseded in warrant cases the following year when the Court held that, even if probable cause were lacking,

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<sup>132</sup> *Illinois v. Gates*, 462 U.S. 213, 216-18 (1983).

<sup>133</sup> *Spinelli v. United States*, 393 U.S. 410, 412-13 (1969).

<sup>134</sup> *Id.* at 413.

<sup>135</sup> *Gates*, 462 U.S. at 229.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 238.

<sup>138</sup> *Id.* at 238-39.

evidence would not necessarily be excluded. This case, *United States v. Leon*,<sup>139</sup> is discussed in the next Part, but *Gates's* loosening of the definition of probable cause would prove helpful to police in warrantless search and arrest cases as well.

#### IV. LIMIT THE APPLICATION OF THE EXCLUSIONARY RULE

If the government cannot convince the courts that a given investigatory activity is not a search, that a warrant is not required, or that the warrant was based on probable cause, there is a fourth line of defense established by the 1984 case of *United States v. Leon*.<sup>140</sup> Prior to *Leon*, it had been assumed by the Court that, if a Fourth Amendment violation were found, the evidence would automatically be excluded. *Leon* held that if the police got a search warrant from a magistrate or other judicial officer and relied on it in good faith, then the evidence would *not* be excluded, even if the trial judge concluded that the warrant was not in fact based on probable cause.<sup>141</sup> The Court reasoned that the police had done their job properly by submitting their evidence of probable cause to the magistrate.<sup>142</sup> If the magistrate made a mistake as to whether probable cause existed, the blame should not be laid at the feet of the police, as long as they relied in reasonable good faith upon the magistrate's decision.<sup>143</sup> The purpose of the exclusionary rule, to deter police misconduct, would not be well served by excluding evidence where the magistrate, not the police, had made the mistake.<sup>144</sup> This was a six-to-three decision, with Rehnquist joining Justice White's majority opinion.<sup>145</sup>

*Leon* was an important victory for police, making it difficult for defendants to suppress evidence in cases where the police had gotten a warrant, even if the warrant was defective. However, the worst fear of liberals had not yet been realized:

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<sup>139</sup> 468 U.S. 897 (1984).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 925-26.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

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

<sup>145</sup> *See id.* at 897.

That is, that the “good faith exception” to the exclusionary rule would be extended to all “good faith” mistakes by police, even in non-warrant cases. This was essentially Rehnquist’s position in *Minjares*, and, as noted, has now been achieved by *Herring* in the Roberts Court. Since it will be difficult to establish *bad* faith, the effect may be largely to wipe out the exclusionary rule as an effective remedy against illegal searches. Instead, Rehnquist was able to extend *Leon* only modestly in his 1995 opinion in *Arizona v. Evans*.<sup>146</sup> In *Evans*, the defendant was arrested based on erroneous computer information that an arrest warrant had been issued for him.<sup>147</sup> Marijuana was found during the search incident to the arrest.<sup>148</sup> The Court held that since the erroneous information appeared to have been entered into the system by a court clerk, rather than by a police official, this was not a mistake of the police and, as in *Leon*, deterrence of police misconduct would not be served by excluding the evidence.<sup>149</sup>

After that case, the Court left *Leon* alone until a surprising 2004 decision, *Groh v. Ramirez*.<sup>150</sup> In *Groh*, federal agents had probable cause that Ramirez possessed illegal weapons, including grenades and grenade launchers.<sup>151</sup> The agents prepared an affidavit that set forth their probable cause and properly described the place to be searched and the weapons to be seized.<sup>152</sup> However, in the separate search warrant itself, which the agents had prepared for the magistrate’s signature, the description of the weapons was omitted due to a clerical error, and the description of the house to be searched was repeated in the “property to be seized” section.<sup>153</sup> Nobody noticed this omission, and the warrant was executed. As it happened, no evidence was found, but Ramirez brought a

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<sup>146</sup> 514 U.S. 1 (1995).

<sup>147</sup> *Id.* at 3-5.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 14-16.

<sup>150</sup> 540 U.S. 551 (2004).

