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Crimes and Errors Impossible to Commit: Defining Away the Fourth Amendment - Wyoming v. Houghton

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CRIMES AND ERRORS[1] IMPOSSIBLE TO COMMIT: DEFINING AWAY THE FOURTH AMENDMENT. *WYOMING v. HOUGHTON*, 56 U.S. 295 (1999)

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[1]GEORGE ORWELL, 1984 (1975). "There would be many crimes and errors which it would be beyond (a person's) power to commit, simply because they were nameless and therefore unimaginable. Newspeak was designed not to extend but to *diminish* the range of thought, and this purpose was indirectly assisted by cutting the choice of words down to a minimum. Take for example the well-known passage from the declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that the are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their power from the consent of the governed. That whenever any form of Government becomes destructive of those ends, it is the right of the People to alter or abolish it, and to institute new Government . . .
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> It would have been quite impossible to render this into Newspeak while keeping the original. The nearest one could come to doing so would be to swallow up the whole passage in the single word *crimethink.*"

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I. INTRODUCTION

In the early morning hours of July 23, 1995 Sandra Houghton, a passenger in an automobile,[3] thought she was protected by the Fourth Amendment.[4] She thought she had a guaranteed right to be secure in her person against unreasonable searches and seizures based solely upon police discretion. She also thought that absent a warrant, the police would need to base any search and seizure of her person and/or her belongings upon individualized probable cause.

Sandra Houghton had no idea that the Court would use her case to help eliminate Fourth Amendment guarantees.[5] The language of the Majority in *Wyoming v. Houghton*[6] is reminiscent of legal scholar Akhil Reed Amar[7] who champions the

[3]Wyoming v. Houghton, 526 U.S. 295 (1999). The United States Supreme Court granted Wyoming's writ of certiorari to rule on whether police officers violated the Fourth Amendment when they searched the personal belongings of a passenger inside an automobile that they had probable cause to believe contained contraband. The question as stated by the Court makes no direct mention of the issue concerning lack of individualized suspicion and probable cause.

[4]"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.

[5]For an impression of Justice Scalia's view on the Fourth Amendment *see* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring). "The Fourth Amendment does not by its terms require a prior warrant for searches and seizures . . . What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirements of their use." *Id*.

[6]526 U.S. at 295.

[7]Southmayd Professor, Yale Law School.

complete erasure[8] of the exclusionary rule[9] and the redefining of the meaning of the Fourth Amendment[10] altogether.

Until *Houghton* the Court steadfastly held that the so-called "automobile exception"[11] to the warrant requirement did not apply to a search of an automobile passenger[12] or her belongings by virtue of her "mere presence"[13] in a suspected car[14] without individualized probable cause.[15]

The Court previously rejected the notion that the container in which contraband could be hidden established the scope of a warrantless search of a vehicle[16]. Rather, the Court defined the scope by the object of the search and the places where there was probable cause to believe the contraband could be found.[17]

The focus of the Fourth Amendment is the people[18] and individualized probable cause pertaining to them. In *Houghton* the Court has constructed a new lexicon that

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[8]Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 761 (1994). "Make no mistake: I come to praise the Fourth Amendment, not to gut it." The choice of allusion to Mark Antony's speech in William Shakespeare's *Julius Caesar* is an unfortunate choice. Mark Antony's " I come to bury Caesar, not to praise him." (William Shakespeare, *Julius Caesar,* Act III, Sc. II) speech has been understood from its inception to be an ironic/satirical foil for Antony to praise Caesar under the noses of the authorities. Does Amar intend for us to understand that he really does come to gut the amendment and not to praise it?

[9]*Id.* at 758. Amar believes that the exclusionary rule must be done away with in favor of civil juries and civil damage actions in which government officials are to be held liable for unreasonable intrusions against person, property and privacy.

[10]*Id.* "The Fourth Amendment today an embarrassment. Much of what the Supreme Court has said in the last half century—that the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided." *Id.* at 757. "The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures. They do not require probable cause for all searches and seizures without warrants." *Id.* at 801.

[11]Lawrence A. Mintz, *Requiem for the Exclusionary Rule*, 19 HOWARD L. REV. 161 (1976).

[12]United States v. Di Re, 332 U.S 581 (1948) (holding that the existence of reasonable cause for searching an automobile believed to be carrying contraband does not warrant the search of an occupant thereof, especially when if the contraband sought might be concealed on the person).

[13]*Id.* at 585.

[14]526 U.S. at 295.

[15]*Id*. at 309.

[16]United States v. Ross, 456 U.S. 798, 824 (1982) (the Court reasoned that the scope of the warrantless search of an automobile is not defined but the nature of the container but rather by the object of the search and the places where there is probable cause to believe the contraband will be found).

[17]*Id*. at 824.

[18]Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (Mar. 1994).

alters the accepted focus of the Fourth Amendment, the warrant requirement and the exclusionary rule, to the contents of the automobile.[19]

The decision in *Houghton* is the most recent of the Supreme Court's efforts to gut the Fourth Amendment and constrict the protections afforded by the exclusionary rule under the guise of maintaining a balance[20] between effective law enforcement and individual privacy[21].

On the surface, *Houghton* seems like the next logical step in the present Court's gutting of the Fourth Amendment in general and the exclusionary rule in particular. Yet, by allowing police officers to search the belongings of a passenger, without individualized probable cause, the court has redefined the guarantees of the Fourth Amendment.

Over the past 30 years, the Court has redefined the exclusionary rule,[22] and the scope[23] and content [24] of the Fourth Amendment. In 1975 Justice Brennan challenged his colleagues on the Burger Court[25] by saying that if they (were) determined to discard the exclusionary rule in Fourth Amendment cases, they should

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[19]526 U.S. at 295.

[20]Pennsylvania v. Mimms, 434 U.S. 106 (1977) (holding that a police officer who lawfully stops a vehicle for a traffic violation has the right to order the driver out of the automobile to protect the officer's safety). *See* Ohio v. Robinette, 519 U.S. 33 (1996) (holding that a police officer can lawfully order a driver to exit the vehicle as reasonable and wholly objective under the totality of the circumstances). *See also* Maryland v. Wilson, 519 U.S. 408 (1997) (holding that a police officer can lawfully order a passenger to exit the vehicle when stopped on a routine traffic violation even when the officer has no reason to suspect a passenger has committed a crime of threatened an officer's safety).

