Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment during the 1982 Term

Arnold H. Loewy

PROTECTING CITIZENS FROM COPS AND CROOKS: AN ASSESSMENT OF THE SUPREME COURT'S INTERPRETATION OF THE FOURTH AMENDMENT DURING THE 1982 TERM

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Professor Loewy argues that the primary purpose of the fourth amendment is to protect innocent citizens, from both criminal activity and excessive governmental intrusion. In this Article, he reviews the Supreme Court's 1982 Term, assessing the Court's performance in light of the purposes of the fourth amendment.

The fourth amendment explicitly forbids unreasonable searches and seizures, and implicitly permits reasonable ones.[1] The criteria for ascertaining reasonableness are designed to separate searches and seizures likely to yield evidence of crime (reasonable searches and seizures) from those unlikely to yield such evidence (unreasonable searches and seizures).

A search or seizure in which there was an unjustifiably high risk that an innocent person could have been victimized is declared invalid. Sometimes a search or seizure is invalid because it occurred when there was an insufficient probability of finding the sought-after evidence (in legal jargon, no probable cause).[2] Other searches and seizures that were not authorized by a neutral and detached magistrate[3] are invalid because they rendered a presumptively innocent person[4] subject to a search or seizure on the whim of a policeman who may be biased in favor of allowing the search or seizure as opposed to protecting the privacy of the citizen.[5] Inasmuch as these criteria are designed to en-

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

U.S. CONST. amend. IV.

2. *See, e.g.,* Spinelli v. United States, 393 U.S. 410, 419 (1969).

3. *E.g.,* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

4. At trial a defendant is presumed innocent, not because he is probably innocent, but because fundamental fairness requires that he be clothed with the presumption of innocence until proven guilty beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358 (1970). At the search and seizure stage, common sense tells us that a significantly higher percentage of these presumptively innocent people will be innocent.

5. The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences that reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enter-

sure that only searches and seizures likely to produce incriminating evidence are allowed, it seems fair to conclude that the fourth amendment is designed to protect the innocent.[6]

The overall scheme of the amendment (forbidding unreasonable searches and seizures and implicitly permitting reasonable ones) is designed to protect innocent citizens from both overzealous police officers (hereinafter called "cops") and criminals who would otherwise prey on these citizens (hereinafter called "crooks"). These goals are somewhat contradictory. Protection from crooks could be maximized by allowing searches and seizures on minimal suspicion, hunch, or whim. The fourth amendment, of course, would not tolerate so much police intrusiveness.[7] Conversely, searches and seizures could be limited to situations in which the discovery of evidence was virtually certain[8] or they could be eliminated entirely,[9] which would require the government to rely on eyewitness testimony or real evidence obtained without a search or seizure. Although such procedures would maximize citizens' protection from cops, it would leave them too vulnerable to crooks. Consequently, the Court's role under the fourth amendment should be to balance carefully innocent citizens' need for protection from crime against the right to be free from intrusive searches.

During its 1982 Term, the Supreme Court decided nine cases involving claims by crooks that their drugs had been unlawfully obtained by the cops.[10] Each one of these fourth amendment claims had been sustained by a federal circuit court of appeals or by the highest state court that heard the case.[11]

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prise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society that chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (citations omitted).

6. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983). ("By 'innocent' I do not mean totally innocent. (How many of us are?) I mean innocent of the crime charged or not in possession of the evidence sought.").

7. U.S. CONST. amend. IV.

8. *See, e.g.*, Illinois v. Andreas, 103 S. Ct. 3319 (1983), discussed *infra* text accompanying notes 140-148.

9. It has been contended that the government should not be permitted to search for evidence of crime, no matter how probable the cause, unless it can assert a superior proprietary interest in the property to be seized. *See* White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983); Warden v. Hayden, 387 U.S. 294, 312 (1967) (Douglas, J. dissenting). Both the Court in *Warden* and this commentator, Loewy, *supra* note 6, at 1231-44, reject this contention.

10. United States v. Knotts, 103 S. Ct. 1081 (1983); Florida v. Royer, 103 S. Ct. 1319 (1983); Texas v. Brown, 103 S. Ct. 1535 (1983); Illinois v. Gates, 103 S. Ct. 2317 (1983); United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983); Illinois v. Lafayette, 103 S. Ct. 2605 (1983); United States v. Place, 103 S. Ct. 2637 (1983); Illinois v. Andreas, 103 S. Ct. 3319 (1983); Michigan v. Long, 103 S. Ct. 3469 (1983). I am excluding from discussion such per curiam and civil cases as Florida v. Casal, 103 S. Ct. 3100 (1983), and Kolender v. Lawson, 103 S. Ct. 1855 (1983).

11. *Id.*

Each was brought to the Supreme Court by the prosecutorial arm of the government disappointed with the loss of its evidence.[12] In seven of the nine cases, the Supreme Court reversed the decision below, holding that no fourth amendment rights were violated.[13] In the other two cases, the Court upheld the exclusion of the evidence, but provided the police with significantly more latitude than was provided by the opinion under review.[14]

From this breakdown, it would appear that as between cops and crooks, the Supreme Court gave cops the upper hand. What about innocent citizens? Certainly, they now have more protection from crooks and less protection from cops than they had prior to the 1982 Term. This Article's analysis is directed towards the effect of the 1982 Term's decisions on the citizen's right to be free from unreasonable searches and seizures, and to be reasonably protected from both crooks and cops.

I. THE BEST AND WORST OF THE TERM

The most significant victory for innocent citizens was *United States v. Place*,[15] which held: (1) subjecting luggage in a public place to a drug sniffing dog is not a search within the meaning of the fourth amendment; (2) lengthy detention of luggage, even for that purpose cannot be predicated upon mere reasonable suspicion; but (3) a brief seizure of the luggage can be justified by reasonable suspicion.

In upholding the canine sniff, the Court said:

> The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure

12. Three cases were brought by the United States (United States v. Knotts, 103 S. Ct. 1081 (1983); United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983); United States v. Place, 103 S. Ct. 2673 (1983)), three by Illinois (Illinois v. Gates, 103 S. Ct. 2317 (1983); Illinois v. Lafayette, 103 S. Ct. 2605 (1983); Illinois v. Andreas, 103 S. Ct. 3319 (1983)), and one each by Florida (Florida v. Royer, 103 S. Ct. 1319 (1983)), Texas (Texas v. Brown, 103 S. Ct. 1535 (1983)), and Michigan (Michigan v. Long, 103 S. Ct. 3469 (1983)).

13. United States v. Knotts, 103 S. Ct. 1081 (1983); Texas v. Brown, 103 S. Ct. 1535 (1983); Illinois v. Gates, 103 S. Ct. 2317 (1983); United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983); Illinois v. Lafayette, 103 S. Ct. 2605 (1983); Illinois v. Andreas, 103 S. Ct. 3319 (1983); Michigan v. Long, 103 S. Ct. 3469 (1983).

14. Florida v. Royer, 103 S. Ct. 1319 (1983); United States v. Place, 103 S. Ct. 2637 (1983).

15. 103 S. Ct. 2637 (1983).

> also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.[16]

Stated differently, the dog can detect a crook's drugs without revealing anything that an innocent citizen may wish to keep private.[17] A better device for protecting citizens from both cops and crooks is hard to imagine.[18] Beyond this, the knowledge that a dog's sniffing a suitcase in a public place is not a search should encourage policemen to station more dogs at airports. This will benefit innocent citizens because drug smugglers will be deterred if they are aware of the dogs, or caught if they are not aware of them.

Less obvious, but at least as important to the innocent citizen, the availability of dogs should reduce unpleasant or frightening confrontations between cops and citizens. Before the use of drug-detecting dogs was legalized, a cop who suspected a citizen of drug smuggling would question the citizen and seek permission to search his suitcases. The frightened citizen would likely (and probably correctly) perceive that he would be detained beyond the departure of his airplane flight if he did not consent to the search. Consequently most innocent citizens consented.[19] Even those that did not consent could not be certain that the cops would respect their privacy.[20] With the legality of dog sniffs now ensconced in our jurisprudence, one might hope that a cop who becomes suspicious of an individual would not subject him to questioning, but would subject his baggage to a dog sniff after he has voluntarily relinquished

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16. *Id.* at 2644-45 (citations omitted) (quoting United States v. Chadwick, 433 U.S. 1, 7 (1977)).

17. Be it his shaving lotion, secret woman's undergarments which he wears in private, literature which is kinky or subversive (in the opinion of the police) or, perish the thought, a Duke University pennant.