<sup>151</sup> *Id.* at 554.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 554-55.

lawsuit under 42 U.S.C. § 1983 based on a violation of his constitutional rights.<sup>154</sup>

Despite the clerical nature of this error, and the fact that the magistrate was partly at fault for signing this defective warrant, the Court held, five-to-four, that the good faith exception of *Leon* did not apply in this case.<sup>155</sup> Rather, citing an exception in *Leon*, the Court held that this warrant was “so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.”<sup>156</sup> Consequently, the evidence, had they found any, should have been suppressed and Groh, as the leader of the search team, was not entitled to immunity from civil suit.<sup>157</sup> Needless to say, Rehnquist was among the dissenters.<sup>158</sup>

By finding that even negligent mistakes by police in warrant cases could lead to exclusion, the Court limited any tendency that the lower courts might have to read *Leon* expansively and put to rest any hope Rehnquist might have had of using *Leon* as a beachhead from which to further undercut the exclusionary rule, until Alito replaced O’Conner after Rehnquist’s death.

Another important way that the Court has limited application of the exclusionary rule is to find it inapplicable to proceedings other than the criminal trial. Although the Warren Court held that the exclusionary rule would be applied in criminal forfeiture proceedings as well as at the defendant’s trial,<sup>159</sup> the Burger and Rehnquist Courts have refused to extend its application any further. Thus, in a series of cases, they have found the exclusionary rule inapplicable in grand jury proceedings,<sup>160</sup> parole revocation proceedings,<sup>161</sup> deportation proceedings,<sup>162</sup> and civil forfeiture proceedings

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<sup>154</sup> *Id.* at 555.

<sup>155</sup> *Id.* at 557-561.

<sup>156</sup> *Id.* at 565 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)) (internal quotation marks omitted).

<sup>157</sup> *Id.* at 562-65.

<sup>158</sup> *See id.* at 566 (Kennedy, J., dissenting).

<sup>159</sup> *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965).

<sup>160</sup> *United States v. Calandra*, 414 U.S. 338, 354-55 (1974).

<sup>161</sup> *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998).

<sup>162</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).



brought by the IRS.<sup>163</sup> The Court's view, consistently joined by Rehnquist, was that the cost of using the exclusionary rule in these ancillary proceedings exceeds the deterrence benefit.

Using similar reasoning, the Court has further held that, though evidence must be excluded from the prosecution's case-in-chief due to its wrongful obtainment by police, it may be used to impeach the defendant's testimony if he takes the stand<sup>164</sup>—though not, over Rehnquist's objection, to impeach defense witnesses.<sup>165</sup>

Finally, the Court has limited the extent of evidentiary exclusion by narrowly interpreting the fruit-of-the-poisonous-tree rule. The leading Warren Court case on this subject is *Wong Sun v. United States*, which held that, when police illegally entered the suspect's residence and arrested him (the poisonous tree), not only physical evidence found there, but also the suspect's incriminating statement must be excluded as fruit of the illegal entry.<sup>166</sup> However, the application of the rule depends on the nature of both the "poisonous tree" and the "fruit." In some of these cases, the poisonous tree is a confession obtained in violation of *Miranda* requirements.

If the poisonous tree is an illegal search or arrest, the Court has been fairly tough, holding, for example, that a confession obtained after an illegal arrest, even if voluntary and preceded by *Miranda* warnings, must be excluded.<sup>167</sup> Rehnquist concurred in part, joining Justice Powell who opined that such confessions should only be excluded when the Fourth Amendment violation is "flagrant[]."<sup>168</sup>

In *United States v. Ceccolini*, Rehnquist limited the fruit of the poisonous tree doctrine, holding that the testimony of witnesses who were discovered as a result of an illegal search ordinarily could not be excluded as a fruit.<sup>169</sup> Finally, the Court, with Rehnquist's concurrence, has held that evidence that is a

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<sup>163</sup> *United States v. Janis*, 428 U.S. 433, 460 (1976).

<sup>164</sup> *United States v. Havens*, 446 U.S. 620, 628 (1980) (illegal searches); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (*Miranda* violations).