[21]Chris K. Visser, Comment, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car*, 35 HOUS. L. REV. 1683, 1724 (1999). In evaluating Fourth Amendment reasonableness the Court balances law enforcement interests against privacy, balancing; 1) the officer's safety in avoiding violent confrontations during traffic stops; and 2) minimizing the hazard of injury to an injury of a police office standing by the side of the road, against minimal intrusions into a driver's privacy.

[22]Arizona v. Evans, 514 U.S. 1 (1995) (holding that the exclusionary rule did not require suppression of evidence seized in violation of the Fourth Amendment where erroneous information leading to a search resulted from a clerical error of court employees who did not keep records up to date).

[23]United States v. Hodari D., 499 U.S. 621 (1991) (stating that a defendant was not seized until the officer tackled him. Thus the drug discarded before the chase were admitted into evidence).

[24]California v. Ciraola, 476 U.S. 207 (1986) (stating that warrantless aerial observation of fenced areas adjacent to a home was not an "unreasonable" search under the Fourth Amendment). *See also* John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105 (1989).

[25]The Warren Court 1953-1969. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 251-95 (3d ed. 1992) (for a discussion of the make up the Warren Court and an analysis of the underling motivation in the process of presidential selection and appointments).

do so forthrightly and be done with it and not "covertly" erode an important rule 61 years in the making.[26]

Twenty-four years later his challenge becomes even more relevant as the Burger Court's progeny[27] continues the dismemberment of the Fourth Amendment and the exclusionary rule.

This Note contends that the Court's decision to adopt the *Houghton* approach to the automobile warrant exception is problematic for three reasons. First, the Court has erroneously interpreted the historical evidence behind the creation of the Fourth Amendment. Second, the Court, by chipping away at stare decisis, is disrupting the foundations of American jurisprudence and the development of the law. Third, by creating a new lexicon, changing the meanings of the words, the Court is trying to define away the protections afforded by the Fourth Amendment.

This Note will briefly summarize the facts of *Houghton* and review the historical purpose for the creation of the Fourth Amendment and then summarize the Court's opinion and the dissenting opinion. Finally, this note will analyze the significance of this "newly minted"[28] test.

II. SUMMARY OF FACTS

On July 23, 1995, Sandra Houghton was one of three people in the front seat of a car stopped by a Wyoming Highway Patrol officer for speeding and driving with a faulty brake light.[29] While the officer questioned David Young (the driver) he noticed a syringe in Young's shirt pocket.[30] The officer called for back up and returned to the car and asked Young what the syringe was for; Young answered that he used it to take drugs.[31] Backup officers asked the two passengers to identify themselves and Houghton stated falsely that she was Sandra James and that she did not have identification.[32]

The officer searching Young's car, in light of his admission, found a purse on the back seat of the car that Houghton claimed as hers.[33] Continuing the search of the purse, the officer found a wallet, which he opened and removed from it, a driver's license identifying Sandra K. Houghton.[34] The officer also found a brown pouch containing drug paraphernalia and a syringe with 60 ccs of methamphetamine; Houghton denied this was hers and stated she was ignorant of how it came to be in

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[26]United States v. Peltier, 422 U.S. 531, 561-62 (1975). "To attempt covertly the erosion of an important principle over 61 years in the making as applied to federal courts clearly demeans the adjudicatory function, and the institutional integrity of this Court." *Id.*

[27]The Rehnquist Court 1986-Present. *See* Abraham, *supra* note 25, at 349-69 (for a discussion on the make up of the Rehnquist Court and its views).

[28]526 U.S. at 310.

[29]*Id.* at 297.

[30]*Id.* at 298.

[31]*Id.*

[32]*Id.*

[33]526 U.S. at 298.

[34]*Id.*

her purse.[35] The officer arrested Houghton.[36] The State of Wyoming charged Houghton with felony possession of methamphetamine.[37]

On appeal Houghton raised several challenges to her conviction including the district court's denial of her motion to suppress the evidence found in her purse.[38] The Wyoming Supreme Court reversed the conviction holding that an officer with probable cause to search a vehicle may search all containers that might conceal the object of the search; but, if the officer knows or should have known that a container belongs to a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal contraband within it to avoid detection.[39] The Wyoming Supreme Court reversed the district court's denial of the motion to suppress[40] and remanded the case for disposition in accord with their opinion.[41]

The United States Supreme Court granted Wyoming's writ of certiorari to rule on whether police officers violated the Fourth Amendment when they searched the personal belongings of a passenger inside an automobile that they had probable cause to believe contained contraband.[42] The court held that "[p]olice officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."[43]

III. BACKGROUND

A. Shared Vision: The Framers and the Fourth Amendment

The Framers of the Fourth Amendment shared a common moment in time. They reflected on a past of Writs of Assistance,[44] James Otis' role in the Paxton Case in

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[35]*Id.*

[36]*Id.* The officer also found fresh needle-track marks on Houghton's arms.

[37]*Id.* Houghton was charged with felony possession of methamphetamine in a liquid amount greater than three-tenths of a gram which is punishable by imprisonment for not more than 5 years and a fine not more than $2,500.00 or both under WYO. STAT. ANN. § 35-7-1031 (c) (iii) (Supp. 1996).

[38]Houghton v. Wyoming, 956 P.2d 363, 364 (1998). The trial court reasoned that the officer had probable cause to search the car for contraband and thus all containers therein that could hold contraband.

[39]*Id*. at 372.

[40]*Id.* at 366 n.2. The Wyoming Supreme Court stated that the Wyoming Constitution article 1 § 4 is somewhat stronger than its federal counterpart, in that it is mandatory that the search warrant be issued upon affidavit.

[41]*Id.* at 372.

[42]*Houghton*, 526 U.S. at 298. The question as stated by the Court makes no direct mention of the issue concerning lack of individualized suspicion and probable cause.

[43]*Id*. at 295.

[44]Visser, *supra* note 21, at 1700.

1761,[45] the Sugar Act of 1764,[46] the seizure of John Hancock's sloop, the Liberty in 1768,[47] the Wilkes Case in 1769[48] and widespread intimidation and corruption by customs inspectors[49] who were granted unchallenged authority to search and seize[50] under the auspices of the Vice-Admiralty Courts.