18. At least in society as it actually exists. I have suggested elsewhere that "[i]n a Utopian society, each policeman would be equipped with an evidence-detecting divining rod. He would walk up and down the streets and whenever the divining rod detected evidence of crime, it would locate the evidence. First it would single out the house, then it would point to the room, then the drawer, and finally the evidence itself. Thus, all evidence of crime would be uncovered in the most efficient possible manner, and no innocent person would be subject to a search." Loewy, *supra* note 6, at 1244.

19. In United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), the court reviewed the consent statistics for the D.E.A. drug courier enforcement program. "Of the 77 searches in which illegal drugs were found, the agents identified 26 consent searches. Forty-three searches were nonconsensual. Illegal contraband was seized in all cases in whch consent was not given and a search was made. In 15 to 25 consent searches, agents did not uncover any contraband drugs." *Van Lewis*, 409 F. Supp. at 539.

20. *See id.* at 540 (discussing defendant Hughes).

possession of it by checking it with the airline.[21] If the police do so change their tactics, the Court's turning loose the dogs could be an important though not immediately apparent victory for civil liberties.[22]

A more obvious victory for innocent citizens' civil liberties was the Court's unanimous invalidation of the ninety-minute seizure of Place's luggage.[23] Demonstrating an unusual concern for the right of innocent travelers, the Court emphatically rejected the Government's attempt to justify a lengthy detention of luggage:

> The premise of the Government's argument is that seizures of property are generally less intrusive than seizures of the person. While true in some circumstances, that premise is faulty on the facts we address in this case. The precise type of detention we confront here is seizure of personal luggage from the immediate possession of the suspect for the purpose of arranging exposure to a narcotics detection dog. Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itenerary. The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage . . . . Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return . . . .
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> The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than [momentary ones] . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation. We note that here the New York agents knew the time of Place's scheduled arrival at La-Guardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on respondent's Fourth Amendment interests . . . .
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> Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the

21. *See, e.g.,* the preseizure procedure in United States v. Chadwick, 433 U.S. 1 (1977). Indeed, the police could secretly subject all such luggage to a dog sniff.

22. It was not immediately obvious to Justice Brennan. *See Place*, 103 S. Ct. at 2651 (Brennan, J., concurring).

23. Justice O'Connor wrote the opinion of the Court, which Justices Rehnquist, Powell, Stevens, White and Chief Justice Burger joined, *Place*, 103 S. Ct. 2637; Justices Brennan and Blackmun wrote separate opinions in which they concurred in the result, *id.* at 2646 (Brennan, J., concurring); *id.* at 2651 (Blackmun, J., concurring). Justice Marshall joined both of the latter opinions.

> length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion. In short, we hold that the detention of respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.[24]

Although the Court did permit a temporary seizure of luggage on reasonable suspicion, even this portion of the opinion reflected a need to protect citizens from cops as well as crooks. In *Place* the Court defined reasonable suspicion as "specific articulable facts that . . . lead [the officer] reasonably to believe that a traveler is carrying luggage that contains narcotics."[25] Definitionally, at least, this standard is not far short of probable cause.[26] Yet the Court clearly required that the police intrusion be minimal in order to be sustained. A willing Court could have found probable cause,[27] thereby allowing more intrusion. Happily this Court did not.

While *Place* represents the zenith of the Supreme Court's effort last Term to carefully balance the citizen's need to be protected from both cops and crooks, *United States v. Villamonte-Marquez*[28] is surely the nadir. In *Villamonte-Marquez* the Court, purportedly relying on "the overarching principle of 'reasonableness,' "[29] upheld a statute providing that "any officer of the customs may *at any time* go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . and to this end may hail and stop such vessel . . . and use all necessary force to compel compliance."[30] Although one could argue that the customs officer and the state patrolman who boarded the respondents' boat had a good reason for doing so,[31] the opinion proceeded on the assumption that they did not.[32] Similarly, although the boarding occurred in midday, nothing in the opinion suggested a different result had the officers accepted the statutory invitation to board at a less convenient time, for example, three o'clock in the morning.[33] Indeed, to the extent that a customs officer might wish to use a purported document inspection as an excuse to look for illegal aliens or drugs,[34] one

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24. *Place*, 103 S. Ct. at 2645-46.

25. *Id.* at 2644.

26. If it is short at all. *See infra* text accompanying notes 43-105.

27. *See infra* text accompanying notes 43-105.

28. 103 S. Ct. 2573 (1983).

29. *Id.* at 2579.

30. *Id.* at 2575 (emphasis added) (quoting 19 U.S.C. § 1581(a) (1976)).

31. Just prior to the boarding, a freighter had passed defendants' anchored forty-foot sailboat causing the sailboat to rock violently from side to side. In response to the officer's questions about whether the sailboat and crew were all right, one of the defendants shrugged his shoulders nonresponsively. *Villamonte-Marquez*, 103 S. Ct. at 2576-77.

32. *Id.* at 2575-82 (At least no reasonable suspicion of wrongdoing. No other reason, beyond a general desire to check registration, was presented.).

33. The only suggested limitation was to waters providing ready access to the sea. Query if even that limitation will be followed. *Cf. Villamonte-Marquez*, 103 S. Ct. at 2589-90 n.10 (Brennan, J., dissenting).

34. Perhaps the true rationale for the boarding in this case. *See Villamonte-Marquez*, 103 S. Ct. at 2577 n.3.

might expect some midnight or early morning raids since at that hour it would more likely be necessary to go below deck in order to find the occupants (who, of course, would be sleeping) and in the process view more places where drugs or aliens could be hidden. Thus, to ensure that improperly registered boats are not docked in our harbors,[35] every person who ever sleeps in a boat so docked is subject to an invasion of privacy at the whim of any customs officer.

Although this is precisely the type of invasion that precipitated the fourth amendment,[36] the Court upheld the statute largely because a similar statute was passed by the first Congress, many of whose members helped frame the Constitution, thereby giving it "an impressive historical pedigree."[37] Yet it was those same constitution-framers and congressmen who gave us such gems as the Alien and Sedition Acts[38] and empowered the Supreme Court to issue writs of mandamus as a matter of original jurisdiction.[39] Furthermore, while the original statute did permit customs officers to examine the manifest and board a boat, it did not permit them to do so at any time.[40]

> There is no issue in this case concerning the activites of the officers once they boarded the Henry Morgan II. The only questions presented to this Court concerns the validity of the suspicionless boarding of the vessel for a document inspection.
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> Respondents, however, contend in the alternative that because the Customs officers were accompanied by a Louisiana State Policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in Scott v. United States, 436 U.S. 128, 135-139 (1978), and we again reject it. Acceptance of respondent's argument would lead to the incongruous result criticized by Judge Campbell in his opinion in United States v. Arra, 630 F.2d 836, 846 (1st Cir. 1980): "We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers."

Villamonte-Marquez, 103 S. Ct. at 2577 n.3 (citations omitted).

35. The boat in *Villamonte-Marquez* was docked. *Villamonte-Marquez*, 103 S.Ct. at 2576.

36. *See, e.g.*, John Adams' "abstract" of the argument of James Otis in Paxton's Case, Quincy Mass. Bay Rep. 51 (1761). " 'Custom-house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.' " M. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978) (quoting Adams in the Massachusetts Spy, April 29, 1773).

Otis' argument in *Paxton's Case* "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppression of the mother country." M. SMITH *supra*, at 36 n.9 (quoting Boyd v. United States, 116 U.S 616, 625 (1886)); *See also* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 56-61 (1937).

37. *Villamonte-Marquez*, 103 S. Ct. at 2578.

38. Alien and Sedition Act, ch. 74, 1 stat. 596 (1798) (expired). "I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

39. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding such power unconstitutional).

40. In 1790 the first Congress enacted a comprehensive statute "to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." Act of Aug. 4, 1790, ch. 35, 1 Stat. 145, *repealed by* Act of March 2, 1799, ch. 22, 1 Stat. 627. Section 31 of that Act provided in pertinent part as follows:

> That it shall be lawful for all collectors, naval officers, inspectors, and the officers of the revenue cutters herein after mentioned, to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United

On the brighter side, it is possible that the Court, which twice referred to the modest or limited intrusion in this case,[41] would not sustain a midnight check such as the statute authorizes. If so, perhaps the opinion could be upgraded from an unmitigated disaster to just another very bad decision.[42] Until the Court says otherwise, however, one's right to sleep on one's boat depends on the unfettered whim of a customs officer as he goes about trying to stamp out crime.

