

ARTICLES

When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of Law

by GERALD S. REAMEY*

ROPER: So now you'd give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — Man's laws, not God's — and if you cut them down — and you're just the man to do it — d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.¹

In the last several years a war has been waged on the Fourth Amendment, along with wars on drugs and on crime generally.² Presumably, the former has been undertaken in an effort to facilitate the latter. In all candor, the Fourth Amendment, to the extent that it has

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1. ROBERT BOLT, *A MAN FOR ALL SEASONS* 39 (1960). See Stanley Hauerwas & Thomas L. Shaffer, *Hope Faces Power: Thomas More and the King of England*, *LXI SOUNDINGS* 456 (1978).

2. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 *HASTINGS L.J.* 889 (1987); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 *U. PITT. L. REV.* 1, 1-3 (1986).

been taken seriously, is frequently a formidable obstacle to law enforcement.³ This fact is not cause for alarm; rather, it shows that the purpose of the amendment is at least sometimes realized. Restraints on government power form the essence of the Bill of Rights and particularly of the Fourth Amendment.⁴

The elusive goal of crime control seems to some to lie just beyond the next constitutional stumbling block,⁵ its realization impeded only by the removal of one more "technicality" that protects those responsible for crime from their deserved punishment.⁶ Adjustment of the criminal justice system and the framework of laws constructed to effectuate American criminal law policy is essential to achieving all of the crime control benefits that realistically can be wrung from our constitutional scheme.

"Tinkering" with or "fine tuning" the system inevitably entails some danger that through shortsightedness or excessive zeal or other human frailty, the wrong decisions will be made for the right reasons. In itself, this is not especially alarming, because law, especially in a system that still considers itself part of the common law tradition, is meant to change. Every American lawyer accepts that the law will change and that changes will often occur with frightening speed.

The reasonable response to those who dislike particular changes is that these wrong decisions can be righted by the same facile system that allowed the change in the first place. Although experimentation may produce short-term disappointment or danger, it can, if properly con-

3. Cf. *Illinois v. Gates*, 462 U.S. 213, 237 (1983) (Supreme Court noted in abandoning the *Spinelli* test for probable cause that "[t]he strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement."). Some doubt that the exclusionary rule is much of an obstacle to law enforcement, but its existence, along with the perceptions of its effectiveness, may well produce a considerable systemic response. Even the very existence of the Fourth Amendment, without the exclusionary rule as an enforcement device, undoubtedly dissuades some officers and agencies from conduct they believe is contrary to its protections. See Arnold H. Loewy, *A Modest Proposal for Fighting Organized Crime: Stop Taking the Fourth Amendment So Seriously*, 16 RUTGERS L.J. 831 (1985) (police officers fail to take advantage of search opportunities afforded them by the Supreme Court).

4. WAYNE R. LAFAVE, 1 CRIMINAL PROCEDURE § 2.6, at 56 (1984); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 44 (1st ed. 1966); see John M. Burkoff, *When is a Search not a "Search?" Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515, 522 (1984) (the aim of the Fourth Amendment is to prevent breaches of personal privacy by agents of the State).

5. See David S. Catuogno, Note, *"Special Needs Beyond the Normal Need for Law Enforcement" Doctrine Excuses Traditional Fourth Amendment Requirements in Toxicological Testing of Railroad Employees — Skinner v. Railway Labor Executives Assoc.*, 109 S. Ct. 1402, (1989), 20 SETON HALL L. REV. 582, 582-83 (1990) (public sentiment favors closing the apparent loophole afforded criminals by Fourth Amendment).

6. Americans have probably always believed, as they do now, that the courts and laws favored the accused at the expense of the innocent. See RICHARD SHENKMAN, LEGENDS, LIES AND CHERISHED MYTHS OF AMERICAN HISTORY 158-60 (1988).

trolled, eventually result in great advances. America is itself the product of experimentation; it is an adaptable country. Most Americans would probably agree that despite the regrettable mistakes the country has made, it has achieved a great deal in a relatively short time because of its willingness to change.

This process of change cannot, however, be applied equally to all laws. A constitution is qualitatively different from legislative enactments and judicial pronouncements. Among other things, it is a limiting law, a philosophical barrier beyond which other laws may not pass. Changing a constitution is a serious matter.

Constitutional prescriptions provide a stability and permanence that generate social confidence.⁷ This is not to say that a constitution is not subject to interpretation. But its mandates need not be so specific that it periodically becomes obsolete. Rather, a constitution defines boundaries that are not subject to whim and caprice because they represent some sacred principles that a society has embraced. Justice Brennan noted:

A constitutional right is of little comfort if the government is free whimsically to repeal it the moment it is invoked. Wary of the fragility of constitutional guarantees, the Framers of our Constitution devised an amendment process that all but precludes the diminution of the textual rights. They made it extraordinarily difficult to amend any of the Constitution's terms including the rights that were themselves appended by amendment.⁸

The Supreme Court of the United States, in its role as interpreter of these boundaries and the sacred principles they protect, has a very great responsibility.⁹ It may be likened to the priestess charged with the care

7. Some may disagree that Americans in the 1990s are reassured or even aware of constitutional principles. But there is at least a vague awareness of the larger principles that pervades popular culture. No television police show is complete without numerous references to "Miranda rights," search warrants, or civil rights complaints. Law may not be well understood by contemporary society, but we are all aware of it, at least as a mysterious omnipresence. If the contours of the Fourth Amendment are hazy in the modern American mind, the amendment at least exists as a deeply ingrained sense of the right to be left alone.

8. See William J. Brennan Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1 (1991); Laurence H. Tribe, *The Constitution in the Year 2011*, 18 PAC. L.J. 343, 344 (1987). Professor Tribe described the Constitution as the only law that "has almost attained the status of scripture" and that we as a nation "virtually worship." *Id.* This probably overstates the point considerably for most Americans; constitutional principles are not sacred in any religious sense, but they may be sacred in the sense of their permanence and our consensus that they are ideals a society should adopt.

9. Judicial review may be a self-imposed responsibility, but it is well past questioning on other than purely historical grounds. When the Court accepted (or assumed) the role of interpreter of the Constitution, it simultaneously accepted the responsibility of interpreting the document in a manner consistent with the principles it could derive from the Constitution. Otherwise, judicial review would be a usurpation of the power reserved to the people. While

and feeding of the House Snake in ancient Greek kingdoms.¹⁰ But our Supreme Court Justices have a more difficult task because unlike priestesses, they live in society and see at least a part of society in microcosm in their courtroom.

Although judges do see society in microcosm, they see a very skewed vision of society. Especially in criminal cases, judges see the worst of society. Through testimony and transcripts they are repeatedly shown vicious assaults, dope dealing, property crimes motivated by greed, and other forms of human weakness and depravity. If judges come to believe that what they see represents society as a whole, it is little wonder that they are tempted to react to that vision of society with increasingly harsh punishments and diminished concern for the rights of the accused. Perhaps very few judges consciously react to cases in this way, but how many weigh the seriousness of crime as a national problem without reference to their own courtroom experiences? Judges can, of course, benefit greatly from the kinds of professional and life experiences that permit them to foresee the impact their decisions will have, or to assess the nature of the persons and institutions within the criminal justice system that will ultimately apply those decisions. Unfortunately, to the extent most judges have this perspective, it is limited to an understanding of the needs of the government since they have never themselves been accused or suspected of criminal activity, and have usually not represented those who have.

Judges engage in constitutional decisionmaking with full and sometimes awful knowledge of its effect on the prosecution of a crime. The extent to which this knowledge shades the outcome has been endlessly debated, but that it does so is a basic tenet of jurisprudence.¹¹ For example, it is inconceivable that recent Fourth Amendment interpretation favorable to the prosecution has occurred by pure coincidence in a society preoccupied with the high incidence of crime — particularly violent and drug-related crime. Numerous commentators have reported and lamented this pro-law enforcement bias.¹² In future years, commentators

the line between interpretation and amendment is often indistinct, courts in a representative democracy dare not admit more than the former.

10. Cf. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 13 (1986) ("Justices constitute a kind of secular priesthood").

11. See Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1, 19 (1990); cf. Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 48 (1988) (Balancing tests are subject to "slippage" when the Court is under political pressure to crack down on criminals.).

12. See, e.g., Saltzburg, *supra* note 2, at 4; Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 260 (1983); Wisotsky, *supra* note 2, at 907-09;

will undoubtedly lament, as they did during the Warren Court years,¹³ constitutional interpretation favoring the accused. To merely observe these swings of the pendulum, criticize the decisions, and then brand them examples of judicial activism is overly simplistic. That sort of analysis suggests that faithfulness to the Constitution can be measured by the proximity of a decisional result to some philosophical median. That philosophical median might happen to coincide with the core values of the Constitution. But if the median instead represents the thinking of the day,¹⁴ or even some median point between the extreme views being advocated but one inconsistent with constitutional principles, then criticism of the decision is justified. In short, adherence to the Fourth Amendment's values does not simply mean compromise any more than it means dominance of the majority's ideology or political agenda. Constitutional judging requires correctly understanding what the "core values" of the Constitution are and not confusing those values with political accommodation or wishful thinking.

The development of Fourth Amendment law over the past three decades is a fascinating study of the dynamics of decisionmaking. Particularly noteworthy is the Supreme Court's acceptance of "reasonableness" rather than probable cause, as the touchstone of the amendment.¹⁵ Because this change has been so dramatic and sudden, it simultaneously calls into question the proper role of the Court and provides an experiment-in-progress for study.

This Article first explores the development of a line of cases based on a reasonableness standard, in which the Supreme Court abandoned probable cause and warrants, the traditional Fourth Amendment safeguards, because of the presence of "special needs" that were used to justify the searches. The cases that produced and now represent this contemporary version of the Fourth Amendment are individually flawed for failing to adhere to their conceptual antecedents, and are collectively

Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1290-91 (1981).

13. See, e.g., Robert Emmet Burns, *Mapp v. Ohio: An All-American Mistake*, 19 DEPAUL L. REV. 80 (1969); Raymond L. Spring, *The Nebulous Nexus: Escobedo, Miranda and the New 5th Amendment*, 6 WASHBURN L.J. 428 (1967); B.J. George Jr., *Interrogation of Criminal Defendants - Some Views on Miranda v. Arizona*, 35 FORDHAM L. REVIEW 169, 193 (1966); Richard H. Kuh, *Interrogation of Criminal Defendants - Some Views on Miranda v. Arizona*, 35 FORDHAM L. REVIEW 169, 233 (1966).

14. See Ashdown, *supra* note 12, at 1290 (In the 1970s, interest in law and order and the general political trend to the right "resulted in a renewed tolerance for police practices at the expense of individual rights.").

15. See JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 43-44 (1st ed. 1966); Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107 (1987).

flawed by requiring that the Supreme Court interpret the amendment in an ad-hoc and unprincipled fashion.

Second, this Article proposes, by using the “special needs” cases as examples, a method of constitutional decisionmaking more consistent with the realities of politics, judicial process, and constitutional ethics.¹⁶ Two lines of reasoning recommend this method. First, because the Supreme Court can act only as a court and is a branch of government uniquely suited to preserving the enduring principles of the Fourth Amendment, it has a duty to decide aspirationally with respect to those principles. Second, the Fourth Amendment embodies the privacy rights of individual citizens rather than law enforcement needs or other “special needs.”

I. The Development of “Special Needs” Analysis

A. The Rise of Reasonableness

As noted above, the Fourth Amendment’s wording suggests at least two interpretations.¹⁷ One interpretation that seemed for many years to guide the Supreme Court’s decisions, is that searches and seizures require a warrant based on probable cause.¹⁸ Nowhere does the Constitution expressly refer to warrantless searches and seizures, or to searches or seizures based on less than probable cause.¹⁹ Nevertheless, even the most casual observer of criminal procedure appreciates that warrantless arrest or search is commonplace, and that substitutes for probable cause are widely employed.

This state of affairs reflects the adoption of the alternative interpretation of the Fourth Amendment, that only “reasonableness” is required. It also reflects that searches and seizures conducted with probable cause and a warrant are *per se* reasonable.²⁰ Courts sometimes say that warrantless searches and seizures are *per se* unreasonable unless the government shows some narrowly defined exception to the warrant requirement. While the burden theoretically lies with the government, exceptions are so numerous, and defined so broadly, that the burden has

16. By “constitutional ethics” I mean the kind of value-laden arguments described by Professor Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93-95 (1982).

17. See U.S. CONST. amend. XIV; Ashdown, *supra* note 12, at 1296 (the Fourth Amendment is either a hard-and-fast, monolithic proposition or a variable and flexible provision that operates in degrees).

18. See Grayson, *supra* note 15, at 109 (arguing that warrantless searches were not within the contemplation of the drafters at all); Ashdown, *supra* note 12, at 1296.

19. See Grayson, *supra* note 15, at 109.

20. See LANDYNSKI, *supra* note 4, at 43-44.

become one of little practical consequence. Therefore, describing search and seizure pursuant to a warrant as *per se* reasonable is now more accurate than describing warrantless activity as *per se* unreasonable.

The adoption of this alternative approach to Fourth Amendment interpretation was signalled by the truly landmark case of *Terry v. Ohio*.²¹ In *Terry*, the Court first permitted a seizure or investigative detention on facts from which probable cause clearly could not be inferred.²² The facts known to Officer McFadden, along with his training and considerable experience, produced in his mind a reasonable suspicion that the men he was observing were about to commit a robbery.²³ Significantly, the Court did not attempt to justify his stop of the suspects as something less than a seizure for Fourth Amendment purposes.²⁴ Nor did the Court choose to characterize his level of suspicion as probable cause.²⁵ Rather, the Court embraced a view of the Fourth Amendment's language that it had previously avoided, and simultaneously set off down the doctrinal road it continues to travel.²⁶

Whenever "reasonableness" has appeared in law, it has been interpreted by courts as an invitation to engage in more flexible, and often *ad hoc*, decisionmaking.²⁷ Apparently determined to avoid the appearance

21. 392 U.S. 1 (1968); Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 339 (1991) (*Terry's* characterization as a "major development in Fourth Amendment jurisprudence" is an understatement).