An historical inquiry into the Framers' intent in creating the Fourth Amendment must be viewed in terms of the drafters shared consensus of what those categories were.[51] The Framers did not need to enumerate the specific categories of searches and seizures they thought unreasonable. The Framers' discourse reflected their shared cultural sensibilities when they wrote:

> 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.[52]

B. The People

The first words of the Fourth Amendment reflect the Framers concern for the people and their 'rights'. The Framers did not view "the people" as merely a collection of private interests.[53] The Debates of the Convention of Virginia on the drafting of the Constitution reflect the controversy the term "the People" ignited.[54] Some delegates believed that "[t]he origin of the General Government, the source of

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[45]*Id.* at n.118. The British government used writs of assistance (among other things) to enforce import duties . . . to prevent the American colonies from trading outside the British Empire. Sixty-three Boston merchants challenged the writs and hired James Otis, Jr. to argue the case. "He was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance . . . Then and there the Child Independence was born." (citing John Adams Memoirs).

[46]Bacigal, *supra* note 18, at 366.

[47]Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Overview,* 77 B.U. L. REV. 925, 964 (1997).

[48]*Id.* at 933.

[49]Bacigal, *supra* note 18, at 377.

[50]*Id*. at 372.

[51]Maclin, *supra* note 47, at 974 n.270.

[52]U.S. CONST. amend. IV.

[53]Bacigal, *supra* note 18, at 384. "Values are public as well private in origin, originating in political engagement and dialogue as well as in private experience . . . The people conceived of themselves as acting to advance the public interest, and they came together to discuss, to deliberate upon, and ultimately to decide on the court their society would take." (citing Frank I. Michelman, *Politics and Values or What's Really Wrong with Rational Review?*, 13 CREIGHTON L. REV. 487, 509 (1979)).

[54]JOHN B. DILLON, NOTES ON THE ORIGIN AND NATURE OF THE GOVERNMENT OF THE UNITED STATES 42 (1871) (Bayard's Brief Exposition of the Constitution of the United States from Debates of the Convention of Virginia 1788).

all its power, was a matter too important to be left in doubt, and it is therefore declared to be ordained and established by 'the People of the United States.'"[55] Others believed the introductory expression of 'We the People" improper.[56] 'The People' for whom the contrivances of States, Kingdoms and Empires are intended[57] carried the day over those who believed "We the State governments"[58] might be more proper.

C. Unreasonable Searches and Seizures

The American experience of unreasonable searches and seizures from many quarters led the Framers to create the right to be free from promiscuous intrusion.[59] Viewing the general warrant as law enforcement instruments that substantially undermined their privacy and security, Americans strongly resented them.[60] In the most widely held protests on the search process prior to the amendment, the Continental Congress, in 1774, had unconditionally condemned promiscuous, warrantless searches by customs and excise officers.[61] "Legislation, case law, legal treatises, pamphlets, newspapers, constitutional debates, and correspondence in America during the 1780's condemned not only the general warrant but also other methods of search and seizure so consistently that their constitutional designation as unreasonable would have been almost superfluous."[62] Some scholars believe that the history behind the constitutional right to be free from unreasonable searches and seizures tells us more than the nebulous language of the text about the right.[63] Conversely, there are scholars who contend that as long as government officials act reasonably when they intrude upon privacy and property, the commands of the Fourth Amendment have been satisfied.[64]

D. The Warrant, Probable Cause and the Neutral Magistrate

Perhaps more so than any other provision of the Bill of Rights, the Fourth Amendment is profoundly antigovernment.[65] More than any other constitutional

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[55]*Id.* at 43.

[56]*Id*.

[57]*Id.* at 44.

[58]*Id.* at 43.

[59]Maclin, *supra* note 47, at 954-55.

[60]*Id.*

[61]*Id.* at 955 n.178. "In short the debate on search and seizure of 1787-88 not only provided impetus for what became the Fourth Amendment but defined its contents. That debate connected the enlarged understanding of unreasonable searches and seizures that had emerged after 1782 with the guarantee against those procedures of 1789." *Id.*

[62]*Id.* at 974.

[63]*Id.* at 938.

[64]Amar, *supra* note 8, at 757-58.

[65]Bacigal, *supra* note 18, at 363 n.15 (stating that "more than any other single constitutional provision the amendment stands between us and the police state, for its central

provision, the Fourth Amendment stands between the people and a police state, for it contends that police (or other governmental) conduct that interferes with a person's liberty, bodily integrity, or right to exclude others from what is his shall be subject to judicial control.[66]

The Framers understood the need for specific warrants based on probable cause approved by a neutral magistrate when they wrote " . . . 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".[67]

Between 1776 and 1787, the American Law of search and seizure underwent a transformation that separated it from British law. The most obvious mark of that transformation was the written constitutional acknowledgment of a right respecting search and seizure by most of the new states.[68]

The colonial experience of general warrants and writs of assistance led to colonial legislative bodies, like Massachusetts Bay, enacting bills establishing the specific warrant as the conventional means of search and seizure.[69] Americans in the 1760's began to reject the general warrant not only because it was not specific but also because they associated it with the violent British efforts to subjugate them politically[70].

The probable cause requirement became a focus for the colonists when British searches of American ships began to threaten not only their privacy, but also their economic livelihoods. The Sugar Act of 1764 barred shipowners from suing the customs officers who seized their vessels if a judge found, retrospectively, probable cause to seize the ship.[71] This, along with the deputizing of Royal Navy personnel as customs agents and the seizing of ships belonging to Henry Laurens of South Carolina and John Hancock of Massachusetts, lead to organized protests over the wrongful seizure of their ships without probable cause. A Boston Town Meeting

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premise is that police . . . conduct . . . shall be subject to judicial control) (citing JAMES B. WHITE, JUSTICE IN TRANSLATION 177 (1990)).

[66]Bacigal, *supra* note 18, at 362.

[67]U.S. CONST. amend. IV.

[68]Maclin, *supra* note 47, at 972-73.

[69]*Id.* at 942-44 (revealing that within two years of the Excise controversy the specific warrant as the standard mode of search and seizure in the colonies. Although these early specific warrants would not meet current constitutional standards, many contained various procedural safeguards that the Warrant Clause of the Fourth Amendment would subsequently incorporate).

[70]*Id.* at 943 n.94 (hostility toward general warrants and promiscuous intrusions in Massachusetts dates back to at least the mid-seventeenth century. In 1644, after a sheriff entered a boarding house without a warrant to arrest a drunk, an angry mob unsuccessfuly attempted to rescue the man).