II. THE MEANING OF PROBABLE CAUSE

Probable cause is the substantive heart of the fourth amendment.[43] Without probable cause, no warrant may issue[44] and absent some unusual circumstance,[45] no search or seizure may occur. The purpose of probable cause is to allow citizens a modicum of protection from overzealous cops while at the same time allowing the cops enough leeway to protect citizens from crooks.[46] One's general definition or particular assessment of probable cause obviously will be affected by the considerations that concern him most.[47]

In its definition and application of probable cause, nobody could accuse the Court in *Illinois v. Gates*[48] of being unsympathetic to the cops' need for

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States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels . . . .

Villamonte-Marquez, 103 S. Ct. at 2577 (quoting Act of August 4, 1790, ch. 35, § 31, 1 Stat. 145, 164).

41. "Neither the [vessel] nor its occupants are searched, and visual inspection of the [vessel] is limited to what can be seen without a search." *Villamonte-Marquez*, 103 S. Ct. at 2581 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)). Any interference with interests protected by the fourth amendment is, of course, intrusive to some degree. But in this case, the interference created only a modest intrusion. *Villamonte-Marquez*, 103 S. Ct. at 2581-82.

The nature of the governmental interest in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, are substantial; the type of intrusion made in this case, while not minimal, is limited. *Id.* at 2582.

42. Since, in any event, it allows the suspicionless search on the whim of a customs officer, it cannot be upgraded further.

43. The warrant issuing process is the procedural heart.

44. "[No] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

45. *E.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search), Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk).

46. These long-prevailing standards (for determining probable cause) seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcment. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Brinegar v. United States, 338 U.S. 160, 176 (1949).

47. Compare the majority opinion, *id.* at 175-76, with the dissenting opinion, *id.* at 180 (Jackson, J., dissenting), in *Brinegar*.

48. 103 S. Ct. 2317 (1983).

leeway in catching crooks. Whether the Court was sufficiently sympathetic to innocent citizens' need to be protected from overzealous cops is considerably more doubtful.

The situation in *Gates* began on May 3, 1978, when the Bloomingdale, Illinois police department received an anonymous handwritten letter:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back. She flys [sic] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will by flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs [sic] dealers, who visit their house often.[49]

Upon receiving this letter, Detective Mader of the Bloomingdale Police Force ascertained the following facts: First, he obtained from the Secretary of State's Office an address and physical description of a Lance B. Gates, to whom a driver's license had been issued. The address was different from that which appeared in the anonymous letter. Second, he learned from a confidential informant who had previously given reliable information that a check of financial records revealed that Gates had moved to the Greenway address listed in the anonymous letter. Third, a Chicago police officer advised him that one L. Gates was registered on a 4:15 p.m. flight to Atlanta and West Palm Beach on May 5, 1978, and could be reached at 980-8427. Last, the phone company informed him that 980-8427 was a nonpublished phone number issued to Lance Gates at 189B Greenway Drive, Bloomingdale, Ill.[50]

On May 5 a drug enforcement officer observed a person using the name Lance Gates and matching Gates' description board the 4:15 plane to Atlanta and West Palm Beach. The next day, Mader was informed that federal agents in Florida had observed:

> 1) Gates arrive in West Palm Beach, Florida via Eastern Flight Number 245 and remain in the airport for one hour before taking a taxi to the West Palm Beach Holiday Inn; 2) the room he entered was registered to one Susan Gates; 3) at 7:00 AM May 6, 1978, Lance Gates and a female left the Holiday Inn room registered to Susan Gates, and entered a red vinyl over gray Mercury bearing Illinois

49. *Id.* at 2325.

50. People v. Gates, 82 Ill. App. 3d 749, 751, 403 N.E.2d 77, 78-79 (1980), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

> 1978 license RS 8437; 4) Lance Gates and the female left the West Palm Beach area driving the Mercury northbound on that interstate highway commonly used by travelers to the Chicago area.[51]

Mader also learned that a "check of the records of the Illinois Secretary of State revealed that license RS 8437 registers to LANCE B. GATES on a 1975 Hornet station wagon, . . . [and] that the driving time from West Palm Beach, Florida to Bloomingdale, Illinois is approximately 21-23 hours."[52] Armed with this information, Mader obtained a search warrant for the Gateses' car and home. At 5:15 the next morning, the Gateses returned home where they were met by the Bloomingdale police who executed the warrant, finding contraband in both the car and home.[53]

Prior to *Gates* a warrant could not validly be issued on the word of an informant unless the magistrate was given some basis for judging both the credibility of the informant and the reliability of his information.[54] *Gates* held "that these elements should [not] be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . . Rather . . . they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."[55] Thus, what had come to be known as the *Aguilar-Spinelli* two-pronged (credibility and reliability) test[56] was overruled.

In a vitriolic dissent, not atypical of him, Justice Brennan said, "words such as 'practical,' 'nontechnical' and 'commonsense' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the fourth amendment."[57] In response, the Court, per Justice Rehnquist, countered:

> "Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true," and we think we have done that in this case.[58]

"Holding the balance true," of course, requires an accurate assessment of the interests to be balanced. The Court unquestionably appreciated the cops' need to be free of excessive inhibitions in the crook-catching process. In justifying the demise of *Spinelli*, the Court said: "[T]he direction taken by decisions

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51. *Id.* at 79, 403 N.E.2d at 751.
52. *Id.* at 757, 403 N.E.2d at 82-83.
53. *Id.* at 752, 403 N.E.2d at 79-80.
54. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
55. *Gates*, 103 S. Ct. at 2327-28.
56. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
57. *Gates*, 103 S. Ct. at 2359 (Brennan, J., dissenting).
58. *Gates*, 103 S. Ct. at 2333-34.

following *Spinelli* poorly serves 'the most basic function of any government: to provide for the security of the individual and his property.' The strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement."[59] Yet the very purpose of the fourth amendment strictures are to impede law enforcement (at least to some degree) in order "to provide for the security of the individual and his property," which can be threatened by cops as well as crooks. The Court's inability or unwillingness to perceive the true balance is illustrated by its attempt to justify the standard as one which "will better achieve the accommodation of *public and private* interests that the Fourth Amendment requires."[60] This subtle misstatement suggests that a citizen's interest in receiving protection from crooks is public, whereas his or her interest in protection from cops is merely private. In fact, each of these interests have public and private components. Both society at large and the immediately affected individual are victimized when one's property or security is unjustifiably invaded by either a cop or a crook.

From the innocent person's perspective, overruling *Aguilar-Spinelli* was not all bad. State court misapplication of the rule had resulted in overturning several convictions of crooks that should have been upheld.[61] Although occasional misapplication of a rule would not normally justify jettisoning it, the ease of misapplication certainly cuts against the argument that the rule creates a bright line test for police and magistrates.[62] Furthermore, depending on the judge, the rule may not make much difference. For example of the four opinions in *Gates*, two analyzed the situation under totality of the circumstances and two under *Aguilar-Spinelli.* In each group of two, one found the search valid, and one found it invalid.[63] Thus, the important question is the quality of the new test rather then the demise of the old.

Under the Court's new standard for ascertaining probable cause, magistrates are left unguided about the type and quantum of evidence necessary to constitute probable cause.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.[64]

The amorphous character of the term "fair probability" is exacerbated by the Court's definition of what it does not mean: "Finely-tuned standards such

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59. *Id.* at 2331 (citations omitted).

60. *Id.* at 2332 (emphasis added).

61. *See id.* at 2330, n.9.

62. In recent years, the Court has stressed the importance of "bright line" rules to guide the police. *See, e.g.*, New York v. Belton, 453 U.S. 454, 458 (1981).

63. Justices Rehnquist and Stevens analyzed the search under a totality of circumstances test. Justice Rehnquist found the search valid, *Gates*, 103 S. Ct. at 2320, while Justice Stevens found it invalid, *id.* at 2360. Justices White and Brennan analyzed the search under the *Spinelli-Aguilar* test. Justice White found it valid, *id.* at 2336, while Justice Brennan found it invalid, *id.* at 2351.