22. 392 U.S. at 22-24, 27; Ashdown, *supra* note 12, at 1296 (with *Camara* and *Terry* the Court "began to look upon the Fourth Amendment as a more flexible provision capable of being applied on a graduated basis"); Catuogno, *supra* note 5, at 587 (*Terry* was the "first significant retreat from the absolute nature of the probable cause requirement.").

23. *Terry*, 392 U.S. at 1.

24. *Id.* at 16-19.

25. *Id.* at 7-8. While such a characterization would have been patently disingenuous, it would hardly have been more so than other characterizations of fact in Supreme Court decisions. For example, in the regulatory search case *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court held that probable cause in code enforcement contexts could be established without individualized suspicion of a violation.

26. Searches and seizures based on less than probable cause did exist before *Terry v. Ohio*, but only in exceptional cases such as international border searches. Border searches are unique, however, because they are justified in large part by the ancient principle of state sovereignty. The investigation of plain "street crime," unadorned by some supplementary justification, was rather strictly limited by the probable cause requirement until *Terry v. Ohio*.

27. If the virtue of balancing to decide reasonableness lies in the increased flexibility courts have to adjudicate Fourth Amendment cases, its most serious process flaw is its *ad hoc* nature. Cases like *Terry v. Ohio* present a wide variety of circumstances bearing on reasonableness. The majority opinion reflected this by noting: "In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." *Terry*, 392 U.S. at 12. Chief Justice Warren later added in the opinion: "each case of this sort will, of course, have to be decided on its own facts." *Id.* at 30. The objection that reasonableness necessarily

of judicial activism or caprice (a daunting challenge when forced to decide what is reasonable), the Supreme Court has labeled its adjudicatory process "balancing," a description that connotes objectivity and even suggests an approach that is scientific.²⁸

What goes into the "balance" is said to be governmental interests (usually law enforcement) on the one hand and individual interests (liberty interests, the right to be let alone) on the other.²⁹ When the government's interests clearly outweigh the individual's, the search or seizure is reasonable, otherwise not.³⁰ For example, in *Terry*, the government sought to advance its interest in the detection and prevention of crime, an interest that the court found outweighed the interest of the suspects in being free from a brief investigative detention. The safety of the officer was the interest to be protected by allowing a "frisk," or pat-down of the outer clothing of the suspects. Officer McFadden reasonably believed to be armed and dangerous.

Balancing has not completely replaced probable cause as the principal means of determining reasonableness,³¹ but it is now well entrenched and growing rapidly. Reported cases in which probable cause or a warrant is absent now seem to rival or exceed in numbers those cases in which one or the other is present. If probable cause has not been eliminated as a requirement, exceptions to the requirement have virtually become the rule.

An earlier experiment in deviating from the traditional probable cause requirement was less successful.³² In the year preceding the *Terry*

involves this kind of ad hoc adjudication is a "tip of the iceberg" objection in that numerous other important objections are subsumed under the rubric of ad hoc decisionmaking. See Thomas E. Baker, "*The Right of the People to be Secure . . .*": *Toward a Metatheory of the Fourth Amendment*, 30 WM. & MARY L. REV. 881, 888-89 (1989) (describing difficulty in applying a balancing methodology).

28. See Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camera and Terry*, 72 MINN. L. REV. 383, 429 (1988) (balancing requires normative judgments despite efforts to give them a scientific or mathematical thrust).

29. *Terry*, 392 U.S. at 26-27. For an analysis of the development of reasonableness in Fourth Amendment cases, see Sundby, *supra* note 28, at 386-97.

30. 392 U.S. at 27.

31. See Wasserstrom & Seidman, *supra* note 11, at 47 ("Balancing has been confined to 'new' or peripheral Fourth Amendment problems.").

32. See *Camara v. Municipal Court*, 387 U.S. 523, 537-39 (1967). *Camara* redefined probable cause for administrative searches. It raised the question whether the Supreme Court would also alter its view of probable cause in other kinds of cases. See Dennis Stewart, Comment, *Constitutional Law - Administrative Searches and the Fourth Amendment: The Definition of "Probable Cause" in Camera v. Municipal Court of the City and County of San Francisco*, 36 UMKC L. REV. 111, 118 (1968) (*Camara* perhaps prefigures erosion of Fourth Amendment safeguards in areas other than administrative search).

decision, the Supreme Court redefined probable cause rather than accept a lesser standard under a different name.

The San Francisco Housing Code authorized employees of the Division of Housing Inspection to enter any building or premises to conduct an inspection for Housing Code violations.³³ An inspector of the Division requested that Roland Camara permit him to enter Camara's leasehold to conduct an inspection, and Camara refused.³⁴ Repeated subsequent demands by the inspector met with no success. Camara insisted that the inspector obtain a search warrant.³⁵ Eventually, Camara was prosecuted for his refusal to comply with the Housing Code. In his defense, he contended that the code provision violated the Fourth Amendment's requirements of probable cause and a warrant.³⁶

In *Camara v. Municipal Court*,³⁷ while proclaiming adherence to the traditional probable cause and warrant standards, the Court introduced a new, diminished probable cause.³⁸ By balancing "the need to search against the invasion which the search entails," the Supreme Court upheld, as reasonable, area code-enforcement inspections for which no individualized suspicion of any code violation existed.³⁹ The Court cited government interests in support of this departure from the ordinary probable cause requirement, suggesting that probable cause was a much more malleable concept than previously believed.⁴⁰ In explaining the relationship between probable cause and reasonableness, Justice White wrote:

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government intrusion.⁴¹

33. *Camara*, 387 U.S. at 526.

34. *Id.*

35. *Id.*

36. *Id.* at 527.

37. *Id.* at 523.

38. *Id.* at 534-36; see Sundby, *supra* note 28, at 392-93.

39. 387 U.S. at 536-37.

40. *Id.* at 534-39.

41. *Id.* at 539 (citations omitted).

What this language meant, and what the Court came to acknowledge in the following term, was that probable cause and warrants were henceforth merely one way to satisfy the Fourth Amendment. Reasonableness could be achieved by gathering sufficient information to constitute probable cause, and it could involve prior judicial approval, but it also might be achieved by a police officer acting without a warrant on some lesser degree of suspicion. The Supreme Court made this abundantly clear in *Terry v. Ohio* by approving a seizure of the suspects and a search for weapons based on reasonable suspicion rather than probable cause.⁴² In doing so, the Court connected probable cause to the Warrant Clause, implying that it was not otherwise necessary.⁴³ Chief Justice Warren wrote:

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure [citations], or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances [citations]. But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.⁴⁴

The Supreme Court's adoption of reasonableness as the ultimate test of Fourth Amendment compliance was accompanied by the development of "reasonable expectation of privacy" as the trigger for Fourth Amendment scrutiny.⁴⁵ In one term, the Supreme Court in *Terry v. Ohio* diminished the role of probable cause in favor of reasonableness and in *Katz v.*

42. *Terry v. Ohio*, 392 U.S. 1, 20-27 (1968).

43. *Id.* at 20.

44. *Id.* Justice Harlan, concurring in *Terry*, stated the point more succinctly:

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court.

Id. at 31 (Harlan, J., concurring).

45. See *Katz v. United States*, 389 U.S. 347 (1967); Ashdown, *supra*, note 12, at 1294 (reasonable expectation of privacy is doctrinal device used by Supreme Court to restrict scope of Fourth Amendment); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549 (1990).

United States abandoned the "bright-line" approach of applying the Fourth Amendment only to "constitutionally protected areas" in favor of a context-based reasonableness inquiry.

The ascendancy of case-by-case adjudication may have been an attempt by a self-confident Supreme Court to shape the contours of the Fourth Amendment in a far more sophisticated and less formalistic fashion than had its predecessors.⁴⁶ Whatever its original purpose, this attempt eventually resulted in a diminution of individual search and seizure rights. For example, "reasonable expectation of privacy," a phrase originally designed to break courts loose from arcane property distinctions in deciding search issues, has been subsequently used to deny standing to raise a Fourth Amendment claim.⁴⁷ The previous "bright-line rule" permitted any person legitimately on the premises to question the constitutionality of a search of those premises. It was swept aside by a conservative Court and replaced with a flexible analysis that in application more often denies defendants the right to complain about the legality of searches.⁴⁸

B. Balancing the Government's Needs Against the Citizen's: Laying the Groundwork

By adopting the "reasonableness" analysis, the Supreme Court was able to alter the impact of the exclusionary rule without directly modifying the rule.⁴⁹ The "reasonableness" analysis broadly applies to deter-

46. For a comparison of the approaches taken by the Warren, Burger, and Rehnquist courts, see Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11 (1988).

47. See *Rakas v. Illinois*, 439 U.S. 128 (1978).

48. *Jones v. United States*, 362 U.S. 257 (1960). Professor George Kannar passionately condemns this development:

The Burger Court consistently failed to recognize that exceptions of this sort can only be kept from swallowing the rule if they are *kept* narrowly — and clearly — limited. Out of a misplaced zeal to punish individual malefactors, it began behaving like a neighborhood police court, cluttering its docket with insignificant cases simply because it could not bear the sight of particular individuals going free. In the process, the Republican-dominated Court converted Fourth Amendment jurisprudence into the impossibly confused quagmire it is today — piling exception upon exception, creating exceptions *to* exceptions, until not even the legal treatise writers can figure out exactly what the law is, or conscientious officers figure out how to act. In short, it was the conservative Burger Court, not the liberal Warren Court, that made search and seizure law a labyrinth of muddled "technicalities." And then opponents of the exclusionary rule seized upon the mess conservatives had themselves created as an excuse for abolishing the rule completely.

George Kannar, *Liberals and Crime*, NEW REPUBLIC, Dec. 19, 1988, at 20-21.

49. See *id.*; Wasserstrom & Seidman, *supra* note 11, at 48; Ashdown, *supra* note 12, at 1289. The Fourth Amendment's exclusionary rule was also attacked directly. One limitation, the "good faith exception," permitted the introduction of illegally obtained evidence if police

mine the applicability of the Fourth Amendment, one's standing to complain about alleged violations of the amendment, or whether a violation actually occurred. In its "reasonable expectation of privacy" manifestation, the analysis led to the creation and validation of an entirely new sub-class of searches for which probable cause did not exist and warrants were not obtained, but which embodied a government need to search.

The aborted approach of *Camara v. Municipal Court* foreshadowed some of this development.⁵⁰ The Supreme Court did not continue to alter the definition of probable cause to validate various sorts of administrative searches. Instead, it began using the "reasonable expectation of privacy" analysis to find that such searches were not "searches" at all, or if they were, that they were reasonable because they were minimally intrusive.⁵¹

In the earliest of these cases, the government need was clear and the traditional privacy right of the persons searched questionable. In *United States v. Martinez-Fuerte*,⁵² the Supreme Court authorized a brief detention without individualized suspicion of persons at an international border.⁵³ Citing *Camara*, the majority employed a balancing of interests,⁵⁴ found the government's need to prevent illegal immigration by controlling the border to be weightier than the individual's interest in not being detained. It also held that "[a] requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."⁵⁵ Significantly, the government did not contend that a checkpoint stop was not a "seizure."⁵⁶

acted pursuant to a warrant and in the objectively reasonable but mistaken belief that the warrant was valid. *See* U.S. v. Leon, 468 U.S. 897 (1984).

50. 387 U.S. 523 (1967). *See generally* Michael J. Lacey, Comment, *Camara*, *see, and Their Progeny: Another Look at Administrative Inspections Under the Fourth Amendment*, 15 COLUM. J.L. & SOC. PROBS. 61 (1979).

51. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New York v. Burger*, 482 U.S. 691 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

52. 428 U.S. 543 (1976).

53. *Id.* at 557.

54. *Id.* at 555.

55. *Id.* at 557.

56. *Id.* at 556. This continues to be the position of the Court. *See* *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990). Contrast this approach with, for example, *Wyman v. James*, a case in which the Court rejected the civil rights plaintiff's contention that

Although on its face it was an innocuous beginning,⁵⁷ *Martinez-Fuerte* signalled the Court's future direction in using its power to interpret reasonableness. The government need⁵⁸ was hard to contradict, and sympathy with privacy rights of those crossing borders, especially illegal immigrants or persons involved in crime, was slight.⁵⁹

What seemed to go virtually unnoticed by commentators at the time was that individualized suspicion, as well as the warrant requirement, were held unnecessary to insure reasonableness.⁶⁰ This distinguished *Martinez-Fuerte* from both *Camara*, which required a warrant but not individualized suspicion, and *Terry*, which required individualized suspicion but no warrant.⁶¹

C. "Special Needs" Meet Probable Cause

As reasonableness, balancing, and "reasonable expectation of privacy" gained an increasingly prominent role in Fourth Amendment adjudication, the war on drugs and violent crime captured a larger share of the attention and concern of the American public. Border searches were aimed at interdicting drug traffickers as often as they were aimed at detecting illegal immigrants.⁶² An entire line of airport search cases devel-

a nonconsensual entry into her home was a "search." See *Wyman v. James*, 400 U.S. 309 (1971).