[71]Maclin, *supra* note 47, at 961 nn. 207 & 209.

report organized by James Otis Jr.[72] and John Adams complained that confiscation of the ships was without probable cause.[73]

The text of the Fourth Amendment did not emerge in a vacuum.[74] The right to be free from unreasonable search and seizure owes much to history. The specific warrant mandated by the Warrant Clause evolved over centuries of legal thought and practice . . . the evolutionary process that produced the Amendment also brought about the renunciation of historic precedent.[75] The Fourth Amendment did not emerge from colonial precedents; rather it repudiated them.[76]

The Framers of the Constitution created the Fourth Amendment as a direct response to the practically unrestrained and judicially unsupervised searches associated with general warrants and writs of assistance.[77]

E. The Birth of the Exclusionary Rule. The Twin Imperatives: Judicial Integrity and Deterrence

The earliest method of suppressing unreasonable searches and seizures was not the exclusionary rule, but monetary punishments that juries imposed on those who searched and seized unlawfully.[78] The prospect of incurring financial ruin at the

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[72]Visser, *supra* note 21, at 1700 (commenting that when Mr. Otis raised the then-controversial argument that courts should review legislation and overturn illegitimate laws, he helped sow the seeds of later American constitutional practice).

[73]Maclin, *supra* note 47, at 962.

[74]*Id*. at 938 (noting that several centuries of British and American legal theory and practice gave shape and meaning to the Fourth Amendment). *Id*. at 938 n.65 (stating that the text of the Fourth Amendment articulated ideas that had percolated through Anglo-American law for centuries).

[75]*Id.* at 972.

[76]LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 139, 224 (1988). *See* Maclin, *supra* note 47, at 972 ("[t]he ideas comprising the Fourth Amendment reversed rather than formalized colonial precedents. Reasonable search and seizure in colonial America closely approximated whatever the searcher thought reasonable."). *See also* Amar, *supra* note 8, at 767-68. Contradicting this thinking by criticizing the warrant preference rule (which holds that a judicial warrant is a necessary precondition of a reasonable search unless good reasons call for proceeding without one) as not expressly provided for in the Amendment and lacking historical support in eighteenth or nineteenth century thinking on the subject. *Id*.

[77]Visser, *supra* note 21, at 1683, 1699. *See* Henry v. United States, 361 U.S. 98, 100-01 (1959) (noting that abuses associated with general warrants and writs of assistance prompted the authors of various state declarations of rights, early courts, and the Framers of the Constitution to require probable cause as a prerequisite to issuance of a warrant to arrest or search); *See also* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 20-21 (1966) (describing the Fourth Amendment as a procedural safeguard rooted in American and English experiences).

[78]Maclin, *supra* note 47, at 935 n.59. *See* Amar, *supra* note 8, at 757-67 (describing a structure to return to civil remedies); *see also* Warren E. Burger, *Who Will Watch The Watchman?*, 14 AM. U. L. REV. 1 (1964) (describing civil tort remedies to Fourth Amendment violations).

hands of a jury undercut the incentive to conduct any search and seizure that the community, in the form of a jury, might find unreasonable.[79]

Since the text of the Fourth Amendment provides no remedy for its violation, courts for over a century after the Revolution admitted evidence obtained in an illegal search.[80] Not until 1866 did the Supreme Court decision in *Boyd v. United States*[81] plant the seed of what was to become the exclusionary rule.[82] The Court concluded that papers and books illegally seized had to be excluded as a by-product of the Fifth Amendment ban on compelling a man to be witness against himself.[83] The Court in *Boyd* did not link the violation to the Fourth Amendment.[84] In 1904 the Court attempted to distinguish *Adams v. New York*[85] from *Boyd* and essentially overruled the earlier case. In *Adams* the court found no unreasonable search and seizure had occurred[86] but stated that even if a search were unreasonable, a court could not stop during a trial to address the issue of how police officers obtained evidence.[87]

Ten years after *Adams* the Court developed and used the exclusionary rule in federal criminal trials in its landmark decision in *Weeks v. United States*.[88] *Weeks* also established the "judicial integrity" rationale for the exclusionary rule believing that restraints and limits must be put on officers and courts so that evidence obtained in an illegal search and seizure will not be protected under the guise of law.[89]

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[79]Elisa Masterson White, *Criminal Procedure: Good Faith, Big Brother, and You: The United States Supreme Court's Latest Good Faith Exception to the Fourth Amendment Exclusionary Rule. Arizona v. Evans, 115 S. Ct. 1185 (1995),* 18 U. ARK. LITTLE ROCK L. J. 533, 537 (1996). A common law remedy of a civil suit was what the British common law applied when no specific enacted law contradicted it. *Id*. (citing BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY (1986)).

[80]White, *supra* note 79, at 537.

[81]116 U.S. 616 (1866) (noting that only testimonial evidence such as papers or books—not contraband such as drugs or guns—had to be excluded because the exclusion was a by-product of the Fifth Amendment's ban on compulsory testimony).

[82]*Boyd*, 116 U.S. at 617. The opinion did not make clear whether the Fourth Amendment violation alone required the exclusion.

[83]*Id.* at 633.

[84]*Id.* at 630-35. Justice Miller's concurring opinion found no Fourth Amendment search or seizure violation in this case. *Id.* at 638-40 (Miller, J. concurring).

[85]192 U.S. 585 (1904).

[86]*Id.* at 594. Officers received a warrant for "gambling paraphernalia" but also seized other private papers and used them in evidence against the defendant at trial. *Id*.

[87]*Id.* at 595.

[88]232 U.S. 383 (1914). After the defendants arrest in his place of business a U.S. Marshall searched his home and confiscated his property without a search warrants. *Id.* at 386. This case was distinguished from *Boyd* by basing the reversal of the lower court's ruling on the Fourth Amendment alone. *Id*. at 390-91.

[89]*Id.* at 388. *See also* Olmstead v. United States, 227 U.S. 438, 469-71 (1928) ("[i]f the government becomes a lawbreaker, it breeds contempt for the law.") (Brandies, J., dissenting).