64. *Gates*, 103 S. Ct. at 2332.

as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision."[65] It seems clear that the Court did not just reject the words "preponderance of the evidence" but rejected the concept of "more likely than not" because it thought that no "numerically precise degree of certainty corresponding to 'probable cause' [would be] helpful."[66] Consequently, magistrates are left unguided not only concerning the type of evidence necessary to constitute probable cause, but also concerning how probable the cause must be in order to qualify. Of greater concern is the likelihood that this probable cause definition will spill over into situations in which the police act without a warrant,[67] which will leave those "engaged in the often competitive enterprise of ferreting out crime"[68] with the right to search those who they believe to be probably innocent so long as this greater probability of innocence is countered by a "fair probability" of finding evidence of crime.[69]

In rejecting the preponderance of evidence standard, the Court appears to be fighting the usual definition of "probable." While it might be technically correct to call something with any degree of probability "probable" (*e.g.*, if there is a 1% probability that Lance Gates has marijuana, it is probable that he has it), such a definition would denude the fourth amendment of any meaning and the Court rightly rejected it. The only other commonly accepted definition of "probable" is "more likely than not."[70] When something is less likely than that (*i.e.,* having only a fair probability), common parlance would deem it "possible," but not "probable."[71]

The Court in *Gates* appears to run counter to its own precedent as well as linguistics. *Jones v. United States*,[72] from which the Court draws much of its notion of flexibility, upheld a warrant only because "there was substantial basis for [the magistrate] to conclude that narcotics were *probably* present in the

65. *Id.* at 2330.

66. *Id. Compare* Texas v. Brown, 103 S. Ct. 1535 (1983), discussed *infra* text accompanying notes 106-108: "[Probable cause] merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items *may* be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Id.* at 1543 (Rehnquist, J., plurality opinion) (emphasis added, citations omitted).

67. *See, e.g.,* United States v. Ross, 456 U.S. 798 (1982) (predicating the constitutionality of a warrantless search on probable cause).

68. Johnson v. United States, 333 U.S. 10, 14 (1948).

69. The Court in *Gates*, 103 S. Ct. 2317, relied heavily on Draper v. United States, 358 U.S. 307 (1959), a case involving a named informant who had been reliable in the past and who had provided the kind of detail (clothing, brief case, manner of walk, etc.) that would only be known by one planning to meet the arrestee at the train station. *Draper* was certainly not a case in which the arrestee was probably innocent.

70. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Vol. II 1806 (17th ed. 1976) ("probable," definition 2), defines "probable" as being on a continuum, between certain and possible.

71. "Possible" refers to that which is within the limit of what may happen or of what a person or thing may do, although it may not seem probable." *Id.* ("probable," definition 1).

72. 362 U.S. 257 (1960).

apartment . . . ."[73] Whatever may be said of the word "probable," there is no evidence that "probably" ever meant anything other than more likely than not.[74] While one could argue that the Court has not always been true to this standard,[75] it has never before consciously applied a lesser one.[76]

Because one could argue that etymology and precedent should not preclude a result mandated by policy,[77] a policy analysis of the Court's "fair probability" standard is necessary. Typically a standard of evidence is predicated on the amount and quality of harm caused by a wrong conclusion. For example, one can only be convicted of a crime if one is proven guilty beyond a reasonable doubt, because vastly more harm is done by convicting an innocent person than by acquitting a guilty one.[78] Nobody has ever suggested such a standard for searches and seizures because the harm done to the wronged innocent person is not nearly so great. On the other hand, the harm is not insignificant. Unnecessary searches of innocent people contributed to the Revolutionary War.[79] Justice Jackson, shortly after returning from Nuremberg, noted the effect of allowing uncontrolled searches and seizures:

> Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualitites but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[80]

Furthermore, one's privacy, once breached, is not repaired easily (whatever Judge Posner might think).[81] Therefore, a search or seizure of a

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73. *Id.* at 271 (emphasis added). *See also* Rugendorf v. United States, 376 U.S. 528, 533 (1964).

74. "[P]robably: 1. archaic: in a fairly convincing way; 2a: insofar as seems reasonable true, factual, or to be expected: so far as fairly convincing evidence or indications go; b: without much doubt: with practical certainty; very likely: in all probability." WEBSTER'S, *supra* note 70, at 1806.

75. I would argue that neither Carroll v. United States, 267 U.S. 132 (1925), nor Brinegar v. United States, 338 U.S. 160 (1949) was true to this standard. These cases may be explicable on the grounds that each involved a rapidly moving automobile and each defendant had previously engaged in the same kind of unlawful activities to the knowledge of the police officer. While I do not believe that either of these factors justifies the result in these cases, they may explain them.

76. At least not in a criminal case. *Cf.* Camara v. Municipal Court, 387 U.S. 523 (1967) (upholding a lesser standard of probable cause for safety inspection searches).

77. *See, e.g.*, Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L.REV. 703 (1975), Nowak, *Realism, Nihilism, and the Supreme Court: Do the Emperors Have Nothing but Robes?*, 22 WASHBURN L.J. 246 (1983).

78. *See In re* Winship, 397 U.S. 358, 363-64 (1970).

79. For example, "[t]he Bostonians complained that 'our houses and even our bed chambers are exposed to be ransacked, our boxes, chests and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants.'" Warden v. Hayden, 387 U.S. 294, 315 (Douglas, J., dissenting) (quoting R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 25 (1955)).

80. Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

81. Judge Posner believes that a breach of one's fourth amendment rights can easily be com-

presumptively and probably innocent person should not be allowed without strong justification.

The only serious argument for upholding such a search or seizure is the concern that without such power too many crooks would escape detection. In assessing the strength of this argument, one must evaluate the cops' alternatives. If a warrant had not been issued in *Gates*, it is unlikely that the police would or should have given up. They could have surveyed the Gates' home to see if Lance and Sue drove straight through. Once the police ascertained that they drove home nonstop their case for obtaining a warrant would have been stronger.[82] In addition, the police could have learned, either from other sources or from surveillance, such things as whether the Gateses were in fact unemployed and whether known drug dealers visited their home. Furthermore, when the police have reasonable suspicion, they may detain a suspect or his luggage briefly to investigate the situation. This device, approved in *United States v. Place*[83] and *Florida v. Royer*,[84] permits a relatively minor assault on the privacy of citizens in order to avoid either subjecting a possibly innocent citizen to a full blown search or letting a crook go free. Ironically, the definition of reasonable suspicion approved in *Place* may well be more demanding[85] than the "fair probability" definition of probable cause approved in *Gates*, two weeks earlier. Indeed the frequency with which the *Gates* opinion referred to cases in which only "reasonable suspicion" was in issue,[86] strongly suggests that "probable cause" has been reduced to that level.

In *Royer* the Court had drawn a sharp distinction between reasonable suspicion and probable cause. In that case, the police were originally attracted to Mark Royer because he corresponded to a series of abstractly innocent characteristics frequently possessed by drug smugglers, somewhat euphemistically called the "drug courier profile."[87]

> In Royer's case, the detectives' attention was attracted by the following facts which were considered to be within the profile: (a) Royer

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pensated by money damages. *See* Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49. *See also* Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*. 57 WASH. L. REV. 635 (1982). For a critique, see Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647 (1982).

82. *See Gates*, 103 S. Ct. at 2361 (Stevens, J., dissenting). Given United States v. Ross, 456 U.S. 798 (1982), which upheld the warrantless search of everything in a car as long as there was probable cause to search, a police officer might be encouraged not to get a warrant in the hope that probable cause will ripen by an event such as a nonstop drive from Florida to Illinois. One potential solution to this dilemma is to issue a warrant conditioned upon a future event. For example, the *Gates* warrant could have been made conditional on the Gates arriving home within twenty-four hours of their departure from Florida. Whether such a solution is desirable or even constitutional is beyond the scope of this Article.

83. 103 S. Ct. 2637 (1983).

84. 103 S. Ct. 1319 (1983).

85. *Place*, 103 S. Ct. at 2642. *See supra* text accompanying notes 25-27.

86. *Gates*, 103 S. Ct. at 2328-29 (citing *inter alia* United States v. Cortez, 449 U.S. 411 (1981) and Adams v. Williams, 407 U.S. 143 (1972)). Ironically, in *Cortez* it really was more probable than not that the police would have found the sought-after evidence.

87. For a critical commentary on the amorphous character of the "profile," see J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT, TRENDS AND DEVELOPMENT 1979-80 119, at 134-38 (1981).