57. *Martinez-Fuerte* was innocuous only in the sense that it seemed rather unremarkable as an incursion on traditional Fourth Amendment requirements. Border cases are *sui generis* in the search and seizure universe, so decisions involving border searches do not necessarily portend changes in the usual street search. *Martinez-Fuerte* was not at all innocuous in its message that Hispanic citizens can be searched without any level of individualized suspicion if they venture too near the border. See *Martinez-Fuerte*, 428 U.S. at 551-53.

58. The case cited statistics of illegal immigration, as well as the length of the border and the difficulty in effectively maintaining its security. *Id.* at 551-53.

59. The Court has always treated border crossings differently. The concept of sovereignty and the right to protect international boundaries excused a wide variety of searches and detentions that otherwise would have been condemned. Unfortunately, once precedent for such practices was established at the border, it was sometimes conveniently forgotten that their acceptance depended on the situs of the activity.

60. Justices Brennan and Marshall certainly noticed these characteristics of the decision. See *Martinez-Fuerte*, 428 U.S. at 567-78 (Brennan, J., dissenting). Calling the holding "consistent with [the majority's] purpose to debilitate Fourth Amendment protections," Justice Brennan charged that the decision "virtually emptie[d] the Amendment of its reasonableness requirement." *Id.* at 568.

61. Citing *Terry v. Ohio*, Justice Brennan dissented from what he saw as a departure from objectivity in searches based on less than probable cause. *Id.* at 569. In retrospect, the argument is less that the reasonableness analysis in *Martinez-Fuerte* was deficient in its objectivity, and more that *all* so-called "objective" analyses of reasonableness are necessarily ad hoc and subjective within a broad range of outcomes between the obvious extremes.

62. See, e.g., *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985) (detention of suspected alimentary canal smuggler at border); Leonard B. Mandell & L. Anita Richardson, *Lengthy Detentions and Invasive Searches at the Border: In Search of the Magistrate*, 28 ARIZ. L. REV.

oped.⁶³ Although the justification for the searches often included fear of hijacking, the prosecutions were virtually always for drug possession or trafficking.⁶⁴

When a majority of the Supreme Court reversed a drug conviction in *Florida v. Royer*⁶⁵ because the investigative detention at an airport exceeded its permissible scope, Justice Blackmun dissented.⁶⁶ In balancing the interests at stake, Justice Blackmun noted the "short-lived and minimal" intrusion into the defendant's privacy on the one hand, and the "special need for flexibility in uncovering illicit drug couriers" on the other.⁶⁷ Although Justice Blackmun's view did not prevail in *Royer*, his notion that some "special needs" might weigh in the balance of reasonableness came to life less than two years later in the school search case, *New Jersey v. T.L.O.*⁶⁸ T.L.O., a freshman high school student, was found by a teacher smoking in the girls' rest room.⁶⁹ Because she was violating a school rule, T.L.O. was taken to the Assistant Vice Principal who questioned her about the incident.⁷⁰ The student denied smoking in the rest room, claiming she did not smoke at all.⁷¹ This prompted the Vice Principal to open T.L.O.'s purse in which he found various incriminating items, including marijuana, drug paraphernalia, money, and records and letters associated with drug dealing.⁷² The State sought to adjudicate T.L.O. a delinquent, and she challenged the evidence taken from her purse by the Vice Principal as the fruit of an unlawful search.⁷³

T.L.O. concerned a special class of citizen: students,⁷⁴ and only stu-

331 (1986) (growing drug trade has caused intensified interdiction efforts); Donna Wares, *A Broader Border Patrol?*, 11 CAL. LAW. 24 (1991) (federal prosecutors attempting to use Border Patrol in war on drugs).

63. The Court frequently treated the airport as the functional equivalent of an international border. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979).

64. Wisotsky, *supra* note 2, at 907. A leading treatise on constitutional criminal procedure devotes an entire subsection to "airport searches." See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 3.9(h) (1985); see also *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Place*, 462 U.S. 596 (1983).

65. 460 U.S. 491 (1983).

66. *Id.* at 513 (Blackmun, J., dissenting).

67. *Id.* at 518 (Blackmun, J., dissenting).

68. 469 U.S. 325 (1985).

69. *Id.* at 328.

70. *Id.* at 325.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Martinez-Fuerte* also involved an identifiable class, persons crossing the border. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Specifically, the search focused on

dents engaged in school-related activity. The Supreme Court might have validated the search of T.L.O.'s purse by holding that students enjoy a diminished expectation of privacy in their belongings while on school property, but the Court rejected that approach.⁷⁵ It resorted instead to a balancing analysis to determine whether the search was reasonable.⁷⁶ Justice White wrote, "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."⁷⁷

Reasonableness, the *T.L.O.* Court said, depends on "whether the . . . action was justified at its inception," and whether the scope was excessive.⁷⁸ Stating the "test" of reasonableness as a simple formula, however — something the Court began doing in *Terry v. Ohio* — adds nothing to the resolution of the issue. It merely adds to the illusion that the analysis is precise and scientific. In fact, the core issue is usually whether sufficient suspicion existed at the time of the search, an issue now described as whether the search was "justified at its inception." This formula is impossible to apply until a court establishes the *level* of suspicion necessary for the search. Once a court makes that decision (once it decides, say, that reasonable suspicion will suffice for an investigative detention), the formula merely describes the court's obligation to find that level of suspicion actually existed and to review the scope of the search in light of its objective. The level of suspicion necessary to justify a given search, at least when probable cause is not required, is a product of balancing.⁷⁹

In *New Jersey v. T.L.O.*, the result of the Court's balancing was a determination that the search was justified at its inception because the Court found "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."⁸⁰ While this result was significant, the balancing

illegal aliens, and presumably only those "appearing" to be illegal immigrants would be subjected to a border search.

75. *T.L.O.*, 469 U.S. at 338-39; see Gerald S. Reamey, *New Jersey v. T.L.O.: The Supreme Court's Lesson on School Searches*, 16 ST. MARY'S L.J. 933, 937-39 (1985).

76. *T.L.O.*, 469 U.S. at 340-41.

77. *Id.*

78. *Id.* at 341-42 (citing *Terry v. Ohio*).

79. Exactly how the Court balances competing interests is usually confined to the secrecy of the conference room. The Supreme Court has been notably reluctant to reveal which facts weighed most heavily or lightly, or to explain why some interests are necessarily more weighty than others. See T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987).

80. *T.L.O.*, 469 U.S. at 341-42.

itself was ultimately more important.⁸¹ Justice White's opinion somewhat vaguely referred to "the substantial need of teachers and administrators for freedom to maintain order in the schools" as the primary government interest served in this case.⁸² But it was Justice Blackmun's concurrence that explained the balance in language that would later become the catch phrase for a whole series of decisions.⁸³ Recalling his dissent in *Florida v. Royer*,⁸⁴ Justice Blackmun resurrected his view that the Court used balancing only when "a special law enforcement need for greater flexibility" existed.⁸⁵ As modified, the Justice now believed that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement[s] impracticable is a court entitled to substitute its balancing of interests for that of the Framers."⁸⁶

The obvious and conceptually significant modification in Justice Blackmun's "special needs" justification for balancing was in limiting the analysis to needs "beyond the normal need for law enforcement."⁸⁷ Obviously, the "normal need for law enforcement" cannot by itself justify abandonment of Fourth Amendment strictures because those restraints are the very ones designed to limit search and seizure by law enforcement. Justice Blackmun illustrated the limitation by citing *Terry*, a case in which the protection of the officer, rather than the usual investigation and prosecution needs of law enforcement, justified a balancing approach.⁸⁸ He neglected to note that *Terry* also employed balancing to find the detention of the suspects reasonable,⁸⁹ and that the purpose of investigative seizure of persons is precisely and exclusively to advance a "normal need for law enforcement."

81. For a discussion of why the Court did not require probable cause and whether that course of action was desirable, see Reamey, *supra* note 75, at 946-49.

82. *T.L.O.*, 469 U.S. at 341.

83. See *id.* at 351-53 (Blackmun, J. concurring).

84. 460 U.S. 491, 513 (1983) (Blackmun, J., dissenting).

85. *Id.*

86. *T.L.O.*, 469 U.S. at 351. Justice Blackmun explained that the "balancing" done by the Framers required that probable cause exist and that a warrant be obtained to justify a search. *Id.*; *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring).

87. See Irene Merker Rosenberg, *New Jersey v. T.L.O., Of Children and Smokescreens*, 19 *FAM. L.Q.* 311, 324 (1985) ("The implicated governmental interest cannot be efficient law enforcement because that need is historically circumscribed by the probable cause requirement . . .").

88. See *T.L.O.*, 469 U.S. at 352. The Court recently cited protection of officers to justify a warrantless "protective sweep" made during an in-home arrest. See *Maryland v. Buie*, 494 U.S. 325 (1990).

89. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

Ironically, two years after the *T.L.O.* decision Justice Blackmun dissented in *O'Connor v. Ortega* to the plurality's use of his own special needs analysis.⁹⁰ In *O'Connor*, a plaintiff in a federal civil rights case alleged a Fourth Amendment violation.⁹¹ Ortega, the plaintiff, was a physician employed by a state hospital who was suspected of misfeasance in supervising a residency program.⁹² While the physician was on administrative leave during the investigation, the Hospital Administrator entered Ortega's office and thoroughly searched his desk and file cabinets, taking items that were eventually used in a termination procedure initiated against Ortega.⁹³ The Supreme Court took the case to decide whether plaintiff Ortega had any reasonable expectation of privacy in his office and its furnishings, and if so, whether the search of those places violated that reasonable expectation.⁹⁴

In language reminiscent of *T.L.O.*, the Court held that a government employee may reasonably expect privacy in his personal effects, and that a search conducted by a state employee, even if not for the purpose of criminal investigation, is subject to the requirements of the Fourth Amendment.⁹⁵ The Court then quickly qualified the recognition of a privacy interest in personal effects by noting that because of the quasi-public nature of some governmental offices and their furnishings, an expectation of privacy by some employees may be unreasonable when a supervisor and not a police investigator conducts the search.⁹⁶ Fortunately for him, Dr. Ortega had limited others' access to his desk, preserving his reasonable expectation of privacy in its contents.⁹⁷

Having found that Ortega did enjoy a right to privacy in his office furnishings, the Court then addressed whether the search was reasonable — that is, whether it violated the Fourth Amendment.⁹⁸ The now-standard balancing approach was used, but with a twist. The Court employed Justice Blackmun's special needs analysis to justify avoidance of the probable cause and warrant standards.⁹⁹ Citing the special need of public employers to promote effectiveness and efficiency and to detect and eliminate misfeasance, the Court concluded that the reasonable sus-

90. See *O'Connor v. Ortega*, 480 U.S. 709, 732-48 (1987) (Blackmun, J., dissenting).

91. *Id.* at 709.

92. *Id.* at 712.

93. *Id.* at 713-14.

94. *Id.* at 711-12.

95. *Id.* at 714-15. Justice O'Connor wrote: "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717.

96. *Id.*

97. *Id.* at 718-19.

98. *Id.* at 719.

99. See *id.* at 719-20.

picion standard better promotes those aims than do probable cause and prior judicial approval.¹⁰⁰ This decision was specifically limited to searches conducted as part of an investigation of "work-related misconduct" rather than criminal activity, or some "noninvestigatory work-related purpose such as to retrieve a needed file."¹⁰¹

Justice Blackmun, author of the "special needs" formulation, criticized its misuse by the plurality in *O'Connor*.¹⁰² He explained that balancing is appropriate only when "the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute."¹⁰³ In judging Dr. Ortega's case, he asserted, the plurality ignored whether a special need justified the balancing approach; the plurality balanced without first finding that the goals of the hospital could be advanced only by dispensing with the formula for reasonableness struck by the Framers.¹⁰⁴

Justice Blackmun finally wrote on this issue for the majority in *New York v. Burger*.¹⁰⁵ The defendant in *Burger* owned an automobile salvage business. Acting pursuant to a New York state regulatory scheme permitting warrantless police inspections of vehicles, parts, and records, police searched Burger's business and discovered stolen vehicles and parts, along with a wheelchair and a walker.¹⁰⁶

The Court characterized the auto salvage business as a "closely regulated industry" in which owners like Burger have a lesser expectation of privacy.¹⁰⁷ A reduced expectation of privacy, in turn, means that "the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context."¹⁰⁸ Justice Blackmun then concluded that, "as in other situations of special need, where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the

100. *See id.* at 724. The Court expressly refused to decide whether "individualized suspicion" is necessary in such searches, finding that it existed in the present case. *Id.*

101. *Id.* at 726.

102. *See id.* at 741-42 (Blackmun, J., dissenting).

103. *Id.* at 741 (Blackmun, J., dissenting).

104. *See id.* at 742 (Blackmun, J., dissenting).

105. 482 U.S. 691 (1987).

106. *Id.* at 695-96.

107. *Id.* at 700-07. The Court recognized, however, as it had in *T.L.O.* and *Ortega*, that the defendant did retain *some* reasonable expectation of privacy in commercial premises. *Id.* at 699.