Although the Court continued to broaden the exclusionary rule over the next forty-seven years[90] it was not until 1961 in its landmark decision in *Mapp v. Ohio*,[91] that the Court held that the Fourth and Fourteenth Amendments required unconstitutionally obtained evidence be excluded in state, as well as, federal courts.[92] The Warren Court[93] majority in *Mapp* continued the "imperative of judicial integrity" and deterrence rationale as the purpose of the exclusionary rule,[94] calculated to prevent and not repair, to deter and thereby to compel respect for the Constitution by removing any incentive to disregard it.[95] The decision was met with great controversy.[96]

Seven years later in *Terry v. Ohio*,[97] Chief Justice Warren conceded some problems inherent in the exclusionary rule established in *Mapp*, recognizing that the rule had its limits as a tool of judicial control and in some contexts the rule was ineffective as a deterrent.[98]

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[90]Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (the Court moved away from the property based application of the Fourth Amendment and forbade the government to use papers or derivative property illegally seized). *See also* Bradford P. Wilson, *Forgotten Points in the "Exclusionary Rule Debate"*, 81 MICH. L. REV. 1237, 1278-79 (1983); Wolf v. Colorado, 338 U.S. 25 (1949). (The Court applied the Fourth Amendment to the states through the Fourteenth Amendment Due Process Clause, but the evidence was still admissible in federal court). *Id. See also* Elkins v. United States, 364 U.S. 206, 208 n.2 (1960) (the Court reexamined what had become known as the "silver platter doctrine") (quoting Lustig v. United States, 338 U.S. 74 (1949) (holding that federal courts must suppress evidence obtained by state officers)). *Id.*

[91]367 U.S. 643 (1961).

[92]*Id.* at 655.

[93]The Warren Court 1953-1969. *See* Abraham, *supra* note 25, at 251-95 (for a discussion of the make up the Warren Court and an analysis of the underling motivation in the process of presidential selection and appointments).

[94]367 U.S at 659. *See Elkins*, 364 U.S. at 223-24 (discussing the "imperative of judicial integrity" as a reason to exclude illegally obtained evidence).

[95]*Elkins*, 364 U.S. at 221.

[96]Burger, *supra* note 78, at 1 (describing the inefficiency of the rule). *See* RICHARD NIXON, TOWARDS FREEDOM FROM FEAR 13 (1968). "The barbed wire of legalisms that a majority of one of the supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment." *See also* Richard Nixon, N. Y. TIMES, Aug. 10, 1968 at 20 col.4 (on the night he accepted the candidacy for president, "Let us always respect, as I do, our courts and those who serve on them, but let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country").

[97]392 U.S. 1 (1968) (authorizing limited searches of the outer clothing of a person detained to detect weapons).

[98]*Id.* at 12-15. The Chief Justice came to believe that the rule could not be properly invoked to exclude products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. *Id.*

F. The Demise of the Exclusionary Rule: Cost-Benefit Analysis

The twin imperatives of judicial integrity and deterrence[99] were immediately taken up after the establishment of the judicially conservative, strict constructionist[100] Burger Court.[101] In 1969, with *Alderman v. United States*[102] the court determined that standing applied only to those whose rights had been violated.[103] The decision applied a cost-benefit analysis[104] based on the reasoning that the benefit of deterring police misconduct by extending the exclusionary rule to third parties would not outweigh the cost of allowing the more guilty criminals go free.[105]

In 1971, Chief Justice Burger called for the creation of other remedies to the exclusionary rule and then its abandonment in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics.*[106] Two other cases tried that same year, *Whitley v. Warden*[107] and *Coolidge v. New Hampshire*,[108] failed to convince a majority of Justices that the Fourth Amendment does not expressly command that evidence obtained by an infraction should always be excluded from evidence. Yet the Chief Justice asserted that judicial integrity was not necessarily damaged by inclusion of tainted evidence and suggested that there be some narrowing of the rule's thrust to

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[99]Norman M. Robertson, *Reason and the Fourth Amendment-The Burger Court and the Exclusionary Rule*, 46 FORDHAM L. R. 139, 152 (1977).

[100]*Id.* at 150-54. Richard Nixon was in a unique position. Between 1969 and 1971 he filled the Chief Justice position with Warren Burger and when Justices White and Black retired, Nixon appointed William Rehnquist (the present Chief Justice) and Lewis Powell. With the ascent of Rehnquist and Powell the Nixon Court was complete and the majority of judicial conservatism was ripe to create grave limits on the exclusionary rule's power. *See* JAMES F. SIMON, IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973) (for further discussion on the strategy for choosing the Justices at 122-48).

[101]The Burger Court 1969-1986. *See* Abraham, *supra* note 25, at 296-348 (for a discussion on the make up of the Burger Court and its views).

[102]394 U.S. 165 (1969).

[103]*Id.* at 171-72.

[104]WAYNE R. LAFAVE, SEARCH AND SEIZURE A TREATIES ON THE FOURTH AMENDMENT § 11.4(f) 294-99 (1996) (for a discussion on deterrence and cost-benefit analyses).

[105]*Alderman*, 394 U.S. at 174-75.

[106]403 U.S. 388, 420 (1971). "Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct. I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed." *Id*. (Burger, C. J., dissenting).

[107]401 U.S. 560 (1971) (holding that an arrest made by police based on a police bulletin issued without probable cause was therefore an arrest made without probable cause).

[108]403 U.S. 443 (1971) (holding that a neutral magistrate was required to issue a warrant and in this case the State Attorney General had issued a warrant in his capacity of justice of the peace).

eliminate the anomalies it had produced.[109] It was in *Coolidge* that Justice Harlan called for *Mapp* to be overruled and that there be a re-examination of the rule based on a Court examination of the experience of the states.[110]

During the years 1973 to 1975 the Court fashioned a set of new doctrines in *Schneckloth v. Bustamonte*,[111] *United States v. Robinson*,[112] *United States v. Calandra*[113] and *United States v. Peltier.*[114] Justice Brennan believed that if the vague contours of the Burger Court's newly fashioned rules were to be filled in, it

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[109]*Id.* at 454. *See* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Two studies noting that the deterrent value is minimal. Some of the reasons cited in the study are:

> The application of the rule only benefits the guilty. The innocent man whose rights are violated gains no advantage from the exclusionary rule. He must sue civilly to secure damages. The procedure which gives nothing to the innocent yet gives freedom to the guilty, destroys respect for law far more than police misconduct will.
>
> The rule fosters false testimony by police officers who are under severe public pressure to apprehend offenders and are fearful that minor technical errors will result in their escape.
>
> The existence of the exclusionary rule creates a haven for the corrupt law enforcement officer and allows him to immunize an offender while appearing to do an aggressive job of law enforcement. *Id.*

[110]403 U.S at 492-93.

[111]412 U.S. 218 (1973) (holding that warrantless searches may be conducted with the voluntary consent of the target even without a specific warning by the police advising the suspect of his right to withhold consent).

[112]414 U.S. 218 (1973) (holding that a full search of a person incident to a full custody arrest may be undertaken without regard to what a court may later decide was the probability of was that the detainee was carrying a weapon or not). *See* Robertson, *supra* note 99, at 156. (A clear and broad exception to the warrant requirement was thus recognized).