> was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) Royer appeared pale and nervous, looking around at other people, (e) Royer paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, Royer wrote only a name and the destination.[88]

Upon questioning him, the detectives learned that he was travelling under an assumed name. Although the Supreme Court, contrary to the Florida court, found reasonable suspicion, it strongly rejected Florida's argument[89] for probable cause:

> The facts are that a nervous young man with two American Tourister bags paid cash for an airline ticket to a "target city." These facts led to inquiry, which in turn revealed that the ticket had been bought under an assumed name. The proffered explanation did not satisfy the officers. We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge.[90]

Whatever might be said about Mark Royer's outward manifestations of guilt, they were surely greater than anything emanating from Lance and Sue Gates.[91] Why then did the Court wax so eloquently about all the supposedly innocent nervous young men who pay cash and fly under an assumed name while apparently not caring about those innocent men who fly to Florida to join their wives on a vacation?

One difference between the cases is that *Gates* involved a warrant, whereas *Royer* did not. *Gates* did indeed indicate that when a warrant is obtained it will be upheld so long as the magistrate had a "substantial basis" for concluding that there was a "fair probability" of finding the sought after evidence, even if the reviewing court disagrees. In so holding, the Court, despite its protestations to the contrary, effectively adopted a limited good faith exception to the fourth amendment[92] for magistrate approved searches.[93] Although

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88. *Royer*, 103 S. Ct. at 1333, n.2.

89. *Id.* at 1329 (rejecting Florida's argument for probable cause in Royer v. State, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980)).

90. *Royer*, 103 S. Ct. at 1329.

91. *Gates*, 103 S. Ct. at 2360, n.2 (Stevens, J., dissenting), in which Justice Stevens said of Lance Gates:

> Lance does not appear to have behaved suspiciously in flying down to Florida. He made a reservation in his own name and gave an accurate home phone number to the airlines. And Detective Mader's affidavit does not report that he did any of the other things drug couriers are notorious for doing, such as paying for the ticket in cash, dressing casually, looking pale and nervous, improperly filling out baggage tags, carrying American Tourister luggage, not carrying any luggage, or changing airlines en route. (citations omitted).

92. I say limited good faith exception to the fourth amendment rather than to the exclusionary rule because the Court concluded that there was no violation of the fourth amendment at all;

this aspect of the *Gates/Royer* dichotomy lends substance to the Court's usual rhetoric about a preference for warrants,[94] it seems clear that the "fair probability" standard applies to unwarranted as well as warranted searches.[95]

Another, and perhaps more significant, difference between *Gates* and *Royer* is specificity. In *Royer* it was quite literally true that the police were looking for anybody who fit the amorphous drug courier profile, while in *Gates* attention was focused specifically on one couple. The importance of specificity, extolled in both the fourth amendment itself[96] and several decisions thereunder,[97] should not be understated. For example, if reliable information establishes that sixty percent of all homes in a given neighborhood contain evidence of crime, one might assume that the police could not search all of them on the ground that with respect to each there is a "fair probability" (indeed, a more likely than not probability) that evidence of crime will be found therein. If specificity explains the *Gates/Royer* distinction, it is necessary to focus on the anonymous tip, without which it is clear that the Bloomingdale Police would not have had specific, nor for that matter any kind of, suspicion towards the Gateses.

It has been argued persuasively that an anonymous informant should be treated as presumptively unreliable.[98] By phoning or writing anonymously, the informant has deliberately shielded his identity and credibility from both the police and the magistrate. While there may be some very good reasons for desiring anonymity,[99] there are also some downright ignoble ones.[100] We cannot know which type of reason motivated a particular anonymous informant. In the Court's view, this inability to ascertain an anonymous informant's veracity justifies removing the requirement of veracity:

> The veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable. As a result anonymous tips sel-

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not that there was a violation, but the evidence would be admitted anyway. *Gates*, 103 S. Ct. at 2336. Nevertheless, upholding a warrant on a "substantial basis" for probable cause is effectively an exception to the fourth amendment requirement that "no Warrants shall be issued but upon probable cause."

93. The Court seemed to give every reason under the sun for not ruling on the good faith exception to the exclusionary rule except the most obvious one. Having already determined that the evidence was properly obtained under the fourth amendment, there was simply no occasion to decide whether improperly obtained evidence would be admissible because the police believed that it was properly obtained.

94. *See, e.g.*, United States v. Chadwick, 433 U.S. 1 (1977).

95. *See supra* text accompanying notes 67-69.

96. "*Particularly* describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV (emphasis added).

97. *See, e.g.*, United States v. Cortez, 449 U.S. 411 (1981); Terry v. Ohio, 392 U.S. 1 (1968).

98. Note, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 107 (1983).

99. For example, protection of the informant from reprisal would be justification for anonymity. The informant would not wish to upset Lance Gates, who does not seem like a very nice person.

100. *E.g.*, a desire to harass innocent neighbors whom the anonymous informant does not like. *See, e.g.*, Norton v. Turner, 427 F. Supp. 138, 142 (E.D. Va. 1977), *rev'd on other grounds*, 581 F.2d 390, *cert. denied*, 439 U.S. 1003 (1978). Since innocent victims of such searches frequently do not sue, it is difficult to assess the extent of such occurrences.

> dom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.[101]

The difficulty with this analysis is its implicit assumption that unless anonymous tips are themselves credited, they will be unable to "contribute to the solution of otherwise 'perfect crimes.' " In fact, by alerting police to people who would otherwise not be suspects (such as Lance and Sue Gates), the tip can provide the police with the opportunity to catch them doing something apparently criminal, such as loading narcotics into or out of a car.[102]

Gates may be explained as an overreaction to *Spinelli*. Under *Spinelli*, if an informant was alleged to be "confidential and reliable," the magistrate could not issue a warrant because he could not assess the reasons for the affiant's assertion of reliability.[103] Thus, if the *Gates* letter had come from a known person alleged to be reliable by the police, *Spinelli* would not have allowed the warrant to issue. Yet in that situation the nonanonymity of the informant (at least to the police) would have served as a substantial check against a fabricated story designed to embarrass an innocent person.[104] In the actual *Gates* situation, however, neither the police nor the magistrate had any assurance that the letter writer wanted to aid the police rather than harass innocent neighbors of whose vacation plans he was jealous. Thus, the overly restrictive *Aguilar-Spinelli* "two-pronged" test has been replaced by the insufficiently protective *Gates* "fair probability" test.

In sum, *Gates* helps protect the innocent person from crooks by abolishing *Aguilar-Spinelli*, and from cops by encouraging the use of warrants. On balance, however, *Gates* is not a good decision because it allows probably innocent people to be searched and exalts anonymity to heretofore unheard of respectability.[105]

III. THE REST OF THE TERM

The results of the remaining five cases in the 1982 Term[106] (all of which

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101. *Gates*, 103 S. Ct. at 2332.

102. *See also supra* textual paragraph accompanying notes 82-86. Indeed the informant's tip in *Gates* said to "watch them carefully." *Gates*, 103 S. Ct. at 2325.

103. Spinelli v. United States, 393 U.S. 410 (1968).

104. *See* Adams v. Williams, 407 U.S. 143, 146-147 (1972), in which the Court focused on the nonanonymity of the informant to the police as a justification for finding reasonable suspicion.

105. No prior Supreme Court decision ever sustained a warrant or a finding of probable cause on the word of an anonymous informant. *Cf.* Adams v. Williams, 407 U.S. 143 (1972) and People v. Taggart, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967), in which, under exceptional circumstances, the functional equivalent of a frisk was permitted on the basis of an anonymous tip (tip said that defendant, who was standing in a group of school children, was concealing a fully loaded gun in his pocket).

106. United States v. Knotts, 103 S. Ct. 1081 (1983); Texas v. Brown, 103 S. Ct. 1535 (1983);

upheld the search and seizure) were mixed. *Texas v. Brown*[107] epitomized both good and bad results. In upholding the seizure and subsequent search of an uninflated tied balloon found in plain view,[108] the Court subjected an innocent person to no substantial risk. The only use suggested at trial for such a balloon is to carry narcotics. Consequently, the potential intrusion on an innocent person is trivial. Thus, in balancing a citizen's need to be free from both cops and crooks, this limited invasion seems reasonable.

The Court's unanimous holding that the balloon was properly found in plain view is another matter. The first predicate for this conclusion was the Court's approval of the stopping of an individual at what the plurality called "a routine driver's license checkpoint."[109] Unquestionably such a stop is a seizure, whose reasonableness must be established.[110] As the Court said in *Delaware v. Prouse*:[111]

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. (citation omitted) Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . . [P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.[112]

Although the Court in *Prouse* invalidated random spot checks, it emphasized the limited nature of its holding: "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."[113] Since the roadblock issue was not before the Court in *Prouse*, this "one possible alternative" language should not be read as sus-

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Illinois v. Lafayette, 103 S. Ct. 2605 (1983); Illinois v. Andreas, 103 S. Ct. 3319 (1983); Michigan v. Long, 103 S. Ct. 3469 (1983).