108. *Id.* at 702 (citation omitted).

meaning of the Fourth Amendment."¹⁰⁹ The opinion then described the criteria required to justify a warrantless inspection. These criteria included: the existence of a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made"; a demonstration that the search is "necessary to further [the] regulatory scheme"; and a statutory scheme that "in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."¹¹⁰

Presumably Justice Blackmun intended these criteria to demonstrate the special need for warrantless inspections of vehicle salvage dealers. Instead, the criteria merely stated standards by which warrantless inspections would be judged. The opinion contains only a brief nod in the direction of "special need" by asserting virtually without discussion that "frequent and unannounced" inspections are necessary to stem the flow of stolen vehicles and parts through junkyards.¹¹¹

Any reasons why an administrative warrant scheme like that required in *Camara* would prevent or even hamper "frequent and unannounced" inspections are conspicuously absent from the opinion. Ironically, this is the very kind of omission that caused Justice Blackmun to dissent in *Ortega*.¹¹² Moreover, if the special needs must extend "beyond the normal need for law enforcement,"¹¹³ catching car thieves cannot justify dispensing with warrants and probable cause.¹¹⁴

During the same term in which the Court decided *New York v. Burger*, Justice Blackmun made clear his unwillingness to bypass the warrant requirement simply because special needs justified a reduced level of suspicion.¹¹⁵ In *Griffin v. Wisconsin*,¹¹⁶ the majority employed the now-familiar approach to a search of a probationer's home. Wisconsin law permitted the warrantless search of a probationer's home if "reasonable grounds" existed to believe the probationer possessed contraband.¹¹⁷ Po-

109. *Id.* (citation omitted).

110. *Id.* at 702-03 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600-02 (1981)).

111. *See id.* at 710.

112. *See O'Connor v. Ortega*, 480 U.S. 709, 741-44 (1987) (Blackmun, J., dissenting).

113. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

114. The New York Court of Appeals held the search unreasonable, in part because the statutory scheme permitted searches "undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." *People v. Burger*, 493 N.E.2d 926, 929 (N.Y. 1986). The Court concluded, however, that "[t]he asserted 'administrative schem[e]' here [is], in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." 493 N.E. 2d at 929; *New York v. Burger*, 482 U.S. 691, 698 (1987).

115. *See Griffin v. Wisconsin*, 483 U.S. 868, 881-82 (1987) (Blackmun, J., dissenting).

116. *Id.* at 868.

117. *Id.* at 870-71.

lice had received information that the probationer, Griffin, might have guns in his apartment, and a handgun was found in the ensuing search of the residence.¹¹⁸ Citing the special needs attendant to supervision and rehabilitation of probationers, the Court held that “reasonable grounds” existed to justify the search, and that the search did not require prior judicial approval.¹¹⁹

Justice Blackmun, echoing his complaint in *O'Connor v. Ortega*,¹²⁰ dissented from the majority’s failure to recognize that finding special needs is a “*threshold* determination.”¹²¹ He explained, “The presence of special law enforcement needs justifies resort to the balancing test, but it does not preordain the necessity of recognizing exceptions to the warrant and probable-cause requirements.”¹²²

For the dissenters, special needs in this case supported use of balancing, a term that had come to be synonymous with “reasonable suspicion.”¹²³ But special needs did not support the search of a home without at least an administrative warrant of the sort required by *Camara*.¹²⁴ The majority, on the other hand, had begun to decide cases as if special needs did “preordain the necessity of recognizing exceptions to the warrant and probable-cause requirements.”¹²⁵

D. “Special Needs” Trump Probable Cause (and Warrants and Individualized Suspicion)

It appeared after *Griffin v. Wisconsin* that the formulaic incantation “special needs,” though always hedged about with assurances that the defendant’s class indeed enjoyed at least some reasonable expectation of privacy, inevitably led to an alternative version of reasonableness and to the abandonment of probable cause and the warrant requirement. The Court was always careful to balance the interests to determine whether the search was reasonable, but once special needs were found, the balance inevitably tipped in favor of reasonableness.¹²⁶ Following *Griffin* and *Burger*, Justice Blackmun’s creation was effectively expropriated by those members of the Court who wished to use it — but without the limitations

118. *Id.*

119. *Id.* at 873-75.

120. *See O'Connor v. Ortega*, 480 U.S. 709, 741-42 (1987) (Blackmun, J., dissenting).

121. *Griffin v. Wisconsin*, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting) (emphasis in original).

122. *Id.* at 881-82 (Blackmun, J., dissenting).

123. *Id.*

124. *See id.* at 882-87 (Blackmun, J., dissenting); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

125. *Griffin*, 483 U.S. at 881 (Blackmun, J., dissenting).

126. *See infra* notes 172-73 and accompanying text.

intended by its creator — to skirt the probable-cause and warrant requirements.¹²⁷ The analysis produced the same result whether the suspicion was individualized or not,¹²⁸ and whether the place searched was open to others or intensely private.¹²⁹

The most recent decisions of the Supreme Court illustrate the scope of search justified by special governmental needs. Two of these cases, *National Treasury Employees Union v. Von Raab*¹³⁰ and *Skinner v. Railway Labor Executives Ass'n*,¹³¹ resulted directly from the "war on drugs." Justice Marshall, writing with characteristic candor in his *Skinner* dissent, framed the issue in precisely these terms:

The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government's deployment in that war of a particularly draconian weapon — the compulsory collection and chemical testing of railroad workers' blood and urine — comports with the Fourth Amendment.¹³²

In both cases, employees were required to submit to drug testing, and in both cases the Supreme Court found that a special need, ostensibly apart from law enforcement, justified the search.¹³³ The Court had not hesitated to validate a warrantless search of the defendant's home based on reasonable suspicion in *Griffin*, and it showed no reluctance in *Von Raab* and *Skinner* to extend that search to employees' bodily fluids.¹³⁴ If any doubt remained after *Griffin* whether the Court would draw some line based on the nature of the place to be searched, that doubt seems resolved by *Von Raab* and *Skinner*. The remaining protection of private places lies, if anywhere, in the balancing that was intended to follow a finding of special need. However, if the balancing is formalistic and the result "preordained," as Justice Blackmun suggested in his dissenting opinion in *Griffin*, the protections afforded by probable cause and prior

127. See *infra* note 171 and accompanying text.

128. See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (routine stops at border checkpoints); *Griffin*, 483 U.S. 868 (search of home of probationer believed to have guns at his residence).

129. See *O'Connor v. Ortega*, 480 U.S. 709 (1987) (search of government employee's office); *Griffin*, 483 U.S. 868 (search of probationer's home).

130. 489 U.S. 656 (1989).

131. 489 U.S. 602 (1989).

132. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

133. See *Von Raab*, 489 U.S. at 665-66 (special needs other than law enforcement justify drug testing); *Skinner*, 489 U.S. at 620-21 (1989) (special needs other than law enforcement justify mandatory urinalysis of railroad workers).

134. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

judicial approval were effectively stripped away.¹³⁵ In both *Von Raab* and *Skinner*, the Court preceded its analysis, as usual, by conceding that urine tests are searches subject to the Fourth Amendment.¹³⁶

The employees to be searched in *Von Raab*¹³⁷ were agents of the United States Customs Service.¹³⁸ Those who were engaged in drug interdiction or enforcement, who carried firearms, or who handled classified material were required to submit to drug screening.¹³⁹ The Court justified its resort to balancing to determine the reasonableness of the intrusion by the Customs Service's need to "deter drug use among those eligible for promotion to sensitive positions with the Service and to prevent the promotion of drug users to those positions."¹⁴⁰

Ultimately, the Court found the intrusion reasonable despite the lack of individualized suspicion or, indeed, any suspicion at all.¹⁴¹ Abandoning individualized suspicion is seemingly merited only in cases that involve credible evidence demonstrating a substantial incidence of conduct related to the special need within a narrowly defined and easily recognizable class. But the Customs Service failed to document any significant drug use by its employees.¹⁴² Notwithstanding this seemingly insurmountable constitutional obstacle, the Court found suspicionless, warrantless drug testing "reasonable" because drug abuse is a "pervasive social problem"¹⁴³ and Customs Service employees have only a slight expectation of privacy, which is not infringed significantly by the taking of urine samples.¹⁴⁴

135. *Id.* at 881 (Blackmun, J., dissenting).

136. *Id.* See *Von Raab*, 489 U.S. at 617. This pattern of analysis is at least as old as *Terry v. Ohio*. The Court acknowledges that the activity is indeed a search subject to Fourth Amendment constraints, but concludes on balance that those constraints are inapplicable in the case before the Court. Professor Burkoff likens this approach to George Orwell's "1984": "You have Fourth Amendment rights, of course, the Court tells us. You don't get them here, however, we are also told. Sound familiar? *Doublethink*." Burkoff, *supra* note 4, at 555.

137. *Von Raab*, 489 U.S. 656.

138. *Id.* at 659.

139. *Id.* at 660-61. The case was remanded respecting those employees who had access to classified material.

140. *Id.* at 666.

141. See *supra* notes, at 137-39. The Supreme Court recently reaffirmed the use of roadblocks to detain drivers without individualized suspicion. See *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990); Strossen, *supra* note 21.

142. See *Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting).

143. See *id.* at 674; *id.* at 683 (1989) (Scalia, J., dissenting).

144. *Id.* at 670-72; see Alyssa C. Westover, Note, *National Treasury Employees Union v. Von Raab—Will the War Against Drugs Abrogate Constitutional Guarantees?*, 17 PEPP. L. REV. 793, 814 (1990) (individual privacy rights of no weight in light of compelling government interests).

Railroad employees were the subjects of the drug tests in *Skinner*,¹⁴⁵ and the special need was "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."¹⁴⁶ The Court noted that these tests were not intended "to assist in the prosecution of employees,"¹⁴⁷ but the Court conceded that the provision "might be read broadly to authorize the release of biological samples to law enforcement authorities."¹⁴⁸ Regarding urine samples, the Court wrote:

It is not disputed . . . that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. . . . Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.¹⁴⁹

Despite the admittedly intrusive nature of the testing procedure,¹⁵⁰ the Court concluded that neither individualized suspicion, nor prior judicial approval of the procedure¹⁵¹ is required to conduct such searches.¹⁵²

E. The Impact of "Special Needs" Analysis on Fourth Amendment Decisionmaking

This series of cases reflects an important reshaping of Fourth Amendment protections. If it also portends the future of privacy rights,¹⁵³ it will be a future very unlike the past.¹⁵⁴ In several distinct

145. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); see *Catuogna*, *supra* note 5.

146. 49 C.F.R. § 219.1(a) (1987); see *Skinner*, 489 U.S. at 602.

147. *Skinner*, 489 U.S. at 620-21.

148. *Id.* at 621 n.5. The majority also noted that the regulations did not explicitly permit use of the test results by law enforcement agencies, and that the labor organizations had not shown that the regulations were pretextual. *Id.* The Court expressly avoided deciding whether proof of regular reporting of positive results to law enforcement agencies would undercut the avowed administrative nature of the seizure. *Id.*

149. See *id.* at 617.

150. *Id.*

151. *Id.* at 623.

152. *Id.* at 633.

153. Cf. *Strossen*, *supra* note 21, at 369 (*Michigan Dep't of State Police v. Sitz* heralds a "new epoch of limited Supreme Court protection for individual rights"). Professor Sundby believes the risk is great that the interpretation of reasonableness will lead away from the original premises of the Fourth Amendment. See *Sundby*, *supra* note 28, at 440.

154. What Learned Hand remarked in an earlier context is apropos of the modern trend:

ways, these cases have quietly but surely altered some of the most fundamental assumptions about the intent of the Framers, and they have laid the groundwork for even more sweeping change.

In the pre-*Terry* world, courts took seriously the command that searches and seizures be predicated on probable cause and warrants.¹⁵⁵ The warrant requirement slowly but surely gave way to numerous exceptions, which are now the rule.¹⁵⁶ Incursions on the integrity of the exclusionary rule¹⁵⁷ and procedural limitations like standing have reduced the likelihood that Fourth Amendment violations will be vindicated.¹⁵⁸

Less obviously and more slowly, perhaps because it was considered the indispensable "core" of the Fourth Amendment, probable cause also lost its central role in protecting privacy.¹⁵⁹ The degradation of probable cause may have been inevitable once the Supreme Court announced that "reasonableness" is the real touchstone of the amendment. But if balancing permits a reduction of suspicion levels necessary to justify a search, it does not require it. Reasonableness does not necessarily mean that the concept of individualized suspicion is disposable.¹⁶⁰ And special needs are not always more weighty than individual privacy rights.¹⁶¹

From one perspective, the Supreme Court has created subclasses of the population entitled to less constitutional protection than the rest.¹⁶²

If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion.

United States v. Di Re, 159 F.2d 818, 820 (2d Cir. 1947).

155. See *Catuogna*, *supra* note 5, at 582 ("This idyllic time has passed . . ."). One author suggests that the pre-*Terry* Court avoided a reasonableness analysis because of its "wariness of the potential open-endedness of a Fourth Amendment test based on reasonableness." Sundby, *supra* note 28, at 387.

156. See *Kannar*, *supra* note 48, at 20-21. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984).

157. *Strossen*, *supra* note 21, at 331 (reduced scope of exclusionary rule is one example of erosion of privacy and liberty rights).

158. See generally *Ashdown*, *supra* note 12. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980).

159. *Strossen*, *supra* note 21, at 332 (until 1968 Supreme Court had uniformly insisted on probable cause).

160. *Id.* at 362 (reasonableness does not necessarily imply low level of judicial review).

161. Professors Wasserstrom and Seidman effectively argue in favor of employing a context-based interpretation of reasonableness. See *Wasserstrom & Seidman*, *supra* note 11, at 44-52. I disagree with their premise that the Supreme Court has, for the most part, eschewed a balancing approach. The Court continues to move deliberately toward such an approach, in fact, for many of the reasons Wasserstrom and Seidman cite as problematical.