<sup>165</sup> *James v. Illinois*, 493 U.S. 307, 319-20 (1990).

<sup>166</sup> *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

<sup>167</sup> *Brown v. Illinois*, 422 U.S. 590, 600-03 (1975).

<sup>168</sup> *Id.* at 606, 610 (Powell, J., concurring in part).

<sup>169</sup> *United States v. Ceccolini*, 435 U.S. 268, 278-79 (1978).

fruit of a poisonous tree, but would have been “inevitably discovered” by a legal search, may also be used at the defendant’s trial.<sup>170</sup>

#### V. ENHANCE THE “STOP AND FRISK” POWER

One way to avoid most of the strictures of the Fourth Amendment is for the police investigatory activity to be considered a “stop” and “frisk” rather than an “arrest” and “search.” The authority of the police to detain people briefly when they have “reasonable suspicion” that “criminal activity may be afoot” was established in the waning days of the Warren Court in the famous case of *Terry v. Ohio*.<sup>171</sup> *Terry* recognized that police will make such stops whatever the courts say, so it attempted to bring them under the auspices of the courts. Thus, the opinion recognized that stops are “seizures” and frisks are “searches” within the meaning of the Fourth Amendment. But, to subject these brief investigatory procedures to the warrant, or even to the probable cause requirements, would be unworkable. Accordingly, the Court held that brief detentions for investigation (“stops”) are permitted on the lesser standard of reasonable suspicion, with frisks permitted if it is reasonably believed that the suspect is “armed and dangerous.”<sup>172</sup>

It fell to the Burger and Rehnquist Courts to flesh out this standard, and, predictably, they did so in ways that generally favored police. In *United States v. Hensley*, the Court expanded the “stop” power to extend to past criminal behavior, not just criminal activity that is “afoot” as *Terry* had held.<sup>173</sup> In *Florida v. Bostick*, the Court held that just because the defendant on a bus was not “free to leave”—because he did not want the bus to drive off without him—did not mean that he was stopped in the *Terry* sense.<sup>174</sup> Consequently, reasonable suspicion was not

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<sup>170</sup> See *Nix v. Williams*, 467 U.S. 431, 441, 449-50 (1984) (involving a body found as a result of an improperly obtained statement, rather than an illegal search, but the reasoning would apply equally to a Fourth Amendment violation).

<sup>171</sup> 392 U.S. 1, 20-22, 30 (1968).

<sup>172</sup> *Id.* at 30-31.

<sup>173</sup> *United States v. Hensley*, 469 U.S. 221, 235 (1985).

<sup>174</sup> *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991).

needed to ask him some questions and to seek consent to search his luggage.<sup>175</sup> Likewise, in *California v. Hodari D.*, the Court held that merely chasing someone—who abandoned contraband during the chase—was not a “stop” requiring reasonable suspicion.<sup>176</sup>

In other cases, the question has been whether the “stop” was sufficiently lengthy as to turn it into an arrest for which probable cause would have been required. The Court, over Rehnquist’s objections, has been tougher on the police in these cases. For example, it held in *Florida v. Royer* that taking an air traveler’s ticket and removing him to a private room at the airport had turned a stop, for which DEA agents had reasonable suspicion, into an arrest for which they lacked probable cause.<sup>177</sup> Likewise, detaining a suspect’s luggage for an extended period of time awaiting a dog sniff was an “arrest,” even though the dog sniff itself did not constitute a search.<sup>178</sup> On the other hand, when the defendant’s own evasive activities caused the stop of two vehicles traveling in tandem to extend over a substantial period of time, the Court reasonably concluded that this would not turn a stop into an arrest.<sup>179</sup>

As for the frisk, in 1972, Rehnquist wrote *Adams v. Williams*, in which the Court approved the frisk of a person regarding whom the policeman knew only that an informant had told him that a person in a car had narcotics and a gun.<sup>180</sup> This was upheld despite the fact that possession of the gun was legal.<sup>181</sup> Following *Adams*, the understandable desire of the courts to allow the police to protect themselves has led lower courts to be extremely permissive toward police in approving frisks for all sorts of crimes and in all sorts of circumstances.<sup>182</sup> However, in *Minnesota v. Dickerson*, a Court majority did hold, over Rehnquist’s dissent, that squeezing and manipulating a

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<sup>175</sup> *Id.*

<sup>176</sup> *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

<sup>177</sup> *Florida v. Royer*, 460 U.S. 491, 502-03 (1983).