107. 103 S. Ct. 1535 (1983).

108. Although the judgment of the Court was announced in a plurality opinion of four Justices (Rehnquist, Burger, O'Connor and White), two more (Powell and Blackmun), concurred in upholding the search and seizure, thereby rendering it the opinion of the Court. The remaining Justices (Stevens, Brennan, and Marshall) upheld the seizure, but would have remanded for a determination of the search's validity.

109. *Brown*, 103 S. Ct. at 1538.

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

111. 440 U.S. 648 (1979).

112. *Id.* at 662-63.

113. *Id.* at 663.

taining the constitutionality of such a stop, but simply as reserving the question for a future case.[114] Consequently, if the *Brown* Court wished to sustain a roadblock, it should have justified its conclusion and not treated the matter as established.[115] Instead, the Court stated that "[t]he Court of Criminal Appeals . . . did not question . . . the validity of the officer's initial stop of appellant's vehicle as part of a license check . . . and we agree."[116]

The fourth amendment propriety of roadblocks should have been a most difficult question. As *Prouse* tells us, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[117] In assessing the propriety of roadblocks, much of the *Prouse* balancing is applicable—"It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the numbers of licensed drivers who will be stopped in order to find an unlicensed operator will be large indeed."[118]

It is true that unlike a random stop, a roadblock neither unfairly singles out an individual for special disfavored treatment, nor subjects him to the trauma of being pulled over by a police siren. On the other hand, because of the number of drivers to be questioned, a roadblock can be substantially more time-consuming than a random stop. Furthermore, unlike a fixed border checkpoint[119] or truck weigh station, the location of a roadblock is unknown to the traveler in advance. Therefore, he cannot allocate time for it in his travel plans. Consequently, the roadblock might delay such diverse travelers as an expectant mother rushing to a hospital, a law professor rushing to his nine o'clock class, or a lonely man rushing to a date with the woman of his dreams. On balance, citizens' freedom from unannounced roadblocks appears to be more important than their freedom from the few unlicensed drivers caught therein.

In addition to its uncritical upholding of roadblocks, the Court's finding that the balloon was properly in plain view was predicated on a carte blanche right to use a searchlight, thus creating more hazards for the innocent. Apart from the etymological point that a searchlight is not called a searchlight for nothing, people do not and should not expect police or anyone else to be shining searchlights into their vacant parked cars (or even their homes).[120] Fur-

114. *Cf.* United States v. Brignoni-Ponce, 422 U.S. 873, 883 n.8 (1975), invalidating random border stops but suggesting that "[o]ur decision . . . does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." *Id. Prouse*, however, invalidated random stops to enforce laws regarding driver's licenses. *Prouse*, 440 U.S. at 663-64.

115. "If new ground is to be broken, the ground must be justified and not treated as though it were old ground." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 473 (1959) (Frankfurter, J., dissenting).

116. *Brown*, 103 S. Ct. at 1541.

117. *Prouse*, 440 U.S. at 654.

118. *Id.* at 659-60.

119. Like that upheld in United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

120. The Court held that:

thermore, an innocent person traveling on a public thoroughfare might keep such private items as a nude picture of his spouse on the seat next to him. Had Brown been such a person, the picture would have been visible when, to his surprise, he was stopped and searched by a cop with a searchlight. While the use of a searchlight may sometimes be justified, and may even have been justified in *Brown*,[121] it is nonetheless a search with the potential to affect innocent people, and therefore should be permitted only when reasonable.

Finally, at least four Justices upheld the propriety of Officer Maples' shifting his position to obtain a better view of the interior of the glove compartment:[122]

> Likewise, the fact that Maples "changed [his] position" and "bent down at an angle so [he] could see what was inside" Brown's car, is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy . . . shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.[123]

The flaw in this analysis is that citizens do not normally leave their glove compartments open for "either inquisitive passersby or diligent police officers." Indeed, that is the one place in the passenger compartment that an innocent citizen would assume that prying eyes would not be able to peer. The only reason it was open to Officer Maples' view was that he asked Brown for his registration, which is usually kept in the glove compartment. Consequently, if the plurality opinion ultimately prevails (and nobody on the Court

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> [I]t is . . . beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenched upon no right secured to the latter by the Fourth Amendment. The Court said in United States v. Lee, 274 U.S. 559, 563 (1927) that "[the] use of a searchlight is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search.

Brown, 103 S. Ct. at 1541 (citations omitted).

121. On direct examination, Patrolman Maples testified as follows:

> Q: [Prosecutor]: When he put his hand in his pocket, did you do anything with the flashlight?
>
> A: Not immediately, I didn't.
>
> Q: All right. Was there—you say not immediately. Did you at some point in time shine the light in the car?
>
> A: Yes, sir, I did.
>
> Q: All right, and why did you do that?
>
> A: His hand was in his pocket too long and it worried me.

Brown v. State, 617 S.W.2d 196, 199 (Tex. 1981).

122. Justices Rehnquist, Burger, White and O'Connor. The remaining Justices did not reach this issue. *Brown*, 103 S. Ct. 1535.

123. *Id.* at 1542.

questioned it),[124] the cops will be able to set up roadblocks whenever they wish to look into a glove compartment and accomplish that objective by asking for the driver's registration.[125]

These new burdens (roadblock, searchlight, and prying eyes) although not as outrageous as those permitted by *Villamonte-Marquez*[126] will affect more innocent citizens simply because more citizens drive automobiles than boats. Indeed, there is hardly anyone who may not be subject to these additional instrusions. That the Court could so cavalierly permit these intrusions, while carefully analyzing and ultimately fragmenting over the less important question whether the properly seized balloon could be opened,[127] is indicative of its failure to consistently recognize that the innocent should be the primary beneficiaries of the fourth amendment.

In contrast to *Brown*, *Illinois v. Lafayette*,[128] which upheld a police station inventory search of an arrestee's shoulder bag, did not significantly increase the risk to the innocent. Long before *Lafayette*, one's possessions could be searched upon arrest,[129] even for so trivial a crime as disturbing the peace,[130] the crime for which Lafayette was arrested. Whatever reasons existed for searching Lafayette upon arrest,[131] those reasons continued at the station house. Consequently, upholding the search added little to potential intrusiveness.[132] Indeed, it might even discourage unnecessary but lawful searches incident to arrest since the police now know that failure to search immediately incident to an arrest will not preclude an inventory search prior to incarceration. Thus, some unknown number of arrested but not incarcerated individuals[133] may avoid an unnecessary search.

More important from the perspective of the innocent arrestee[134] is the added protection for his property engendered by the inventory process. If, as Lafayette had argued, the cops put his shoulder bag in a sealed bag without inventorying its contents, a police employee could have entered his bag, stolen some its contents, resealed it, and claimed total innocence when Lafayette

124. *See supra* note 122.

125. In *Brown*, the roadblock was set up on a street "which was part of a 'medium' area of narcotics traffic." Brown, 103 S. Ct. at 1543.

126. 103 S. Ct. 2573 (1983). *See supra* notes 28-42.

127. *See supra* note 108.

128. 103 S. Ct. 2605 (1983).

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

130. *See, e.g.*, New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

131. The classic reasons are potential destruction of evidence or obtaining a weapon. The right to search exists even when these dangers do not. *Id.*

132. It is arguable that an inventory search may be more thorough than a search incident to an arrest because of the greater need to inventory carefully each item however non-incriminating it may be. This possible distinction is too speculative a base upon which to predicate a constitutional rule.

133. Some arrestees post bond or are otherwise released. Indeed, this case was remanded to determine whether the police intended to incarcerate Lafayette. *Lafayette*, 103 S. Ct. at 2611 n.3.

134. By "innocent arrestee" I mean innocent in the sense of not possessing evidence of crime, *see supra* note 4, whether or not he is innocent of the underlying crime for which he was arrested.

claimed that some previously unidentified contents had disappeared.[135] Furthermore, a crooked arrestee[136] could make a false claim of such theft thereby causing the cops[137] considerable inconvenience or expense. Finally, because a weapon or bomb could be in the bag, the inventory procedure helps protect both police employees and other arrestees.

I do not suggest that the inventory procedure might not adversely affect some innocent arrestees. Certainly there are those who might prefer to risk police pilferage rather than expose their nude pictures or contraceptive devices to the police. The fourth amendment, however, does not forbid all searches of even the innocent; only unreasonable ones. Given the utility of an inventory search, this is one occasion when individual privacy can reasonably be expected to yield.