162. This does not mean that equality of Fourth Amendment protection satisfies the Constitution's command. Despite the inference that might be drawn from recent decisions, I do not subscribe to the theory that any level of suspicion, perhaps even none at all, is reasonable if

Probationers, automobile salvage dealers, government workers, railway employees, certain customs agents, and school children no longer enjoy the safeguards of probable cause and warrants.¹⁶³

The intrusions approved by the Court into the privacy of members of these subclasses are not minimal. As Justice Marshall noted in *Skinner*, they implicate "each of the four categories of searches enumerated in the Fourth Amendment: searches of 'persons,' 'houses,' 'papers,' and 'effects.'" ¹⁶⁴ Moreover, they include intrusions into the most private places of the suspects.¹⁶⁵ Regarding the extent of the intrusion permitted by the Court, Justice Marshall wrote:

Until today, it was conceivable that, when a Government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. No longer: with nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the "special needs" framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures.¹⁶⁶

None of the "special needs" cases required a warrant, and in the earlier decisions only reasonable suspicion was necessary. The most recent balancing cases completely abandon the need for suspicion.¹⁶⁷ Noting this departure from what had seemed settled law, Justice Marshall wrote:

. . . [U]ntil today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: in contrast to the searches in *T.L.O.*, *O'Connor*, and *Griffin*, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched, the regulatory regime upheld today requires the postaccident collection and testing of the blood and urine of *all* covered employees — even if every member of this group gives every indication of

applied evenly to all persons. See Strossen, *supra* note 21, at 370-71 (Fourth Amendment protects individual privacy rights, not just equality of application).

163. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationer's home); *New York v. Burger*, 482 U.S. 691 (1987) (search of automobile salvage yard); *O'Connor v. Ortega*, 480 U.S. 602 (1989) (search of government employee's desk); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (search of railway workers' urine); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (search of agents' urine); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student's purse).

164. *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).

165. See, e.g., *Griffin*, 483 U.S. 868 (search of probationer's home); *O'Connor*, 480 U.S. 709 (search of doctor's desk and file cabinet); *T.L.O.*, 469 U.S. 325 (search of student's purse); *Von Raab*, 489 U.S. 656 (search of agents' urine).

166. *Skinner*, 489 U.S. at 640 (Marshall, J., dissenting).

167. See, e.g., *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656; *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

sobriety and attentiveness.¹⁶⁸

This brief survey shows the power of the incantation "special needs." Perhaps most troubling, the potential application of this mighty talisman is virtually unlimited. If the special needs doctrine was originally intended to meet administrative goals unrelated to law enforcement, it has certainly not been restricted to these applications.¹⁶⁹ The Court's opinions give no indication that evidence discovered during these searches is unavailable in the prosecution of criminal activity uncovered by the search. In fact, evidence found in administrative searches has often been used in criminal prosecution.¹⁷⁰

Moreover, the Court has made no serious effort to limit the special needs analysis to the "threshold" inquiry envisaged by Justice Blackmun.¹⁷¹ It is not merely a way to determine whether ad-hoc balancing is appropriate in lieu of applying the Framer's balance. Instead, special needs, once found by the Court, have always led to ad-hoc balancing, have always resulted in a reduced level of suspicion, have always eliminated the need for a warrant, and have always resulted in a finding that a search was "reasonable."¹⁷² Justice Marshall, dissenting in *Skinner*, observed this ineluctable progression:

In the four years since this Court, in *T.L.O.*, first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings: public school principals' searches of students' belongings; public employers' searches of employees' desks; and pro-

168. *Skinner*, 489 U.S. at 640 (Marshall, J., dissenting).

169. See *New York v. Burger*, 482 U.S. 691 (1987) (salvage yard search upheld for purpose of discovering stolen car parts); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (probationer found in possession of handgun convicted of possession of firearm by convicted felon).

170. See *Griffin*, 483 U.S. 868; *Burger*, 482 U.S. 691; *T.L.O.*, 469 U.S. 325 (evidence used in delinquency hearing); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (drugs found in vehicle inventory search). The Supreme Court suggested in a footnote to *Skinner* that it might assess an administrative drug testing scheme in a more traditional way, presumably by employing probable cause or at least reasonable suspicion, if there was a "persuasive showing" that the testing program is pretextual. *Skinner*, 489 U.S. at 621 n.5. Justice Kennedy wrote:

We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the Agency's program.

Skinner, 489 U.S. at 621. See also Dennis Stewart, Comment, *Constitutional Law—Administrative Searches and the Fourth Amendment: The Definition of "Probable Cause" in Camera v. Municipal Court of the City and County of San Francisco*, 36 UMKC L. REV. 111 (1968) (administrative and criminal searches may be inseparable).

171. See *T.L.O.*, 469 U.S. at 351-52 (Blackmun, J., concurring); *O'Connor v. Ortega*, 480 U.S. 709, 741-42 (1987) (Blackmun, J., dissenting).

172. See *Skinner*, 489 U.S. at 637-41 (Marshall, J., dissenting).

bation officers' searches of probationers' homes. Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test.¹⁷³

If, as it appears, the label "special needs" is so potent and the power it implies so unrestricted, extraordinary care must be taken in applying the label. However, the same Supreme Court that fashioned the special needs analysis and has consistently applied it to find searches reasonable, does this labeling.¹⁷⁴ The Court neatly validates searches by the expedient of finding some special need for them. In a world of special criminal justice needs, perhaps most frequently seen in the war on drugs, it is troubling that permission to search depends only on finding such a need. Even more troubling, the task falls to judges who have before them at the time of their decision probative evidence of guilt they are being asked to suppress.¹⁷⁵

Persons entering or now within the subclasses for which special needs have been found to exist are at least constructively aware that any future expectation of privacy is unreasonable, diminished, or inappropriate for prior judicial review. Those persons in situations and subclasses as yet unlabeled are scarcely better off. Although the Supreme Court may never have cause to decide whether some special need warrants abandonment of traditional safeguards respecting their subclass, the trend of recent decisions affords little reason to expect that the Court will forebear in the face of another opportunity to do individual justice.¹⁷⁶

173. *Id.* at 639 (citations omitted).

174. *Id.* at 639; see Wisotsky, *supra* note 2.

Case-by-case analysis obscures the larger social context: the government's relentless drive against the drug supply generates the pressures to test and expand its enforcement powers. Moreover, when the Supreme Court "balances" the collective interest in "effective" law enforcement against the individual's interest in due process and personal liberty, the right of privacy must generally lose out to the weightier social interest, especially if there is a shared perception of a drug "epidemic."

Wisotsky, *supra* note 2, at 909.

175. See Wasserstrom & Seidman, *supra* note 11, at 48 ("[B]alancing tests are notoriously manipulable. For the very reason that they do not provide bright lines, they are subject to slippage when the Court is under political pressure to crack down on criminals."). This troubling aspect of criminal case adjudication is certainly not limited to special needs cases. The same criticism can be made anytime a court reviews probable cause or reasonable suspicion in a criminal case.

176. The dissenting opinion of Justice Marshall in *Skinner* captures this concern:

As this Court has long recognized, the Framers intended the provisions of that Clause — a warrant and probable cause — to "provide the yardstick against which official searches and seizures are to be measured." Without the content which those provisions give to the Fourth Amendment's overarching command that searches and

Indeed, the result of Supreme Court scrutiny of administrative-like searches has become so predictable¹⁷⁷ that it might be said any expectation of privacy entertained by members of these subclasses is already objectively unreasonable.¹⁷⁸

II. Constitutional Decisionmaking

The development of special needs analysis, like the development of other strains of analysis,¹⁷⁹ should not merely be noted and criticized, and then left without consideration of what it says about the role of the Supreme Court and constitutional adjudication. Critics and commentators understandably tend to avoid these broader issues because they may detract from the impact of more focused criticism, because conceptualizing and analyzing global issues is simply too daunting, or maybe because they view the effort as quixotic.¹⁸⁰ The Supreme Court's use of special needs analysis is unsound as applied to determine reasonableness, but it is more important to understand why it is also unsound as a mode of constitutional interpretation.

A. Obfuscation as a Judicial Device

Stand back from the special needs cases — and also from the warrant exception, the good-faith exception, and the standing cases — and note the relatively consistent methods employed by the Court to decide cases over the past decade.¹⁸¹ One of these, obfuscation, plays an important part in search cases in which the Court radically departed from

seizures be "reasonable," the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term.

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (citation omitted). *See id.* at 637-41 (special needs analysis always leads to a finding of reasonableness).

177. *See Skinner*, 489 U.S. at 639 (search found reasonable each time special needs employed).

178. *See Strossen*, *supra* note 21, at 356-57 (as society tolerates more varied forms of search and seizure, "reasonable expectation of privacy" narrows, and more government intrusions lie beyond the Fourth Amendment). This concern crossed the Canadian border with the adoption of a reasonable expectation of privacy approach to Section 8 of the Charter of Rights and Freedoms. *See Murray*, Note, *The "Reasonable Expectation of Privacy Test" And the Scope of Protection Against Unreasonable Search and Seizure Under Section 8 of the Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 25, 30 (1986) (government could manipulate subjective privacy expectations).

179. *See Saltzburg*, *supra* note 2 (open fields doctrine as attack on the Fourth Amendment).

180. For an excellent example of scholars tackling the "broader issues," see Wasserstrom & Seidman, *supra* note 11.

181. *See Ashdown*, *supra* note 12.

traditional doctrine.¹⁸²

Perhaps the most insidious example of this practice is the Court's use of "bright-line rules" to diminish the effect of the exclusionary rule. The touted virtue of simplification of search and seizure rules is that the police are caught unawares by overly technical legalistic doctrines, which frustrate both legitimate aims of law enforcement and common-sense notions of fairness. The Supreme Court never tires of noting that the public is harmed in cases in which evidence is excluded merely because "the constable has blundered." The Justice invoking this venerable phrase invariably omits any discussion of whether the constable *should* have blundered, or whether society must accept that constables will necessarily blunder, or why it is that the State should not pay a price when the constable does blunder. The unstated assumption is that constables, like the rest of us, are human and given to honest mistakes for which they should not be held accountable. This kind of compassion is conspicuously absent from the Court's view of persons convicted or accused of criminal acts.¹⁸³

As an example of this over-simplified view of search and seizure rules, assume that a purposive approach to the search-incident-to-arrest exception could be replaced by an easily applied bright-line rule. Fourth Amendment protections theoretically would be more uniformly assured, and the exclusionary rule would be invoked less often. Presumably motivated by this reasoning, the Supreme Court formulated just such a rule in vehicle search cases.¹⁸⁴ The bright-line rule of search incident to arrest from a vehicle first appeared in *New York v. Belton*,¹⁸⁵ in which the Court approved the search of closed containers within the passenger compartment of an automobile without regard for whether the area searched was within the immediate control of the arrestee. The purposive application of search incident to arrest originated more than a decade before *Belton* with *Chimel v. California*,¹⁸⁶ in which the Court

182. As Felix Cohen noted, "confusion is a more potent source of evil than is error." FELIX COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* Ch. 20 (1933). See Kannar, *supra* note 48, at 21 (opponents of exclusionary rule have used confused the state of search and seizure law as excuse to abolish the rule).

183. This approach implies that law enforcement officers simply lack the capacity to understand and apply any but the simplest rules. My lengthy experience as a police legal advisor and law enforcement consultant does not support this view.

184. The purposive nature of *Chimel* had been eroded prior to the decision in *Belton* by *U.S. v. Robinson*, 414 U.S. 218 (1973), in which the Court refused to suppress evidence seized from the person of the arrestee despite the fact that the offense for which the defendant had been arrested did not involve a weapon, and was not the kind of crime for which physical evidence exists. *Robinson*, 414 U.S. at 235.

185. 453 U.S. 454 (1981).

186. 395 U.S. 752 (1969).

restricted search incident to arrest to those areas within the immediate control of the arrestee and explained that the purpose justifying the warrantless search of this area was to locate weapons dangerous to the police and to prevent the destruction of evidence. Rather than relying on the purposes justifying and limiting the scope of residence search-incident-to-arrest cases, the Supreme Court adopted an "area" approach in vehicle search cases in *Belton*.¹⁸⁷ The area of the vehicle that may be searched is the passenger compartment, including closed containers found within it.¹⁸⁸ This result is not dependent on the arrestee's ability to reach within the compartment to obtain a weapon or destructible evidence, which was the previous justification for abandonment of the warrant requirement for a search incident to arrest in the home.¹⁸⁹ In theory, the area rule is easier for police officers to apply because they need not consider the dimensions of the arrestee's actual area of control. They need not even recall why the Supreme Court gave them permission to search without a warrant in the first place.

The reality is that adoption of a bright-line rule for search incident to arrest has resulted in an increased chance that "the constable will blunder" in a way that violates privacy rights, and in a reduced likelihood that the exclusionary remedy for that violation will be available. Whereas the previous search-incident-to-arrest rule informed the police officer of both the scope of the area in which search was permitted and the policy reasons justifying the search, the bright-line versions of the rule have been cut loose from doctrinal and policy moorings, leaving the officer to guess whether the Court will approve the search. An example of this dilemma is the case of the contraband found within a locked container in the passenger compartment of a vehicle from which the driver has been taken and arrested. If the purpose of the warrant exception is to prevent the arrestee from retrieving a weapon or destructible evidence, the officer has some basis for deciding whether a search of the locked compartment may be made without a warrant. However, under the bright-line approach of *Belton*, it is impossible to decide by the application of logic whether the formalistic holding of *Belton* extends beyond the factual limits of the opinion.¹⁹⁰ By freeing itself from the doctrinal limitations of the rule, the Court is now positioned to define, ad hoc, which areas are susceptible to a search incident to arrest. Most notably,

187. See *Belton*, 453 U.S. at 460-61.

188. See *id.*

189. *Chimel*, 395 U.S. at 762-63.