<sup>178</sup> *United States v. Place*, 462 U.S. 696, 709 (1983).

<sup>179</sup> *United States v. Sharpe*, 470 U.S. 675, 687-88 (1985).

<sup>180</sup> *Adams v. Williams*, 407 U.S. 143, 148 (1972).

<sup>181</sup> *See id.* at 149.

<sup>182</sup> *See* David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1 (1994).

lump felt in the defendant's pocket exceeded the bounds of the weapons frisk authorized by *Terry*.<sup>183</sup>

The Court has extended the reasoning of *Terry* to automobile stops, holding in *Delaware v. Prouse* that police could not stop individual cars at random but, like stops of people on the street, must have reasonable suspicion of either a crime or a traffic violation.<sup>184</sup> Rehnquist was the sole dissenter, arguing that random stops should be permissible.<sup>185</sup>

## VI. ENCOURAGE CONSENT SEARCHES

There is a way in which police can avoid all of the pitfalls discussed above, and create what I have called a "black hole into which Fourth Amendment rights are swallowed up and disappear."<sup>186</sup> This is by getting the defendant to consent to the search in the first place. If the defendant consents, neither warrant nor probable cause is required. The leading case on this subject is a 1973 holding, *Schneckloth v. Bustamonte*,<sup>187</sup> a six-to-three decision written by Justice Stewart and joined by Rehnquist.<sup>188</sup> *Schneckloth* considered the holding of the lower court that before a valid consent could be obtained the police must inform the defendant that he or she had a right *not* to consent.<sup>189</sup> This arguably followed from the Court's 1964 holding in *Miranda v. Arizona* that interrogation must be preceded by a warning that the suspect need not answer questions.<sup>190</sup>

The Court rejected the warning requirement.<sup>191</sup> It held that consents must be "voluntary," that is, not induced by coercive behavior by police, but that suspects need not be warned of their right to refuse consent.<sup>192</sup> The Court

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<sup>183</sup> *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993).

<sup>184</sup> *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

<sup>185</sup> *Id.* at 665-66.

<sup>186</sup> Craig M. Bradley, *The Court's Curious Consent Search Doctrine*, 38 TRIAL 72 (2002).

<sup>187</sup> 412 U.S. 218 (1973).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 246-48.

<sup>190</sup> *See Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

<sup>191</sup> *Schneckloth*, 412 U.S. at 248-49.

<sup>192</sup> *Id.*

distinguished *Miranda* arguing that involuntary confessions are inherently unreliable, whereas physical evidence obtained by a consented search is just as reliable as if it had been obtained by a search warrant.<sup>193</sup> This distinction is fallacious. The reliability of the evidence obtained has nothing to do with the voluntariness of the consent—whether it is a consent to search or to talk to the police. *Miranda*'s holding that a statement given in ignorance of one's rights is not truly voluntary<sup>194</sup> is equally applicable to consent searches.

The Court rejected another limitation on consent searches in *Florida v. Bostick*<sup>195</sup> where, in an opinion by Justice O'Connor, it held by a six-to-three vote that police need not have any "articulable suspicion" to approach somebody to ask for consent to search.<sup>196</sup> Moreover, it was not relevant that the defendant, who was approached by police on a bus, was not "free to leave" when asked to consent.<sup>197</sup> In this context, the Court held the "appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>198</sup> A "reasonable person," the Court further adumbrated, means an *innocent* person.<sup>199</sup> But since the defendant, by definition, is *not* an innocent person, the Court is not considering whether the actual defendant in the case acted voluntarily or not. In 2002, the Court, in another six-to-three decision, reaffirmed these principles in *United States v. Drayton*.<sup>200</sup>

Clearly, defendants in these cases, who are carrying incriminating evidence of various sorts, are not consenting to these searches "voluntarily" in any normal sense of the word. They are consenting either because they believe that they have no choice or that refusing consent would only arouse greater

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<sup>193</sup> *Id.* at 243-44.