There is no substantial risk that the police will use *Lafayette* to make a subterfuge arrest in order to create an opportunity to conduct a search. A cop so predisposed would search immediately upon arrest as the law permitted him to do even before *Lafayette*.[138] Consequently, the *Lafayette* result does not unreasonably burden the innocent person.[139]

If *Lafayette* created no unreasonable risk to the innocent, *Illinois v. Andreas*,[140] which sustained a warrantless search of a table previously found to contain narcotics, created virtually no risks at all. *Andreas* involved a customs inspector's lawful border search of a package sent from Calcutta, India, to John Andreas in Chicago. Upon opening first the package and then the table in the package, the customs inspector found a substance that he believed was marijuana. After a drug enforcement agent (Labek) chemically determined that the substance was indeed marijuana, the table and the marijuana were resealed and delivered to Andreas by Labek and a Chicago policeman (Lipsek) posing as deliverymen.

> Labek and Lipsek entered the apartment building and announced they had a package for respondent. Respondent came to the lobby and identified himself. In response to Lipsek's comment about the weight of the package, respondent answered that it "wasn't

135. Not unthinkable, given citizen-police animosity.

136. If the police are doing their jobs, surely there must be a higher percentage of crooked arrestees than crooks in general.

137. Who, after all, are the servants of us innocent citizens.

138. *See* Chimel v. California, 395 U.S. 752 (1969). *See supra* note 129 and accompanying text.

139. The rationale of the decision in *Lafayette* is another matter. The decision is predicated on the assumption that even if a less intrusive method of accomplishing the governmental objectives is available, it need not be employed. *Lafayette*, 103 S. Ct. at 2610. The applicability of the "least intrusive means" requirement fared better in other cases this term. It was accepted (by four Justices) in Florida v. Royer, 103 S. Ct. 1319, 1325-26 (1983) (White, J., plurality opinion). Justice Brennan later endorsed this plurality position, Michigan v. Long, 103 S. Ct. 3468, 3488 (1983) (Brennan, J., dissenting). Four other Justices, however, rejected the plurality's position. *Royer*, 103 S. Ct. at 1335 n.5 (Blackmun, J., dissenting); *id.* (Rehnquist, J., dissenting). It was also an important factor in United States v. Place, 103 S. Ct. 2637, 2645-46 (1983), decided the same day as *Lafayette*. The ultimate scope of the "least restrictive means" rule is yet to be developed.

140. 103 S. Ct. 3319 (1983).

that heavy; that he had packaged it himself, that it only contained a table."

At repondent's request, the officers making the delivery left the container in the hallway outside respondent's apartment. Labek stationed himself to keep the container in sight and observed respondent pull the container into the apartment; he saw respondent leave his apartment, walk to the end of the corridor, look out the window, and then return to the apartment. Labek remained in the building but did not keep the apartment door under constant surveillance.

Between thirty and forty-five minutes after the delivery, but before Lipsek could return with a warrant, respondent reemerged from the apartment with the shipping container and was immediately arrested by Labek and taken to the police station. There, the officers reopened the container and seized the marijuana found inside the table. No search warrant had been obtained.[141]

Although the Court's holding that this did not constitute a search at all was rightly criticized by the dissent,[142] the search was not unreasonable. Given the chemical analysis and Andreas' admission that he packaged it himself,[143] there could be little doubt of his guilt. His only argument was that he might have removed the marijuana while he had the package in his apartment out of Labek's view. Despite this possibility, searching the box and table (with or without a warrant) was more protective of true fourth amendment values than searching the apartment (with or without a warrant). The apartment was much more likely than the box to contain innocent private items that Andreas (and his co-tenants, if any) might wish to keep to themselves. Assuming no other grounds for probable cause, there would be no justification for searching the apartment if, as anticipated, the marijuana was found in the box.[144] Only if it were not found would the sanctity of his home need to be invaded.

There is at least one other reason for upholding the search.[145] Andreas conceded that upon his arrest the box was properly seized.[146] Given that he transported marijuana in the box, it could be used as evidence at his trial,

141. *Id.* at 3321-22.

142. *Id.* at 3325 (Brennan, J., dissenting). "The court answers that question by announcing that the second search is not a search at all. We have . . . *never* held that the physical opening and examining of a container in the possession of an individual was anything other than a 'search'." *Id.* (emphasis added).

143. *Andreas*, 103 S. Ct. at 3321. Since Andreas volunteered the information about packaging the table himself, the fifth amendment was not violated. *Cf.* Hoffa v. United States, 385 U.S. 293, 303-04 (1966) (fifth amendment privilege aginst compulsory self-incrimination not violated when conversations wholly voluntary). Since Andreas was not in custody, Miranda v. Arizona, 384 U.S. 435, 436 (1966) was not violated. *See* Oregon v. Mathiason, 429 U.S. 492 (1977) (defendant not in custody, and *Miranda* rights not violated when defendant came to police station voluntarily and was informed he was not under arrest).

144. *See Andreas*, 103 S. Ct. 3321-22.

145. I assume that it could be justified neither as a search incident to an arrest, since the search was not conducted contemporaneously with the arrest, *see* United States v. Chadwick, 433 U.S. 1, 15 (1977); Preston v. United States, 376 U.S. 364, 368 (1964), nor as an inventory search, since that was not the intent of the officers.

146. *Id.* at 3323 n.4.

whether or not it still contained marijuana.[147] Therefore, in opening the box and the table, the government was simply examining evidence rightfully in its possession.[148] The fact that they may have hoped and expected to find more evidence (the marijuana) should not invalidate this rightful examination of their properly seized evidence. Thus, *Andreas* is a case in which the cops properly nailed a crook without subjecting a possibly innocent citizen to an unreasonable search.

In sharp contrast to *Andreas* is *United States v. Knotts*,[149] which upheld the warrantless monitoring of a radio transmitter (beeper) that had been attached to a drum of chloroform purchased by Knotts' coconspirators and driven by another coconspirator to Knotts' secluded mountain cabin. Although the cops may have had reasonable suspicion towards Knotts' codefendants,[150] the opinion proceeded on the assumption that electronic monitoring was not a search or seizure at all, thereby rendering any consideration of reasonableness irrelevant. Consequently, on nothing more than a whim (or even a desire to harass), the police could lawfully monitor a beeper attached to a can of chloroform or any other personal item[151] and thereby subject any citizen to twenty-four hour surveillance.

The Court's response to this argument can only be described as a classic "good-news/bad-news" comment.

> But the fact is that the "reality hardly suggests abuse." If such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.[152]

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147. The desk was an instrumentality of crime, which could be used to show where the marijuana was seen and how the marijuana was stored.

148. *Cf.* Cooper v. California, 386 U.S. 58, 61 (1967) (upholding search of a car in lawful custody).

149. 103 S. Ct. 1081 (1983).

150. *Id.* at 1083. Suspicion attached to Knotts' codefendants when the 3M Company, which manufactures chemicals in St. Paul, notified a narcotics investigator for the Minnesota Bureau of Criminal Apprehension that Armstrong, a former 3M employee, had been stealing chemicals that could be used in manufacturing illicit drugs. Visual surveillance of Armstrong revealed that after leaving the employ of 3M Company, he had been purchasing similar chemicals from the Hawkins Chemical Company in Minneapolis. The Minnesota narcotics officers observed that after Armstrong had made a purchase, he would deliver the chemicals to codefendant Petschen. With the consent of the Hawkins Chemical Company, officers installed a beeper inside a five gallon container used for chloroform, one of the precursor chemicals used to manufacture illicit drugs. Hawkins agreed that when Armstrong next purchased chloroform, the chloroform would be placed in this particular container.

151. Knotts did not challenge the installation, as opposed to monitoring, of the beeper, believing he lacked standing to do so. *Knotts*, 103 S. Ct. at 1084. Unfortunately, his analysis is probably correct. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Loewy, *supra* note 6, at 1270-72.

152. *Knotts*, 103 S. Ct. at 1086 (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978)).

The good news is the Court's recognition that the purpose of the fourth amendment is not to limit effective crime detection that has no impact on the innocent. The bad news is its failure to recognize the adverse impact of its decision on the innocent.

It was certainly possible that those transporting the chloroform were seeking privacy for a scientific experiment that they hoped would win the Nobel Prize. Indeed, the chloroform simply might have been for some future use while the visit to the mountain cabin was for some secret, but constitutionally protected, political meeting[153] or romantic[154] interlude.