190. See John M. A. DiPippa, *Is the Fourth Amendment Obsolete?—Restating the Fourth Amendment in Functional Terms*, 22 GONZ. L. REV. 483, 522 (1987-88) (*Belton* approach faulty for being too open-ended).

this diminution in clarity and certainty has been accomplished by citing the need for simplification.

In other areas of criminal procedure, bright-line rules that burden prosecution have been replaced by purposive rules that are much less certain in application. For instance, in the standing cases, the rule has changed from a more bright-line approach granting standing to persons "legitimately on the premises" and automatic standing to those charged with possession of contraband, to a more purposive analysis of whether the defendant had a reasonable expectation of privacy in the place searched.¹⁹¹ Under the contemporary view, a vehicle passenger might or might not have standing to complain about contraband found in the passenger compartment depending on whether he or she had a reasonable expectation of privacy in the place searched.¹⁹² It is usually easier to determine whether a vehicle passenger was "legitimately on the premises" during the search, but that rule also made it much more likely that the passenger would have standing to complain about the search.¹⁹³

All of this may illustrate only that it is as easy to do the wrong thing for the right reason as it is to do the right thing for the wrong reason. Efficiency,¹⁹⁴ clarity, and simplicity are all virtues, especially in a criminal justice system seemingly beset with inefficiency, confusion, and complexity, all of which contribute to the criminal going free. Some problems, however, are not simple or easy; they are not clear; and there is no efficient¹⁹⁵ way to solve them. If the rule is made simpler and easier to apply, the complexity of the problem must be managed by another component of the problem-solving dynamic; the complexity does not just vanish because of a simple response. In recent constitutional criminal procedure cases, the Supreme Court has effectively allocated the burden

191. See generally LAFAVE & ISRAEL, *supra* note 64, at §§ 9.1, -2.

192. See *Rakas v. Illinois*, 439 U.S. 128, 142-43 (1978).

193. See *Jones v. United States*, 362 U.S. 257, 266-67 (1960).

194. Justice Stewart cautioned against the exaltation of efficiency in his opinion in *Mincey v. Arizona*, 437 U.S. 385 (1978):

Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Id. at 393 (citation omitted). This idea is not a new one. Blackstone observed that "delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES 350 (11th ed. 1791).

195. By "efficient," I mean without considerable "cost." Efficiency as maximization of utility can, of course, be achieved.

of managing the residual complexity to the trial courts, eschewing the rule of law (i.e., doctrine) for the rule of judges.¹⁹⁶

The special needs cases illustrate this point especially well, but in a way different from the search-incident-to-arrest cases. Here, the pre-*Terry* rule was the bright-line one: Probable cause and a warrant are required in all search cases unless a well-defined exception to the warrant requirement exists.¹⁹⁷ The adoption of “reasonable expectation of privacy” as the definition of a search,¹⁹⁸ and the subsequent reliance on reasonableness rather than probable cause as the touchstone of the amendment did not signal a simplification in approach.¹⁹⁹ Rather, it signalled the Court’s arrogation of power by substituting its version of Fourth Amendment protection for that of the Framers.²⁰⁰ Although by itself that is assuredly a big step, once made it permits the Court to foreverafter freely reformulate search and arrest law.

196. See Ashdown, *supra* note 12, at 1310 (the Court’s new privacy formulation amounts to an abdication to state judges on Fourth Amendment issues). The Supreme Court has shifted the problems of ad-hoc decisionmaking to the lower courts. Rather than adhere to some relatively fixed rule or doctrine that is more or less interpreted consistently, it has cut search law free of many of its doctrinal moorings, leaving the trial courts to sort out what “reasonable” means in each new situation.

Ironically, a Court considered the most conservative in decades has practiced this brand of activism. Judicial activism may truly be in the eye of the beholder; judges without the power to effect change can always criticize those in other philosophical camps for being activist. That is, most judges would probably agree that the “right” judges should be permitted to “make” law while the “wrong” judges should not.

197. *Id.*

198. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (reasonable expectation of privacy misconstrued by Supreme Court). There are three distinct ways in which “reasonableness” comes into play in Fourth Amendment cases. The first two are threshold issues. One is the issue of standing, which is decided by asking whether the defendant had a reasonable expectation of privacy in the place or thing searched. The second is whether there was any “search” at all. If the defendant had no reasonable expectation of privacy—as in the *Ciraolo*/plain view situation, the defendant also cannot complain. This is not because he lacks standing, but because there was no Fourth Amendment activity by the state. The third use of reasonableness is in interpreting the amendment itself. A “search” of someone with “standing” must be reasonable to avoid the exclusionary sanction.

199. See Wasserstrom & Seidman, *supra* note 11, at 48 (“[I]ndividualized, retrospective balancing provides little prospective direction to police officers, who presumably need clear rules to guide their decisions.”); Ashdown, *supra* note 12, at 1309-10 (elasticity of Court’s view of privacy “is at best confusing and at worst exhibits infidelity to the privacy notions expressed in *Katz*).

200. Opponents of this view will argue that no arrogation of power occurred because the Court correctly interpreted the constitutional scheme to vest in it the responsibility to decide what is reasonable. I leave to my colleagues who are constitutional law historians the arguments why this reading is not correct. See Grayson, *supra* note 15; Strossen, *supra* note 21. Suffice it to say that I am not persuaded that the Framers intended to reduce the imperative of the Fourth Amendment to a mere alternative suggestion.

B. The Inefficiency and Unpredictability of Ad-Hoc Decisionmaking

The preceding characterizations of the Court's decisionmaking do not require the conclusion that the Court has acted extra-constitutionally²⁰¹ or, if it has, that it should not have done so. They do, however, demand consideration of whether its recent approach is appropriate or desirable.

One entirely pragmatic reason to regret the consolidation and concentration of decisionmaking power at the highest level of the judiciary is its inherent inefficiency. Though it may appear more efficient to locate the final and "true" balancing determination in the Supreme Court, the burden will ultimately be unbearable. The Court is unable,²⁰² and presumably unwilling, to decide every case in which balancing is required.²⁰³ Even if the cases accepted by the Court represent only the "new" situations (or subclasses), the docket simply cannot absorb the "protean variety"²⁰⁴ of cases demanding their turn at the scales.

At least two alternatives exist that can alleviate this impact on the Court. The first is to disperse decisionmaking power among the lower courts, as is done now in cases determining, for example, whether probable cause exists in a given situation. The Court then could act to correct only those egregious errors or conflicts occurring below. Unfortunately, many such errors and conflicts will arise, in part because of the nature of ad-hoc decisionmaking and in part for the same reasons that bright-line rules do not really clarify vehicle searches made incident to arrest.²⁰⁵

By severing search analysis from more familiar landmarks like probable cause, the Court has forced lower courts and law enforcement agencies to guess whether a particular search is reasonable.²⁰⁶ Just as police

201. *But see Katz*, 389 U.S. at 347 (reasonable expectation of privacy misconstrued at expense of individual privacy); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989).

202. Richard Posner observes, "The strongest argument for the pedigree approach and against a pragmatic or 'realistic' one may itself be pragmatic: judges just are not smart enough to make wise policy decisions, balancing a myriad of conflicting considerations that include the rule-of-law arguments against balancing." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 142-43 (1990).

203. *See Wasserstrom & Seidman*, *supra* note 11, at 48.

204. *Terry v. Ohio*, 391 U.S. 1, 15 (1968).

205. *See supra* notes 167-72 and accompanying text.

206. *See Wasserstrom & Seidman*, *supra* note 11, at 48 (Retrospective balancing provides little prospective direction to police officers.); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) ("If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable."); Ashdown, *supra* note 12, at 1310 (lack of clarity and predictability inherent in ordering privacy expectations leaves police and courts without standards to guide their conduct).

officers deprived of a purposive rule can act confidently and with guidance only when the situation at hand closely parallels that which gave rise to the bright-line rule, so will courts be guided by Supreme Court pronouncements on reasonableness only when the case before them is virtually identical to established precedent.

The second alternative, obviously, is for the Supreme Court to decide cases in such a way that lower courts and actors within the criminal justice system will be able to fairly predict whether a search or arrest is reasonable.²⁰⁷ One way to do this is for the Court to "show its hand" in its opinions, to make clear what motivated its decisions. Regrettably, this is largely ineffective in special needs and other reasonableness cases because the decisions necessarily turn on the subjective evaluations of specific features peculiar to the case in which they arise.²⁰⁸ Would school searches for criminal evidence be upheld if conducted for the sole purpose of prosecuting the student? If government employees never locked their desks, but asked coworkers not to use their offices, are their expectations of privacy reasonable? Can urine be "seized" from Customs officers who are neither armed nor exposed to sensitive information? The cases that would control the answers to such questions, and myriad others, provide virtually no guidance.

The other way to assure predictability is to decide virtually all reasonableness cases in favor of permitting or denying the search. The special needs cases can be characterized as doing just that. The cases decided to date have been remarkably consistent in dispensing with the warrant requirement and reducing the required level of suspicion.²⁰⁹ But this approach completely abdicates the judicial role in "deciding" cases. It strikes a balance once and for all against the enforcement of the Fourth Amendment's privacy guarantee.²¹⁰

Stated differently, the special needs cases decided recently have embraced a barely disguised formalism. They appear to abandon simplistic reliance on probable cause and warrants in favor of a more sophisticated and substantive analysis that will more often produce justice in the given

207. Predictability is more than aesthetically pleasing. Holmes believed prophecies about the actions of courts to be no less than the law itself. See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). The accuracy of legal prophecy, and the willingness and ability of members of society to resort to it, depends on fair predictability.

208. See Aleinkoff, *supra* note 79, at 976 (Balancing opinions are radically underwritten; balancing takes place inside a "black box.").

209. See *supra* notes 172-73 and accompanying text.

210. See Reamey, *supra* note 75, at 949 ("When measure after measure is removed from one side of the balance without tipping the scales, it can only be because gravity is stayed by an interested hand.")

case.²¹¹

In reality, however, they substitute the incantation "special needs" for a more predictable probable cause and warrant analysis that was more clearly within the contemplation of the Framers and backed by decades of decisions. It may seem peculiar to argue that probable cause is more predictable than some other form of analysis. Considerable precedent exists, however, construing what probable cause means in various contexts. Even more important are those numerous cases in which the Court has held that no probable cause existed. Because all of these cases have necessarily relied heavily on the facts the officers knew when they decided to arrest or search, a relatively complete "profile" of probable cause exists. The profile is not easily accessed, but is reasonably well understood by the actors in the criminal justice system. This widespread understanding comes from decades of judicial decisionmaking. Perhaps after a similar number of decades of decisions, special needs will be as predictable as probable cause, but in the interim it will create considerable confusion and a growing contempt for a system unable or unwilling to make clear its constitutional limitations. Or, "special needs" may acquire no substantive content and be used by courts needing a convenient way to circumvent the Fourth Amendment. In either event, special needs will not just be a contemporary tool for flexible decision-making as probable cause was before it. Probable cause decisions not only have a history; they also reflect a good-faith effort by the Supreme Court to define the contours of probable cause. Sometimes probable cause was found to exist, but often it was found lacking. To date, special needs have never been found lacking.

Not only courts will suffer from the lack of consistency and predictability of the new special needs and reasonableness analyses. Those charged with the enforcement of the law will be unable to discharge their duties.²¹² Citizens who are required to know the law or suffer its consequences will be imperiled by unavoidable uncertainty. Only after the Court tells the next targeted subclass that its previously held expectation of privacy was unreasonable, will it be able to modify its behavior to accurately coincide with what the Supreme Court believes is reasonable.²¹³ Until it is told, that next subclass can only wait and wonder how its privacy rights will weigh in the scales. If those rights are always

211. This argument is made especially well in Wasserstrom & Seidman, *supra* note 11, at 44-51.

212. See Wasserstrom & Seidman, *supra* note 11, at 48.

213. Such decisions are so fact-specific that they offer only marginal gains in predictability. School children, government workers, and vehicle salvage operators are now better informed than previously about their privacy rights, but the opinions directly involving them give lim-

found to weigh lightly, there is a measure of predictability for the police and citizens, but it is bought at a high price. As one author warns:

Before our courts decide to abandon the fourth amendment law that has protected the right of people to find private places and to be left alone, the need for these new law enforcement measures ought to be more clearly demonstrated. Otherwise, the most important victim of illegal drugs may be the liberty of a nation.²¹⁴

C. The Least Political Branch

In addition to the inefficiency and inconsistency inherent in concentrating decisionmaking at the Supreme Court, another reason to rethink the trend exemplified by the special needs cases is that the Supreme Court is not politically suited to active participation in the war on crime. Professor Stephen Salzberg states this point succinctly:

Judges' decisions might well make it easier for police and prosecutors to investigate and convict those involved in drug trafficking. But this is not the task assigned to the judiciary by federal and state constitutions. The judicial task is quite the opposite; courts must ensure that they stand between forces seeking to investigate and convict and the individuals who are the targets of these forces, and judges must guard against overzealous law enforcement.²¹⁵

The judiciary is the least political of the three branches of government. Members of the Court are nominated by one branch and confirmed by another. They have life tenure. The American constitutional scheme contemplates, and depends on, an independent, apolitical judiciary.²¹⁶

Few would argue, however, that judicial independence precludes the Court from adjudication of politically sensitive controversies,²¹⁷ or that the Members of the Court are immune from the pull of political currents. Those most opposed to an activist Court undoubtedly find at least some

ited guidance as to future outcomes because the opinions reveal very little reason for the balance that was struck.

214. Salzberg, *supra* note 2, at 25.

215. *Id.* at 3.