<sup>194</sup> "For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise." *Miranda*, 384 U.S. at 468.

<sup>195</sup> 501 U.S. 429 (1991); *see also supra* Part V.

<sup>196</sup> *Bostick*, 501 U.S. at 431, 437-39.

<sup>197</sup> *Id.* at 436.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 437-38.

<sup>200</sup> 536 U.S. 194, 201-02 (2002).

suspicion and the police would find a way to search anyway. But the Court evidently believes that, whatever the psychological pressure on these suspects to consent, it is enough that the police not use force or the threat of force to obtain this incriminating evidence. The consistent pattern of six-to-three votes, over thirty years, moreover, shows that this is a doctrine that is unlikely to change. This is a major victory for Rehnquist and his fellow conservatives, since police routinely use consent to avoid Fourth Amendment limitations. In one case, *Ohio v. Robinette*, where Rehnquist wrote the majority opinion eschewing any “bright line” rules for determining the voluntariness of consents, it was disclosed that the sheriff’s deputy involved in the case had alone requested 786 consents to search during traffic stops in the year of the defendant’s arrest.<sup>201</sup>

#### VII. EMPLOY “STANDING” LIMITATIONS AGAINST DEFENDANTS

In contrast to the consent-search doctrine, where Rehnquist has generally played a supporting role, he has been a major player in expanding another limitation on the defendant’s ability to raise Fourth Amendment claims. This is the requirement of standing.

Standing is an old and sensible limitation of constitutional law. It holds that, because the Constitution limits the Court’s jurisdiction to various “Cases” or “Controversies”<sup>202</sup> only people who have “alleged . . . a personal stake in the outcome of the controversy” are entitled to litigate a case in federal court.<sup>203</sup> “[T]he plaintiff himself” must have “suffered some threatened or actual injury resulting from the putative illegal action.”<sup>204</sup>

In a criminal prosecution, it might seem obvious that the defendant would have standing to litigate Fourth Amendment violations by the police, since he or she obviously has a personal stake in the outcome of the controversy and will suffer a

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<sup>201</sup> *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (Ginsburg, J., concurring).

<sup>202</sup> U.S. CONST. art. III, § 2.

<sup>203</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>204</sup> *Id.* at 499 (internal quotation marks omitted).

criminal conviction as a result of the putatively illegal action. However, the Supreme Court has long recognized that “Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.”<sup>205</sup> Therefore, in order to bring a motion to suppress illegally obtained evidence, a defendant must show that *his or her* constitutional rights were violated by the search. If the police illegally search *A*’s house and find evidence incriminating *B*, then *B*, subject to an important exception discussed below, would lack standing and could not suppress the evidence.

This doctrine is inconsistent with the Court’s oft-stated position that the purpose of the exclusionary rule is to deter police misconduct.<sup>206</sup> Standing limitations invite the police to violate Fourth Amendment rules when they are willing to sacrifice evidence against a property owner in order to obtain evidence against someone else. Maximum deterrence would be achieved by allowing the defendant to exclude evidence regardless of whose Fourth Amendment rights were violated. But the Warren Court reaffirmed the old standing limitations, holding that:

[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.<sup>207</sup>

Still, the Warren Court was generous in its determination of who had standing, holding that anyone “legitimately on [the] premises” had standing to protest a search of those premises.<sup>208</sup> Thus if *B* was a visitor in *A*’s house, or a passenger in *A*’s car, he would have standing to protest an illegal police search. In *Rakas v. Illinois*, the Court, per Rehnquist, significantly narrowed the standing doctrine.<sup>209</sup> *Rakas* held that passengers

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<sup>205</sup> *Alderman v. United States*, 394 U.S. 165, 174 (1969).

<sup>206</sup> *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974).