Much of the Court's rationale is predicated on the assumption that the information gleaned from the beeper could have been ascertained by either following the car to Knotts' property[155] or by stationing one's self in a public area outside of Knotts' property.[156] The difficulty with this analysis is that the unseen beeper renders it impossible to know one is being followed. An innocent scientist, politician, or lover approaching the Knotts' cabin might not enter if he were being followed or he observed activity outside the property. While such surveillance would undoubtably be intrusive, it would at least leave the innocent citizen with the option to preserve his privacy. The most insidious problem with the beeper is that the innocent citizen doesn't even know that he is being observed.

For this reason, the Court's reliance on *Smith v. Maryland*[157] is misplaced. *Smith*, in which the Court also was not overly concerned with the innocent,[158] upheld the indiscriminate use of a pen register that could give the police a record of every phone number dialed on a particular telephone. There, however, the individual at least knew he was dialing numbers and arguably should have been aware that some public record might be made of them.[159] The visitor to a mountain cabin who sees nobody around for miles, on the other hand, surely should not be aware that "Big Brother"[160] might be watching him.

The final fourth amendment case of the Term, *Michigan v. Long*,[161] upheld a protective search for weapons in the passenger compartment of an automobile based on a reasonable belief that the automobile contained weapons potentially dangerous to the officers. The case arose as follows:

> Deputies Howell and Lewis were on patrol in a rural area one evening when, shortly after midnight, they observed a car traveling erratically and at excessive speed. The officers observed the car turning down a side road, where it swerved off into a shallow ditch. Long,

153. *See* NAACP v. Alabama, 377 U.S. 288 (1964).
154. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
155. *Knotts*, 103 S. Ct. at 1087.
156. *Id.* at 1086.
157. 442 U.S. 735 (1979).
158. *See* Loewy, *supra* note 6, at 1254-56.
159. Although I confess that I was not until I read the opinion.
160. *See* G. ORWELL, NINETEEN EIGHTY-FOUR. (1st Am. Ed. 1949).
161. 103 S. Ct. 3469 (1983).

the only occupant of the automobile, met the deputies at the rear of the car, which was protruding from the ditch onto the road. The door on the driver's side of the vehicle was left open.

Deputy Howell requested Long to produce his operator's license, but he did not respond. After the request was repeated, Long produced his license. Long again failed to respond when Howell requested him to produce the vehicle registration. After another repeated request, Long, whom Howell thought "appeared to under the influence of something," turned from the officers and began walking toward the open door of the vehicle. The officers followed Long and both observed a large hunting knife on the floorboard of the driver's side of the car. The officers then stopped Long's progress and subjected him to a *Terry* protective pat-down, which revealed no weapons.

Long and Deputy Lewis then stood by the rear of the vehicle while Deputy Howell shined his flashlight into the interior of the vehicle, but did not actually enter it. The purpose of Howell's action was "to search for other weapons." The officer noticed that something was protruding from under the armrest of the front seat. He knelt in the vehicle and lifted the armrest. He saw an open pouch on the front seat, and upon flashing his light on the pouch, determined that it contained what appeared to be marijuana. After Deputy Howell showed the pouch and its contents to Deputy Lewis, Long was arrested for possession of marijuana. A further search of the interior of the vehicle, including the glovebox, revealed neither more contraband nor the vehicle registration.[162]

In upholding this search, the Court emphasized that "the reasonableness in all circumstances of the particular governmental intrusion of a citizen's personal security"[163] is the touchstone of analysis. While this same chameleon-like concept of "reasonableness" produced the outrageous *Villamonte-Marquez* decision,[164] the Court in *Long* at least applied it in a (pardon the expression) reasonable manner. The Court emphasized Long's intoxicated behavior, the knife in the car, Long's need to enter the car, and the limited nature of the weapons search.[165] Surely, this approach protects the innocent more than the carte blanche monitoring approved in *Knotts*.[166]

On the other hand, the *Long* approach is certainly not risk free to the

162. *Id.* at 3473 (citations omitted). The police also searched the trunk where they found seventy-five pounds of marijuana. *Id.* Since the Michigan Supreme Court had found the initial intrusion unlawful, *id.* at 3473-74, it never reached the questions whether the search of the trunk would have been proper had the original marijuana been properly found.

163. *Id.* at 3481, (quoting Pensylvania v. Mimms, 434 U.S. 106, 108-09 (1977) and Terry v. Ohio, 392 U.S. 1, 19 (1968)).

164. *Villamonte-Marquez*, 103 S. Ct. 2573 discussed *supra* text accompanying notes 28-42.

165. Presumably if the pouch had been closed, the officers could not have looked inside. *Cf.* Sibron v. New York, 392 U.S. 40 (1968) (opening soft package found pursuant to a frisk was not justified because officer had no reason to believe it contained a weapon).

166. *See supra* notes 149-160 and accompanying text.

innocent. Arguably, a lawfully possessed hunting knife[167] is neither an uncommon sight in rural Michigan, nor reason to believe that further weapons will be found. Since the knife itself had already been seized and a frisk proved that the driver was unarmed, it is at least arguable that the officers' suspicions were not reasonable. More importantly, since this type of ad hoc police judgment is necessarily an individual one and cannot be subject to a "bright-line test,"[168] there is a danger that cops will feel "reasonably suspicious" about weapons even when they should not; a feeling that may be exacerbated by the Court's ever increasing reluctance to second guess a police officer's "good faith" judgment.[169]

Long might have been a less dangerous precedent if there had been a companion case invalidating a similar search conducted without reasonable suspicion.[170] Nevertheless, in a Term that allowed the suspicionless boarding of boats,[171] stopping of cars,[172] shining of lights,[173] and electronic monitoring of personal property,[174] maybe we should be grateful for at least the nominal requirement of reasonableness, and hopeful that perhaps it will be honored more in the observance than the breach.

IV. CONCLUSION

It seems fair to conclude that in the 1982 Term the Court's performance in protecting citizens from both cops and crooks was mixed. It upheld some searches that created virtually no risk to the innocent,[175] and others that could subject innocent citizens to potentially intolerable burdens.[176] The principle reason for this disparity is that the Court usually views the fourth amendment from the perspective of cops and crooks, thereby rendering the effect on the innocent all but irrelevant.

The remedy is to refocus attention on the definition of "reasonable":

To say that the search must be reasonable is to require some criterion

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167. I assume that Long's possession of the knife was lawful, since no argument to the contrary was made.

168. A bright-line test is one in which a rule is spelled out for a broad category of cases so that the police need not worry whether the rationale for the rule is applicable to the precise situation. For example, although a search incident to arrest is justified to protect the officer or preserve evidence, the bright-line rule allows such a search even when those needs are not present. *See* New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

169. In the only two fourth amendment cases lost by the government this term (Florida v. Royer, 103 S. Ct. 1319 (1983); United States v. Place, 103 S. Ct. 2367 (1983)), the officers' lack of good faith in minimizing the intrusion contributed to the loss. *See supra* note 139.

170. *Compare* Terry v. Ohio, 392 U.S. 1 (1968) *with* Sibron v. New York, 392 U.S. 40 (1968) (companion case of *Terry*) (Court found officer's safety concerns reasonable in *Terry*, 392 U.S. at 27-31, and unreasonable in *Sibron*, 392 U.S. at 63-66).

171. *See* United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983).

172. *See* Texas v. Brown, 103 S. Ct. 1535 (1983).

173. *See id.*

174. *See* United States v. Knotts, 103 S. Ct. 1081 (1983).

175. *See* United States v. Place, 103 S. Ct. 2637 (1983); Illinois v. Andreas, 103 S. Ct. 1081 (1983).

176. United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983); United States v. Knotts, 103 S. Ct. 1081 (1983).

> of reason. It is no guide at all either for a jury or for district judges or the police to say that an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonble? The test is the reason underlying and expressed by the Fourth Amendment: the history and experience which it embodies and the safeguards afforded by it against the evils to which it was a response.[177]

Since the primary function of the fourth amendment is to protect the innocent, reasonableness should be defined in terms of balancing the likelihood of the searchee's innocence, the harm done to him if innocent, and the gain in crime detection or police protection if he is guilty or armed. It is precisely this balance that has given us probable cause and the magistrate. Although its mere invocation will not easily resolve difficult questions,[178] it has served us well. Let us permanently resurrect it.

177. United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

178. *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469 (1983); *see also supra* notes 161-174.