216. See Address by Chief Justice William H. Rehnquist, Northern Illinois University School of Law, de Kalb, Illinois 2, 16 (Oct. 20, 1988) (copy available from the Public Information Office of the Supreme Court of the United States) (independent judiciary enforcing written Constitution is a "uniquely American contribution"); see also Vincent R. Johnson, *The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 15 (1990).

At some point, separation of powers requires the Court to abstain from decisions appropriately made by one of the other branches of government. However, as Justice Brennan noted, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Baker v. Carr*, 369 U.S. 186, 209 (1962).

217. See O'BRIEN, *supra* note 10.

politically motivated decisions to their liking.²¹⁸ When the Court is characterized as politically independent, the description is necessarily a qualified one. More accurately, the Supreme Court is not a representative branch of government; the Court is not directly responsible to a constituency as are the other branches.²¹⁹

This insulation from direct political influence provides the Court an opportunity, unique among the branches of government, to avoid responding to the exigencies of the time and resorting to shortsighted policy imperatives. In contrast, the pressure on elected officials to produce immediate results is enormous.²²⁰ Moreover, the Court's political insulation imposes an affirmative *duty* to act in ways the other branches cannot.

The Court has the duty of interpreting the Constitution in many of its most important aspects, and especially in those which concern the relations of the individual and the state. The political proposition underlying the survival of the power is that there are some phases of American life which should be beyond the reach of any

218. *Brown v. Board of Education*, 347 U.S. 483 (1954), was one of the most political of all Supreme Court cases and has been widely accepted as reaching the right result. This is so despite the shaky legal foundations for the decision. *But see* Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1959) (arguing that the decision in *Brown* was required by the Constitution); *see also* Julius G. Getman, *Voices*, *TEX. L. REV.* 577, 584-85 (1988).

219. Alexander Bickel has nicely summarized the point:

Initially, great reliance for principled decision was placed in the Senators and the President, who have more extended terms of office and were meant to be elected only indirectly. Yet the Senate and the President were conceived of as less closely tied to, not as divorced from, electoral responsibility and the political marketplace. And so even then the need might have been felt for an institution which stands altogether aside from the current clash of interests, and which, insofar as is humanly possible, is concerned only with principle. We cannot know whether, as Thayer believed, our legislatures are what they are because we have judicial review, or whether we have judicial review and consider it necessary because legislatures are what they are.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25 (1962).

220. Electronic dissemination of information has required politicians to answer quickly the demands of their constituency. Re-election demands that politicians at least appear to solve complex problems, and to aggressively address high profile issues, even when those problems and issues require protracted consideration, difficult choices, and long-term solutions. Alexander Bickel observed this political reality nearly three decades ago:

Men in all walks of public life are able occasionally to perceive this second aspect of public questions [the unintended or unappreciated bearing on values that have a more general and permanent interest]. Sometimes they are also able to base their decisions on it; that is one of the things we like to call acting on principle. Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view.

Id.

majority, save by constitutional amendment.²²¹

Otherwise, a void would be left in the political dynamic, and the constitutionally provided opportunity to do what courts do best would be wasted.

The Supreme Court is largely ineffective when it abandons its role as preserver of core values to become a combatant against social ills. This ineffectiveness results in part from the way cases are brought to the Court.²²² Unlike the legislature, the Court focuses its attention on relatively narrow issues of law framed and brought to it by the litigants. These issues are narrowed by the existence of prior opinion by which the Court will feel bound and by the limited time and attention a supreme court can give competing cases on a crowded docket. Further narrowing results from the Court's self-imposed restraint and its unwillingness to usurp the prerogatives of other branches.²²³ The Court is also limited by rules of evidence, principles of code construction, standards of appellate review, and other procedural devices²²⁴ that do not exist in a legislative setting. Moreover, the Court is mindful that its credibility, and the response of the other branches to its decisions, turns on its ability to appear to be acting like a court.

The circumstances that determine the reasonableness of judicial decisions include statutory language, precedents, and all the other conventional materials of judicial decision making, including such prudential virtues familiar to lawyers as sensitivity to the limits of judicial knowledge and to the desirability of stability in law.²²⁵

When the Supreme Court, or any court, deviates too radically from the accepted notions of judicial conduct, it risks being ignored, possibly the worst fate a court can suffer.²²⁶ All of these factors influence the scope of

221. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 196-97 (1952).

222. See Wachtler, *supra* note 11, at 16-18 (outlines judicial process and concludes that judicial lawmaking complements, but differs from, legislative lawmaking).

223. See *id.* Contrast this state of affairs with the relatively free-wheeling conduct of legislative bodies. The range of issues they may address is much larger; legislators are supported by staff members and governmental agencies capable of providing or gathering independent data bearing on the issues; and the legislature, unlike a court, decides for itself the direction of its inquiry, how issues will be framed, and the means used to advance the inquiry. Perhaps most importantly, a legislature has access through lobbyists, constituents, experts, and special interest groups to raw and refined data on how the public feels about the matter. No one suggests that legislatures are not appropriately concerned about public response, or that they should not respond to it. That suggestion is, however, often made about courts.

224. Rostow, *supra* note 221, at 198.

225. See POSNER, *supra* note 202, at 131. These conventional resources and constraints of judicial decision-making are foreign to both the legislator and the arbitrator.

226. It is more important for a court to be respected than for it to be popular. The Supreme Court should lead by moral example precisely because it is a highly visible legal

the Court's lawmaking.²²⁷

The composition of the Court also calls into serious question its ability to accurately gauge the "community's moral intuitions"²²⁸ in deciding whether a search or seizure is reasonable. Precisely because the Court is not selected by and answerable to a constituency, it may be considerably out of touch with society's norms. That only nine Justices sit and that only one woman and two African-Americans have ever served on the Court, strongly suggest that many views go unrepresented by members of the Court, a fact that argues against the Court acting in overtly political ways.²²⁹

Courts, on the other hand, are well suited to preserving enduring constitutional and social values. Alexander Bickel stated this well:

[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the

institution. Involvement in a street fight over controversies of the day undermines the respect for, and in turn the effectiveness of, the decisions of the Court. As Professor John Burkoff observed:

[T]he diminution of liberties begins with the increasing disrespect for—or disregard of—our own legal rules and institutions. If the courts—especially the Supreme Court—fail to follow the law, or if they are widely believed to be manipulating it to reach predetermined ends, how can the citizenry be expected to respect—or even to follow—the law themselves?

Burkoff, *supra* note 4, at 556; see Saltzburg, *supra* note 2, at 3-4 ("cheating" by courts diminishes capacity to legitimate governmental decisions).

227. The pejorative "activist" label sums up much of the criticism leveled at the Court by opponents of its decisions. Despite the efforts of the Court to disguise "lawmaking" decisions to give them legitimacy and greater acceptance, some fictions are too transparent. Parties benefitted by the decisions are understandably disinclined to describe the Court in which they won as "activist," but the losers do not hesitate to do so in an apparent attempt to undermine the decision's persuasive force. See POSNER, *supra* note 202, at 132 (judicial self-restraint is a political theory rather than the outcome of legal reasoning).

228. See Wasserstrom & Seidman, *supra* note 11, at 89.

229. Justices of the Supreme Court have never been accused of being representative of American society at large. With almost no exceptions, the members have been white, well-educated men from the mainstream of the legal profession. See O'BRIEN, *supra* note 10, at Ch. 2. It is hardly remarkable that they may not be directly in touch with the contemporary views of all segments of society; it is far more remarkable that the Court has demonstrated as much diversity of thought as it has. See Wasserstrom & Seidman, *supra* note 11, at 100. Because the Supreme Court was never designed to be answerable to a constituency, the composition of the Court is much less troubling than it would be otherwise.

executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.²³⁰

Political isolation does not impede the Court in this role;²³¹ rather, it facilitates the Court's work by shielding it from the distractions of a constituency. Specifically, political isolation permits the Supreme Court to act in the best interests of the whole, sometimes by ignoring the wishes of the majority. Justice Brennan observed:

There is a sense in which judicial review is decidedly counter-majoritarian. The judiciary does not sit to count votes. It rests on the principle, expressed in the Constitution, that there are circumstances in which the majority must yield to the greater national interest in the protection of rights.²³²

Opinions serve as effective vehicles for analyzing and explaining the policy considerations that ultimately determine the decision's persuasiveness and its impact on the other branches and the public. The legislature has no close analogue.²³³ The push and pull of politics effectively forces legislators to abandon any inclinations to uphold unpopular causes on the basis of principle. Only the occasional "lame-duck" officeholder, freed from concern about reelection, will commit political suicide in defense of some noble principle.²³⁴

Many of the same factors that limit or facilitate legislation also distinguish the executive branch from the judicial. The Executive is also directly accountable to a constituency, has many independent sources of information, and appropriately responds to public sentiment. Like legislatures, and unlike courts, the Executive lacks "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."²³⁵

230. BICKEL, *supra* note 219, at 25-26; see Edward H. Levi, *The Nature of Judicial Reasoning*, 32 U. CHI. L. REV. 395 (1965); Wachtler, *supra* note 11, at 16-18.

231. Political independence and judicial decisionmaking processes are especially well suited to the definition and development of individual liberty rights. See Wachtler, *supra* note 11, at 19.

232. Brennan Jr., *supra* note 8, at 6.

233. See POSNER, *supra* note 202, at 131 (conventional resources and constraints of judicial decisionmaking are foreign to both the legislator and the arbitrator).

234. The political rhetoric of principle should not be confused with the real thing. For example, it may be politically expedient to publicly support the freedom of speech involved in a farmers' demonstration against unpopular agricultural policy, but denounce flag burning by a political protester as un-American.

235. BICKEL, *supra* note 219, at 25-26.

D. The Supreme Court's Duty to Decide Aspirationally

The judiciary is the only branch capable of consistently aspirational decisionmaking.²³⁶ The constitutional scheme of government intended that the judiciary act as the keel of the ship of state, and not the rudder.²³⁷ This role lacks the glamour and excitement of day-to-day micromanagement, but it is indispensable. More accurately, this role is as indispensable as the "core" values or principles it protects.²³⁸

When the Supreme Court decides that separate is not equal or that a right to privacy exists, it does so by reaching deep within the traditional values represented by the Constitution, searching the collective latent meaning of the words rather than demanding an expressed prescription.²³⁹ When the Supreme Court requires probable cause or a warrant, its task is simplified by the express command of the Constitution. Deviating from that command is a serious step, but not in itself inconsistent with the Court's proper role. The Court goes too far only when it loses touch with the principles of the Fourth Amendment, when it fails in its duty to remind us of the sometimes unpopular principles it is sworn to defend.²⁴⁰

236. Edward Levi alluded to this function of the Court:

Finally, without regard for the technical propriety of what the Court does, there is no doubt that the Court's influence as an acceptable objective force is diminished the greater the controversy. This easy and customary point, however, must be corrected by an awareness that it is the Court's appeal to our better selves, connoting some controversy, which is the source of its moral power and persuasion.

Levi, *supra* note 230, at 409.

237. *See id.*

238. Some say the American public would not support the Bill of Rights if it were put to a vote today. Regardless of whether this is true, the Bill of Rights is not up for a vote today, or any other day, unless a supermajority agrees that it should be dismantled or modified. *See BICKEL, supra* note 219, at 27 ("Matters of expediency are not generally submitted to direct referendum. Nor should matters of principle, which require even more intensive deliberation, be so submitted."); Brennan Jr., *supra* note 8, at 4 ("Wary of the fragility of constitutional guarantees, the Framers of our Constitution devised an amendment process that all but precludes the diminution of the textual rights."). If constitutional guarantees were easily repealed or modified, governmental excesses might be subsequently curbed by reinstatement or further modification of these rights, but the country's principles would be no more permanent than the latest television sitcom riding a wave of popularity.

239. *See POSNER, supra* note 202, at 141 ("The framers gave us a compass, not a blueprint."); *see also* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 670 (1985) (privacy interest protected by Fourth Amendment is broader than narrow reading of the words suggests).

240. If the principles of the Constitution are truly enduring, perhaps the Court does not need to remind us of them, and we would not suffer their legislative dilution. *See Wasserstrom & Seidman, supra* note 11, at 76. This argument, however, ignores human frailty. In recent memory, popular opinion strongly favored prosecution of flag burners despite the obvious free speech implications. Why would American society have more sympathy for the privacy rights

Courts, executives, and legislatures may all choose to act aspirationally, but constitutional courts have the duty to do so. A lawful and orderly society is itself an aspiration, but for the Supreme Court one that must be sought by faithful adherence to the announced principles of the society. Chief Justice Rehnquist has described a judge's role: "to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent."²⁴¹ Professor John Burkoff has observed that even these goals do not outweigh "constitutional restraints on excessive police conduct."²⁴² Decisions like those in the special needs cases substitute the short-term gain for the long-term stability, the thrill of waging war on crime²⁴³ for the predictable protection of privacy.²⁴⁴

Justice Stevens dissented in *California v. Hodari D.* to the Court's narrowing of the definition of "seizure" to uphold the admission into evidence of contraband abandoned by a suspect fleeing police:

Some sacrifice of freedom always accompanies an expansion in the executive's unreviewable law enforcement powers. A court more sensitive to the purposes of the Fourth Amendment would insist on greater rewards to society before decreeing the sacrifice it makes today. . . . The Court's immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring.²⁴⁵

of those accused of street crime than it has for the speech rights of those violating a flag desecration statute? Nor does American society as a whole correlate privacy rights of "criminals" with privacy rights of law-abiding citizens.

241. *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting).