<sup>207</sup> *Alderman*, 394 U.S. at 174-75.

<sup>208</sup> *Jones v. United States*, 362 U.S. 257, 267 (1960).

<sup>209</sup> *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

in an automobile lacked standing to protest a search of the vehicle, because they had no “expectation of privacy” in the car.<sup>210</sup> Only the driver and owner had standing to protest the search of the car.<sup>211</sup>

Rehnquist expanded *Rakas* into another context in *Rawlings v. Kentucky*.<sup>212</sup> In *Rawlings*, as the police were arriving to search a house that the defendant and his girlfriend were visiting, the defendant dumped his narcotics into his girlfriend’s purse.<sup>213</sup> The defendant attempted to argue that the search of the purse was illegal, but the Court held that he lacked standing to protest the search of the purse.<sup>214</sup> He had no more “reasonable expectation of privacy”<sup>215</sup> in her purse than *Rakas* had in the car in which he was riding. The fact that *Rawlings* owned the drugs found did not give him standing to protest the search of the purse.<sup>216</sup>

In a third case, Rehnquist was able to narrow standing somewhat more, but this time he could not get a majority to go as far as he wanted. In *Minnesota v. Carter*, a policeman peering through the window of an apartment observed the defendant bagging cocaine for resale.<sup>217</sup> It turned out that the defendant had paid the apartment’s resident to use it for that purpose.<sup>218</sup>

Without deciding whether the policeman’s peering through the window was an illegal search, the Court held that a business visitor to a home, such as *Carter*, lacked standing to protest an illegal search of that home.<sup>219</sup> Consequently, the cocaine was not suppressed at *Carter*’s trial.<sup>220</sup>

*Carter* left open an issue that affects many more people than the business-visitor holding: Whether a social guest, or a combined social and business guest, in a home has standing to

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

<sup>211</sup> *Id.*

<sup>212</sup> 448 U.S. 98, 103 (1980).

<sup>213</sup> *Id.* at 100-01.

<sup>214</sup> *Id.* at 103.

<sup>215</sup> See *Katz v. United States*, 389 U.S. 347 (1967).

<sup>216</sup> *Rawlings*, 448 U.S. at 103.

<sup>217</sup> *Minnesota v. Carter*, 525 U.S. 83, 91 (1998).

<sup>218</sup> *Id.* at 86.

<sup>219</sup> See *id.* at 90-91.

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



protest an illegal search of the home. But though this issue was technically not decided in *Carter*, five Justices—including Kennedy, who joined the Rehnquist opinion—made it clear that, in their view, social visitors generally *did* have standing. Since, as was made apparent by his dissent—without opinion—in *Minnesota v. Olson*,<sup>221</sup> Rehnquist would have limited standing to the homeowner himself, not his visitors, overnight, social or otherwise, the Court’s current position on standing is considerably more generous than Rehnquist would have liked.

If these five Justices take a similar view as to social guests in a car, they will largely overrule *Rakas* and only slightly narrow the old Warren Court standing definition—“legitimately on [the] premises”<sup>222</sup>—to deny standing to purely business visitors. However, it is more likely that a majority will continue to apply *Rakas* to automobiles, which have consistently been held to afford their occupants reduced expectations of privacy compared to homes, while eventually holding that social guests to homes do have standing.

#### VIII. LIMIT POSTCONVICTION REMEDIES

Once the defendant has been convicted, he or she still has many ways to challenge the conviction, both in state and federal courts, including raising Fourth Amendment issues. Rehnquist was in the vanguard of a movement to limit the defendant’s post-conviction access to federal courts. But one case, authored by Justice Powell and joined, of course, by Rehnquist, specifically deals with Fourth Amendment claims. In *Stone v. Powell*, the Court held that Fourth Amendment claims would usually not be cognizable on federal habeas corpus.<sup>223</sup> That is, if the defendant could not get the state courts to accept his Fourth Amendment arguments, he could not raise them in federal court—even if the police had clearly violated his Fourth Amendment rights—unless he did not get a full and fair hearing in the state courts. The reason was that “[t]he exclusionary rule [is] a judicially created means of effectuating

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<sup>221</sup> 495 U.S. 91, 101 (1990).