[113]414 U.S. 338 (1974) (holding that a grand jury witness may not refuse to testify concerning evidence obtained in violation of the fourth amendment). The Court held that questioning a witness based on illegally seized evidence is a "derivative use" of evidence and is not a further violation of the Constitution. (*Calandra* essentially followed the pattern of cost-benefit analysis established in *Alderman*). *Id.* at 354.

[114]422 U.S. 531 (1975) (holding that if the police officer believed in reasonable good faith that the evidence they seized would be admissible in court, the imperative of judicial integrity would not be offended). This case was decided a short time after the Court held, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1975), that a warrantless automobile search by border police conducted without probable cause was unconstitutional under the fourth amendment. But the Court decided that it did not have to make Almeida-Sanchez retroactive in this case. *Id*.

would forecast the demise of the exclusionary rule[115] and cause the judicial development of Fourth Amendment rights to be stopped "dead in its tracks."[116]

G. Filling in the Contours: The Automobile Exceptions

During this century the Court has created numerous exceptions to the exclusionary rule, including attenuation,[117] independent source,[118] inevitable discovery[119], and good faith exceptions.[120]

The so-called "automobile exception"[121] to the warrant requirement was first enunciated by the Court in 1925 in *Carroll v. United States.*[122] The mobility doctrine was slow to develop, but by the 1970's the Court began to focus on not only extending the *Carroll* Doctrine[123] itself but also on extending the scope of the

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[115]*Peltier*, 422 U.S. at 551. *See* Mintz, *supra* note 11, at 161. *See also* U.S. v. Calandra, 414 U.S. 338, 348 (1974). The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. With that one rule the Court seemed to settle the question of the rule's constitutional basis. *Id.*

[116]*Peltier*, 422 U.S. at 554. *See* Mintz, *supra* note 11, at 171. "If this narrow construction is furthered the problem arises of what, exactly, the police office will be held responsible for knowing." *Id. See also* U.S. v. Robinson, 414 U.S. 218, 391 (1973) (holding that probable cause to arrest a suspect also justifies a search of that suspect incident to arrest).

[117]Nardone v. United States, 308 U.S. 338 (1939) (allowing courts to admit evidence if the causal connection between the illegal search and the evidence is sufficiently attenuated).

[118]371 U.S. 471 (1963) (holding that narcotics discovered from statements made by an illegally arrested defendant did not come under the independent source exception).

[119]Nix v. Williams, 467 U.S. 431 (1984) (holding that despite illegal questioning of a defendant, which lead to the discovery of the victims body, the search party would have inevitably discovered the body).

[120]United States v. Leon, 468 U.S. 897 (1984) (holding that the Court must sometimes consider competing goals of interest: deterring official misconduct or removing procedures under which criminal defendants are acquitted based on evidence that might expose the truth). *See* Arizona v. Evans, 514 U.S. 1 (1995) (holding that exclusion of evidence based on incorrect court records kept by court employees would not deter the employees from keeping erroneous records since they were not involved in the arrest process). The Constitution does not expressly forbid the use of evidence collected in an illegal search, the Court stated that the exclusionary rule does not apply to all Fourth Amendment violations. *Id.* at 10-16.

[121]Mintz, *supra* note 11, at 164.

[122]267 U.S. 132 (1925) (holding that if a warrantless search and seizure is conducted on an automobile made upon probable cause reasonably arising out of the circumstances known to the seizing officer, the search and seizure is valid).

[123]John R. Werner, Editor-In-Chief Note, *Mobility Reconsidered: Extending the Carroll doctrine to Moveable Items,* 58 IOWA L. REV. 1134, 1145-49 (1973). The proposition that the mobility of an automobile supplied the exigent circumstances for a search without a warrant upon probable cause allowed the Carroll Doctrine to retain validity long after the National Prohibition Act, Title II, ch. 85 §§ 25-26, 41 Stat. 315 (1919), on which it was based, was repealed in 1935. Extending the doctrine allows the police to respond quickly to a situation presented by a movable vehicle.

doctrine, in *Chambers v. Maroney*,[124] to include a lesser expectation of privacy when an item is moveable.[125]

Along with a lesser expectation of privacy in an automobile, the Court began to deal with cases involving containers in automobiles. In 1948 in *United States v. Di Re*[126] refused to extend the *Carroll* doctrine to include a search for containers of contraband on the body of the occupant but did confirm that all warrantless searches must be based on "reasonableness".[127] Even with a lesser expectation of privacy in an automobile, the Court held in several cases that containers could only be searched without a warrant under exigent circumstances,[128] that the Fourth Amendment requires the police obtain a search warrant to search a closed container found in an automobile even though there is probable cause to believe that the container contains contraband;[129] and that an officer's authority to possess a container is distinct from his authority to examine it.[130] There were some Justices who still believed that the word "automobile" was not a talisman in whose presence the Fourth Amendment disappeared.[131]

In *United States v. Ross*[132] the Court, in an effort to reconcile the *Chambers-Carney, and Chadwick-Sanders* lines of authority, held that if there exists probable cause to search an entire car, then the authority to make a warrantless search of the vehicle extends to containers within the vehicle in which contraband might be concealed.[133]

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[124]399 U.S. 42, 48-52 (1970) (reaffirming the exemption from the Fourth Amendment warrant requirement and further holding that a warrantless search of a vehicle may be delayed and conducted elsewhere if a warrantless search would have been proper at the time of the initial seizure. The Court began to shift the focus to an expectation of privacy issue when in a mobile vehicle).

[125]Ybarra v. Illinois, 444 U.S. 85 (1979) (holding that in contrast to a passenger's reduced expectation of privacy, the governmental interest in effective law enforcement would be impaired without the ability to search the passenger's belongings, since the automobile's ready mobility creates the risk that evidence or contraband will be permanently lost while a warrant is obtained).

[126]332 U.S. 581 (1998) (holding that the existence of reasonable cause for searching an automobile believed to be carrying contraband does not warrant the search of an occupant thereof, especially when if the contraband sought might be concealed on the person).

[127]*Id.* at 585 (stating that the Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable).

[128]United States v. Chadwick, 433 U.S. 1 (1977).

[129]Arkansas v. Sanders, 442 U.S. 753 (1979).

[130]Walter v. United States, 447 U.S. 649 (1980).

[131]*Coolidge,* 403 U.S. at 443.

[132]456 U.S. 798 (1982). The Court wanted to provide specific guidance to police and courts in this recurring situation. *Id.* at 826. The Court reasoned that the scope of the warrantless search of an automobile is not defined by the nature of the container but rather by the object of the search and the places where there is probable cause to believe the contraband will be found. *Id.* at 834.