242. Burkoff, *supra* note 4, at 557. The aspirations captured in the Constitution's articulated and implied principles largely focus on individual rights rather than the narrow desires of government. The scope of these aspirations is reflected in a speech by Justice William Brennan who said: "The Constitution with its Bill of Rights thus has a bright future, as well as a glorious past, for its spirit inheres in the aspirations not only of all Americans, but of all the people throughout the world who yearn for dignity and freedom." Brennan Jr., *supra* note 8, at 9; see *California v. Hodari D.*, 111 S. Ct. 1547, 1562 (1991) (Stevens, J., dissenting) (Court must protect "values that are fundamental and enduring").

243. In a criticism also apropos of the Rehnquist Court, Professor Burkoff noted: "The Burger Court often acts, in its resolution of Fourth Amendment issues, however, as much like an overzealous police department, as it does like a court. It quite clearly sees its preeminent role in criminal cases as that of insuring that criminals go to jail." Burkoff, *supra* note 4, at 557. This criticism was echoed recently by Justice Stevens, citing Alexander Bickel and dissenting from the Court's narrowing of the definition of "seizure": "The Court's immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring." *Hodari*, 111 S. Ct. at 1562 (Stevens, J., dissenting).

244. Fourth Amendment guarantees extend beyond the sanctity of personal effects or the home. Privacy is an indispensable predicate for the enjoyment of other liberties. Tomkovicz, *supra* note 239, at 667.

245. *Hodari*, 111 S. Ct. at 1562 (Stevens, J., dissenting) (citation omitted).

E. Which Aspirations Are the Rights Ones?

At the end of the debate, the Court must finally decide what the enduring principles of the Constitution are.²⁴⁶ Guidance in making this foundational decision comes from several sources, including the clear declarations of the Framers, the history of the document, and, to some extent, conventional morality.²⁴⁷ The purpose of the Constitution, and especially the Bill of Rights, is also of great significance. The language of the Fourth Amendment is clearly designed to protect privacy and to establish safeguards against governmental intrusion.²⁴⁸ Given this design, in cases where a court is hardpressed to decide among competing principles because no clear prescription exists, the court should prefer the principle that advances the individual's privacy rights, the prescription that *is* clear.²⁴⁹ Professor Arnold Loewy reminds us that "so long as fourth amendment standards are forged in cases involving not very nice people, the Court must be concerned about the negative impact its decisions have on those of us who are nice."²⁵⁰ A weighty presumption in favor of the individual and against governmental intrusion is most consistent with the

246. The late Judge J. Braxton Craven suggested that these decisions are "exercises in pragmatics often clothed in legalistic syllogisms and that the controlling principle, seldom expressed, is expediency: What is best for the nation?" J. Braxton Craven Jr., *Paeon to Pragmatism*, 50 N.C. L. REV. 977, 981 (1972). "What is best for the nation," however, must be taken in the broad sense. It may seem to a court best for the nation to have yet another tool with which to fight crime, but the higher and more important need of the nation in the long run is for individual privacy. See Saltzburg, *supra* note 2, at 3 ("Courts that turn their backs on constitutional principles do no service to the nation in the long run, notwithstanding any perceived short-run gains resulting from their toleration of practices that ought to be condemned.").

247. For a thorough description of the various approaches to constitutional interpretation, see Wasserstrom & Seidman, *supra* note 11.

248. See Burkoff, *supra* note 4, at 522 ("The aim of the draftsmen of the Fourth Amendment to prevent oppressive breaches of personal privacy by agents of the State cannot be gainsaid."); Saltzburg, *supra* note 2, at 3 (courts must stand between forces of investigation and prosecution and those who are targets of law enforcement). However, Baker has also suggested that the Fourth Amendment coincidentally "recognizes a practical governmental authority to seek out and punish law violators." Baker, *supra* note 27.

249. Ronald Dworkin poses the interesting question of whether even an express constitutional command is a "rule" instead of a "principle" that should be given deference unless it is clearly outweighed by another policy or principle. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 28-29 (1967-68). Even if the individual's right to privacy is a "principle" in this sense, it is entitled to great deference. Dworkin suggests that words like "reasonable" that modify a rule make it "depend to some extent upon principles or policies lying beyond the rule." *Id.* at 29. The reasonableness requirement of the Fourth Amendment was meant only to call into play principles lying beyond the usual rule — presumably the principle of individual privacy against which the rule should be read.

250. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1256 (1983); cf. Wisotsky, *supra* note 2, at 913 (drug enforcement has reached into the lives of ordinary people, not just drug dealers).

principle suggested by the amendment's language.²⁵¹ Such a presumption is also most consistent with the history of the amendment.²⁵² At the time the Bill of Rights was adopted, police presence was virtually nonexistent.²⁵³ Had the Framers been able to foresee the invasion of government into the daily lives of citizens, would the privacy protections of the Fourth Amendment have been less than they are, or more?²⁵⁴ Would reasonableness have been used to soften the hard rule of probable cause and warrant?

Aspirational decisionmaking does not preclude the use of reasonableness as a way to judge the constitutionality of a search or seizure. This method should, however, be employed only in those cases in which the balance tips so obviously in favor of the government and against the individual that reasonable minds could not differ. The Supreme Court could, despite the associated problems, continue to judge searches and seizures against a standard of reasonableness, but with a consistent predisposition in favor of individual privacy and against governmental intrusion.²⁵⁵ This approach would preserve the core principle of the amendment; it would be "aspirational," and it would increase the predictability of decisions by clarifying the purpose of the decisionmaking process. Those who favor a more flexible version of the Fourth Amendment might find this approach acceptable. The Court could then engage in more sophisticated and context-based decisionmaking without abandoning altogether the traditional mode of analysis. This method seeks to

251. See Saltzburg, *supra* note 2, at 3 (judicial task is to guard against overzealous law enforcement).

252. See Grayson, *supra* note 15; see also Tomkovicz, *supra* note 27, at 670-73 (privacy rights extend beyond secrecy to encompass fundamental liberties from government intrusion).

253. Police forces did not appear in America until more than fifty years after the Bill of Rights was adopted. Grayson, *supra* note 15, at 113.

254. See *Id.* at 113. These queries are not intended to suggest that the Supreme Court should be governed by what it perceives the Framers would have wanted had they been able to anticipate the development of society. The great strength of the Constitution, and a credit to the Framers, is that the commands were cast broadly to accommodate changing needs. It is useful, however, in searching for a purpose in the words of the Constitution, to remember the context in which they originated. If the Framers felt, at a time when government was not nearly so invasive or pervasive, that citizens needed protection from searches and seizures, then they were either extraordinarily gifted with foresight, or they felt strongly about the value of privacy. Assuming the latter because the former seems much less likely, an "aspirational" Court seeking to remind us through its decisions of the purpose of the Fourth Amendment should decide in ways that most protect the individual from government.

255. See Sundby, *supra* note 28, at 383-84 (many of Fourth Amendment's "present ills" are symptoms of Court's failure to define reasonableness to reflect amendment's underlying values and purposes).

integrate the aspirational into the pragmatic.²⁵⁶

Applying this method of analysis to the special needs cases may not always invalidate the search, but it would always remind the other branches of government, and the people, that privacy is a principle worth its price.²⁵⁷ The Court should explain why school discipline is more important than privacy. It should divulge why it believes school administrators, government supervisors, and probation officers, but not police officers, are incapable of determining probable cause. The Justices should demand from the government truly *compelling* reasons for dispensing with the traditional Fourth Amendment privacy safeguards.²⁵⁸ Those reasons do not include inconvenience or frustration, for the purpose of the amendment is to frustrate and hinder government searches.²⁵⁹ And the proper role of the Supreme Court is not to facilitate searches.²⁶⁰

If special needs count at all in the constitutional balance, they must be needs other than the needs of law enforcement; the balance for those has already been struck. For a special need to justify anything less than probable cause, individualized suspicion, and a warrant, it must be a need even more compelling than law enforcement needs. Otherwise, the Court is substantially increasing the risk of governmental mistake and harm to the citizen for a reason less worthwhile than law enforcement, which demands more stringent safeguards. The urinalysis cases illustrate this point. The special needs used to justify the intrusions were deterrence of drug use among Customs officers²⁶¹ and prevention of railroad accidents,²⁶² both concededly important goals. But are they more important than the detection and prevention of crime?²⁶³ If not, why does the Constitution permit searches in the urinalysis cases without any suspicion at all and without a warrant, whereas a search for evidence of crime

256. See Baker, *supra* note 27, at 887 ("our constitutional dualism . . . creates a tension in methodology between flexibility and fixity").

257. Cf. Schulhofer, *supra* note 46, at 29 (Fourth Amendment does not prevent dealing with drug and AIDS problems, but requires that "courts resist hasty overreactions and take a hard look at the need for intrusion and the means employed").

258. See Sundby, *supra* note 28, at 442 (compelling-government-interest/least-intrusive-means test establishes a high standard for all intrusions and recognizes that all intrusions implicate privacy).

259. See Saltzburg, *supra* note 2, at 3 (Constitution assigns judiciary task of guarding against overzealous law enforcement).

260. See *id.*

261. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).

262. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 606, 620 (1989).

263. Commentators have noted that governmental interests, because they are tangible and visible, always will be weighed more heavily than less tangible privacy rights. See Sundby, *supra* note 28, at 439; see also DiPippa, *supra* note 190, at 497 ("[P]rivacy inevitably loses when balanced against law enforcement").

requires both?²⁶⁴ The answer *should not* be because the Supreme Court wants to covertly restructure the Constitution's balance.²⁶⁵

And the answer cannot be that the special needs cumulate with law enforcement needs because that analysis would too greatly denigrate the constitutional safeguards associated with law enforcement needs merely because of the presence of special needs. If law enforcement needs are any part of the rationale for conducting a search, the traditional protections associated with searches for criminal evidence should be present.²⁶⁶ Law enforcement is itself a very important and weighty government interest. If the constitutional scheme requires probable cause and a warrant for searches designed to produce criminal evidence, it is hard to imagine what further societal need would be so significant that its presence should reduce the standard of suspicion and judicial review. The Supreme Court has, of course, identified many such needs, but the conceptual integrity of the practice is certainly questionable.

On a more elementary level, if these special needs or ones analogous to them are so important, arguably they would be specifically referenced by the Constitution. However, the document does not except Fourth Amendment prohibitions from application in cases of important governmental need, like law enforcement. It speaks directly only to protection of "the right of the people to be secure."²⁶⁷ The goal of law enforcement *may* be implicitly recognized by limiting but not altogether prohibiting searches and seizures. And other equally important goals *may* deserve similar recognition. But the Supreme Court should be very careful about reading goals into, and protections out of, the Constitution.²⁶⁸

264. In fact, bodily intrusions for criminal evidence are not always permitted even when probable cause exists and the probative value of the evidence is great. *See Winston v. Lee*, 470 U.S. 753 (1985) (court properly denied authorization for surgery to remove bullet from defendant).

265. Speaking of the decision in *Von Raab*, one commentator noted:

The court did not present an effective argument concerning the tangible risks to which society is exposed in the absence of drug testing in the Customs Service. However, by applying the balancing test and by trumpeting the compelling governmental interest rationale, the Court furtively circumvented the requirement of reasonable suspicion.

Westover, *supra* note 144, at 820 (citation omitted).

266. *See Sundby, supra* note 28, at 433 (Warrant Clause's standards for criminal investigation provide appropriate guide for interpreting reasonableness).

267. U.S. CONST. amend. IV.

268. *See Sundby, supra* note 28, at 400 ("Redefining probable cause to include government justifications independent of suspicious activity not only conceptually diminished the role of traditional probable cause in fourth amendment analysis but also diluted its meaning in a way that created a new receptiveness to government intrusions."). Finally, if government needs *are* employed in an effort to determine reasonableness, those needs should be used only to decide

III. Conclusion

It is unlikely that the Framers, having crafted so carefully the branches of government, each with a unique function, meant for the Supreme Court to micromanage the Fourth Amendment. Surely they did not intend that the nation's highest court engage in the kind of ad-hoc balancing that the search for reasonableness requires.²⁶⁹ Had this been their intention, they would have designed the Court as an institution and as a process to be better suited to the task.

Even if the Supreme Court wished to facilitate the detection and prosecution of crime, it has a higher purpose. It must safeguard the constitutional protections of those not within the criminal justice system, those not before the trial court accused of crime. Only the judicial branch has both the power and the freedom to insure that the Fourth Amendment is not just a faded scrap of paper housed in the National Archives.

"Special needs" and other attempts to diminish the role of the Fourth Amendment as a hindrance to law enforcement, reflect Roper's misunderstanding of the function of law and are unworthy of the Nation's highest court. The law, and especially the law of a constitution, exists to protect all of the members of society, not just the good ones. Removing laws to get after the Devil may be well intentioned, but the result is that all of society is laid open to the evils those laws protected against. As More says, "Yes, I'd give the Devil benefit of law, for my own safety's sake."²⁷⁰ If we use special needs as an axe to cut down the laws in pursuit of the Devil, we must imagine not only what the world will be like without the Devil, but what it will be like without the laws.

that issue, and not to answer whether a privacy right exists in the first place. Tomkovicz, *supra* note 239, at 695-96.

269. Professor Schulhofer explained the Court's transformation by noting that:

In our constitutional mythology, the job of the courts, after all, is to find law, to ascertain the rights of the individual, not to balance costs and benefits like a legislature or even a construction engineer. In this sense, the Burger Court again seemed even less respectful of the judicial role than the Warren Court was, even less restrained in treading on the policy-making functions of the other branches of government. Yet the Burger Court never got a bad name for this in its criminal cases, probably because it tied its activist methods to conservative results. It used cost-benefit analysis like a legislature, but the government won.

Schulhofer, *supra* note 46, at 19.

270. BOLT, *supra* note 1, at 38.