<sup>222</sup> See *Alderman v. U.S.*, 394 U.S. 165 (1969).

<sup>223</sup> *Stone v. Powell*, 428 U.S. 465, 494-95 (1976).

the rights secured by the Fourth Amendment.”<sup>224</sup> The Court recognized that:

The primary justification for the exclusionary rule . . . is the deterrence of police [mis]conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any “[r]eparations come too late.”<sup>225</sup>

Since the Court felt that the deterrent effect on police misconduct of recognizing exclusionary rule claims on federal habeas was not sufficient to justify the costs, in terms of new trials and increased litigation of these claims, it denied federal habeas review. Rehnquist, in turn, used *Stone*'s relegation of exclusionary claims to second-class status as one of the bases for his argument in *Minjares*, with which we began this Article, that the exclusionary rule should be significantly limited.<sup>226</sup>

#### IX. MISCELLANEOUS TECHNIQUES

Related to the not-a-search cases is a Rehnquist decision that relies on other literal language of the Fourth Amendment: “[t]he right of *the people*.”<sup>227</sup> While this phrase might seem to have no substantive content, Rehnquist used it as the basis of his opinion in *Verdugo-Urquidez*.<sup>228</sup> In this case, DEA agents, along with Mexican officials, conducted a warrantless search of the defendant's house in Mexico.<sup>229</sup> Rehnquist, writing for a five-Justice majority, ruled that “the people” referred to in the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of

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<sup>224</sup> *Id.* at 482.

<sup>225</sup> *Id.* at 486 (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965)).

<sup>226</sup> *See California v. Minjares*, 443 U.S. 916, 922 (1979) (Rehnquist, J., dissenting from denial of stay).

<sup>227</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (emphasis added) (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).

<sup>228</sup> 494 U.S. 259.

<sup>229</sup> *Id.* at 262.

that community.”<sup>230</sup> Thus it did not apply when the person searched “was a citizen and resident of Mexico . . . and the place searched was located in Mexico.”<sup>231</sup> Rehnquist went on to suggest in dictum that the Fourth Amendment also might not apply to searches of illegal aliens in the United States,<sup>232</sup> a suggestion that the Court has not endorsed in a holding.

In a related case, Rehnquist authored the majority opinion in *United States v. Alvarez-Machain*.<sup>233</sup> In this case, the defendant was kidnapped from his home in Mexico by DEA agents, and convicted in Texas of the murder of another DEA agent.<sup>234</sup> The Supreme Court, by a six-to-three vote, rejected the claim that the federal courts lacked jurisdiction to try him because of an unreasonable seizure.<sup>235</sup> Rehnquist relied on the 1886 case *Ker v. Illinois*,<sup>236</sup> which held that “forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court.”<sup>237</sup>

#### CONCLUSION

When it came to the Fourth Amendment, the police had no greater friend on the Supreme Court than William Rehnquist. It has been said that “a liberal is a conservative who’s been indicted.”<sup>238</sup> To the extent that personal feelings and experiences underlie a Justice’s attitudes about the law, the prospect of being stopped or searched by police would not seem to be a personal concern of Rehnquist’s. Nor does he empathize with those people for whom it is a more realistic possibility. But though he was strikingly consistent in voting to uphold the power of the police to search and arrest, this is hardly the

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<sup>230</sup> *Id.* at 265.

<sup>231</sup> *Id.* at 274-75.

<sup>232</sup> *Id.* at 272.

<sup>233</sup> 504 U.S. 655 (1992).

<sup>234</sup> *Id.* at 657.

<sup>235</sup> *Id.* at 669-70.

<sup>236</sup> 119 U.S. 436 (1886).

<sup>237</sup> *Alvarez-Machain*, 504 U.S. at 661 (quoting *Ker*, 119 U.S. at 444) (internal quotation marks omitted).

<sup>238</sup> Adam Gopnik, *The Caging of America*, NEW YORKER, at 1, Jan. 30, 2012, available at [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik).