[133]*Id.* at 807.

Finally, in 1991, the Rehnquist Court,[134] looking for one clear-cut rule to govern automobile searches[135] overruled *Chadwick-Sanders* in *California v. Acevedo*,[136] holding that containers in cars may be searched without a warrant whether the probable cause is specific or general.[137]

IV. SUMMARY OF THE COURT'S OPINION

Justice Scalia wrote the opinion for the Court's 6-3 decision. Justice Scalia invoked British common law at the time of the Fourth Amendment's creation as the beginning point for the 1999 inquiry[138] to determine whether a particular governmental action is to be regarded as an unlawful search and seizure.[139]

The Court began its opinion with the contention that historical evidence shows that the Framers would have regarded as acceptable a warrantless search of containers in an automobile if there was probable cause.[140] The Court relied on *United States v. Ross*[141] and *California v. Acevedo*[142] to argue that during virtually the entire history of our country, whether contraband had been transported in a horse drawn carriage or in a 1921 roadster, it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.[143]

The Court summarized the *Ross* holding, emphasizing that if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents,[144] adding that later cases have characterized *Ross* as applying broadly to all containers within a car without qualification as to ownership.[145] The Court added that if the rule announced in *Ross* was limited to a

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[134]The Rehnquist Court 1986-Present. *See* Abraham, *supra* note 25, at 349-69 (for a discussion on the make up of the Rehnquist Court and its views).

[135]California v. Acevedo, 500 U.S. 565, 569 (1991).

[136]*Id*. at 565.

[137]*Id.* at 566-67.

[138]*Houghton*, 526 U.S. at 299. (the Court cited *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) and *California v. Hodari D.*, 499 U.S. 621, 624 (1991)). Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *See, e.g.*, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-53, (1995).

[139]*Id*.

[140]*Id*. at 300.

[141]456 U.S. 798 (1982).

[142]500 U.S. 565 (1991).

[143]456 U.S. at 820 n.26.

[144]*Id.* at 825.

[145]500 U.S. 572.

search of the contents of the belongings of the driver one would have expected the Court to have expressed that limit in the *Ross* decision.[146]

Moreover, the Court declared that *Ross* was fully consistent—as the Respondent's proposal was not—with the balancing claim that a permissible scope of a warrantless car search is defined by the object of the search and the places where there is probable cause to believe it may be found.[147] The Court then supported its endorsement of *Ross*, declaring that "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[148]

The Court invoked historical evidence from the Founding era to buttress all of its arguments. The Court likened present day police officers to 18th century customs officials examining packages and containers without regard to probable cause for each one[149] in light of legislation enacted by Congress from 1789 through 1799 and beyond.[150]

In this regard the Court noted that "even if the historical evidence, as described in *Ross*, were thought to be equivocal, we would find that the balancing of relative interest weighs decidedly in favor of allowing searches of a passenger's belongings.[151] The Court also relied on *Cardwell v. Lewis*[152] to support the proposition that passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which 'travel public thoroughfares'.[153]

Next the Court focused on the Wyoming Supreme Court's finding that the "physical proximity" test[154] did not convince them that it provided the most efficacious balance between legitimate individual and state interests.[155] The Court noted that a warrantless seizure and search of a passenger's purse did not give rise to the traumatic consequences[156] of the type a search of one's person would. The Court

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[146]456 U.S. at 834.

[147]*Id.* at 824.

[148]Zurcher v. Standford Daily, 436 U.S. 547, 556 (1978).

[149]*Houghton*, 526 U.S. at 300-01.

[150]*Id.* at 300.

[151]*Id.* at 303.

[152]417 U.S. 583 (1974) (allowing a warrantless search and seizure of an automobile parked in a parking lot when the driver was elsewhere by looking into the automobile windows and examining the exterior of the automobile).

[153]*Id.* at 590.

[154]State v. Andrews, 549 N.W.2d 210 (1996) (holding that police may search all items found on the premises that are plausible repositories for the objects of the search, except those worn by or in the physical possession of persons whose search is not authorized by the warrant).

[155]*Houghton*, 526 U.S. at 303.

[156]*Id.*

distinguished the instant facts from those of *United States v. Di Re*,[157] where there was a body search, and *Ybarra v Illinois*,[158] where even a limited search of the outer clothing constitutes a severe intrusion on cherished personal security.[159]

The Court then presented the dissent's arguments and countered with criticisms of the dissent's "strange criterion" "obvious ownership" argument and the dissent's desire for individualized probable cause to search a passenger's belongings.[160]

The Court ended its opinion by positing that if they were to invent and exception from the historical practice that *Ross* described it would be perplexing that the exception should only protect a passenger's belongings rather than (more logically) property belonging to anyone other than the driver.[161]

Justice Breyer concurred with the "understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question".[162] Moreover, in an effort to forestall the destruction of the bright-line rule established in *Ross*, Justice Breyer pointed out that the scope of the Court's bright-line rule "Obviously . . . applies only to containers found within automobiles".[163] Justice Breyer's concurrence ended with his understanding that a purse is a "special container" and that he was tempted to say "the search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both".[164] However, in the end, he retreated from this line of argument and stated that Court has warned against making distinctions of this kind[165] unless the woman's purse, like a man's billfold, were attached to her person,[166] which in this case it was not.[167]

Justice Stevens, joined by Justices Souter and Ginsburg, dissented from the holding of the majority.[168] The Justices began their dissent by making it very clear that there is an established precedent for warrants and individualized suspicion based on specific probable cause.[169] Furthermore, the dissent stated that in all prior cases the automobile exceptions to the Fourth Amendment warrant requirement applied

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[157]332 U.S. 581 (1948).

[158]444 U.S. 85 (1979).

[159]*Id.* at 88.

[160]526 U.S. at 303-07.

[161]*Id.* at 305.

[162]*Id.* at 307. (Breyer, J., concurring).

[163]*Id*. at 308. (Breyer, J., concurring).

[164]*Id.* (Breyer, J., concurring).

[165]526 U.S. at 308. (Breyer, J., concurring) (stating that it cannot necessarily be argued that the fact that the container was a purse automatically makes a legal difference (citing *Ross*, 456 U.S. at 822)).

[166]*Id.* (Breyer, J., concurring) (stating that outer clothing receives increased protection (citing *Terry*, 392 U.S. at 24)).

[167]*Id.* (Breyer, J., concurring).