“foolish consistency” that is the “hobgoblin of little minds.”<sup>239</sup> More often than not, he has convinced a majority of his colleagues to go along with his conservative views and, even in dissent, invariably advances cogent and well-reasoned arguments. He is hardly the “extremist” that some branded him when he was nominated for Chief Justice.<sup>240</sup> In fact, the Robert’s Court further movement to the right, particularly in regard to the exclusionary rule, is making Rehnquist look more moderate than he seemed in the 1970s and 1980s.

Rehnquist would deny the claim that his narrow view of Fourth Amendment rights is primarily based on a conservative political philosophy. Rather he points out that “[i]t is often forgotten that nothing in the Fourth Amendment itself requires that searches be conducted pursuant to warrants. The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause.”<sup>241</sup> Each search must be assessed according to its reasonableness. Likewise, the Fourth Amendment includes no exclusionary rule. Thus, his narrow view of defendants’ rights under the Fourth Amendment is based on the narrowness of the Amendment itself.

But to say that the Fourth Amendment, by its terms, requires only that searches be “reasonable” does not mean that “reasonableness” must be assessed anew in each case. As Rehnquist has often insisted, the basic function of criminal procedure jurisprudence is to make “rules” for police “in carrying out their work.”<sup>242</sup>

Rehnquist joined Court holdings that searching open fields and curbside trash containers were not “searches,” despite the fact that these activities would seem to fall under the literal

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<sup>239</sup> RALPH WALDO EMERSON, *ESSAYS, FIRST SERIES: SELF-RELIANCE* 50 (1878) (“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”).

<sup>240</sup> See Bradley, *supra* note 55, at 287 (summarizing comments about Rehnquist, including Senator Edward Kennedy’s statement that Rehnquist was an “extremist”).

<sup>241</sup> *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting).

<sup>242</sup> See, e.g., *California v. Minjares*, 443 U.S. 916, 927 (1979) (Rehnquist, J., dissenting from denial of stay).

terms of the Fourth Amendment, in order to give the police “clear rules” to follow.<sup>243</sup> Just as it may be necessary to define the Fourth Amendment narrowly in order to give police direction as to when they may need probable cause or warrants, so, on other occasions, may it be necessary to read it broadly—to require search warrants to search dwellings or other places, even though the Amendment by its terms imposes no such requirement. And it may be necessary to exclude evidence in order to ensure that police abide by Fourth Amendment rules. There is certainly nothing in the Constitution that suggests that the Court may read the Bill of Rights only narrowly, to avoid undue interference with other branches of government, when a majority of the Court believes that it should be read broadly to effectuate its overarching goal of protecting individual liberty and private property.

As noted in the Introduction, Rehnquist joined the Court on a particularly propitious day.<sup>244</sup> For that same day, the swearing in of Lewis Powell gave the Court a Republican majority, which it has never relinquished during Rehnquist’s tenure, or to this day. As this Article shows, Rehnquist’s numerous decisions in the Fourth Amendment area, as well as the many other opinions that he joined, have had a tremendous impact on the development of the law of criminal procedure, which was largely unformed when he joined the Court in 1972. Though no single Rehnquist opinion in this area stands out as particularly influential, the ability of criminal defendants to succeed in Fourth Amendment claims has been significantly circumscribed by Rehnquist’s opinions and his votes.

Rehnquist would have gone considerably further in limiting the rights of defendants, but he was checked by the defection, over the years, from the ranks of the conservatives of several of his Republican colleagues—notably Blackmun, Stevens, and Souter. Moreover, even his most dependable conservative allies, Scalia and Thomas, sometimes exhibit libertarian tendencies that cause them to support defendant’s rights more often than Rehnquist does. Though this may have

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<sup>243</sup> See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

<sup>244</sup> See *supra* notes 1-38 and accompanying text.

led to frustration on Rehnquist's part in individual cases, the overall trend of the Court's Fourth Amendment work in the latter years of his tenure was relatively balanced—a trend for which Rehnquist, as Chief Justice, should have been proud.