[168]*Id.* at 309. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[169]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

only to the owner/defendant of the automobile.[170] The dissent explained that in *Di Re*, the only case involving a search of a passenger/defendant, the Court overwhelmingly held that the exception to the warrant requirement did not apply.[171]

In this section of the opinion, the dissent maintained that the Majority has fashioned a new rule rather than adhering to the settled distinctions between drivers and passengers.[172] The dissent stated that the "newly minted test"[173] is based on a distinction between property contained in clothing worn by a passenger and property in a "container" and it is quite plain that the intrusion on any container is as serious as the intrusion on clothing (as in *Di Re*).[174]

Next, the dissent delineated the ruling in *Ross* to mean that the Court had rejected the notion that the scope of the warrantless search be defined by the nature of the container.[175] Rather, *Ross* was concerned with the object of the search and the places where there was probable cause to believe it might be found.[176] The dissent categorically stated that they disapproved of a container-based distinction between a man's pocket and a woman's purse.[177] Moreover, the dissent was unconvinced by the "mere spatial association"[178] between a passenger and a driver that the majority used as an acceptable basis for ignoring the privacy interests in a purse.[179]

In the last part of the opinion, the dissent addressed the balancing view of the State's legitimate interests in effective law enforcement and privacy issues.[180] The dissent explained that to their knowledge the Court has never restricted themselves to a two-step Fourth Amendment approach "wherein the privacy and governmental interests at stake must be considered only if 18th century common law 'yields no answer'.[181]

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[170]526 U.S. at 309. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[171]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[172]*Id.* at 309-10. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[173]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[174]*Id.* at 309 (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[175]526 U.S. at 310. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[176]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[177]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[178]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[179]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting). "We are not convinced that a person, by mere presence in a suspected car, loses immunities from a search of his person to which he would be otherwise entitled." (citing United States v. Di Re, 332 U.S. 581, 587 (1948)). *See also* Chandler v. Miller, 520 U.S. 305, 308 (1997) (emphasizing individualized suspicion); Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (explaining that a person's "mere propinquity" to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person).

[180]526 U.S. at 311. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[181]*Id.* (Stevens, J., Souter, J., Ginsburg, J., dissenting).

In sum, the dissent concluded that there was no reason to expand the ruling in *Carroll* to justify this arrest and search as incident to the search of the car.[182] The dissent suggested that the Court had crafted an imaginative response to *Di Re* as well as being unable to support its own historical recitation. Finally, the dissent stated that it was thankful that the Court's automobile-centered extension of the warrant exception is limited in scope but concluded that it "does not justify the outcome in this case".[183]

V. ANALYSIS

This Note contends that the Court's decision to adopt a container-based approach to the automobile warrant exception, to allow searches of passenger belongings based on the driver's misconduct, is problematic. The *Houghton* Court was wrong to adopt this new exception for three reasons. First, the Court has erroneously interpreted the historical evidence behind the creation of the Fourth Amendment. Second, the Court, by chipping away at stare decisis, is disrupting the foundations of American jurisprudence and the development of the law. Third, by creating a new lexicon, changing the meanings of the words, the Court is trying to define away the protections afforded by the Fourth Amendment.

A. Original Intent[184] *and Tradition: The Only Guides to the Fourth Amendment Question.*

Using original intent[185] as the first step in determining the meaning of what protections the Fourth Amendment affords at the end of the 20th century is the present Court's first line of attack.

Justice Scalia considers the text of the Constitution to take priority over everything else and has characterized himself as an originalist[186] who relies on the intentions of the Framers as revealed historically. Thus, Justice Scalia in the majority opinion invokes British common law as it existed in the 18th century as the starting point for his argument concerning the meaning of the Fourth Amendment[187] today. Herein lies the problem. The crucial issue is not what (British) common law required but what the Fourth Amendment requires.[188] If constitutional interpretation is simply a matter of identifying whether an historical practice was permitted in

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[182]*Id*. at 312.

[183]*Id.* at 313. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[184]Levy, *supra* note 76. The term "original intent" stands for an *old idea* (emphasis added) that the Court should interpret the Constitution according to the understanding of it by the Framers.

[185]Charles McC. Mathias, Jr., *Ordered Liberty: The Original Intent of the Constitution,* 47 MD. L. REV. 174, 175 (1987). Original intent is viewed by some to mean that the courts and other branches of government should be bound by what can be divined of the intentions of those who wrote or ratified the Constitution. Adherents to this position obtain solace from the supposed certainty of the static meaning provided in the face of changing circumstnaces.

[186]Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[187]*Houghton*, 526 U.S. at 300.

[188]Maclin, *supra* note 47, at 961.

1789, it would be better to appoint historians to the Court and leave lawyers on the sidelines. The country expects and deserves more than a history seminar when our fundamental rights are at stake.[189] The purpose behind the creation of the Fourth Amendment and the Constitution is that the Framers meant the Constitution to mean more than it says, and more than they could have conceived.[190]

Tradition is another of Justice Scalia's routes to interpretation of the Constitution. Justice Scalia sees traditionalism as a corollary to originalism.[191] In *Houghton,* Justice Scalia states that when a historical inquiry yields no answers, one must look at traditional standards to decipher the meaning of "reasonableness", "intrusion on individual privacy" and "governmental interests".[192] Thus, when Justice Scalia compares the needs of customs officers in the 1780's and 1790's to present day police officers[193] he is creating two problems.

First, the Court's comprehension of history and its traditions is selective. Selective understanding scans the past with a narrow focus and, in particular, with a view toward using the past to extract a definitive authoritative rule to resolve problems in the present.[194]

Utilizing a selective view allows the majority to justify a container-based search without individualized probable cause for the person because the "interpretation" sees customs officers at common law, and for a short period in 1789, doing so and hence it must mean that the "interpretation " is applicable today.[195] Of course, the paradox is that history shows that the Revolution was fought and the Fourth Amendment created over just such problematic beliefs.[196]

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[189]Tracey Maclin, Article, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 46 (1994).

[190]*Id.* (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969)); Taylor is considered a trailblazer for those rejecting the warrant preference rule. *Id.* at 11.

[191]David A. Strauss, *Tradition, Precedent, and Justice Scalia,* 12 CARDOZO L. REV. 1699, 1710 (1991). Strauss believes that Scalia is positively reverential in his views about tradition. *Id.* at 1700.

[192]526 U.S. at 300.

[193]*Id.*

[194]Robert A. Burt, *Precedent and Authority in Antonin Saclia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1690 (1991).

[195]Maclin, *supra* note 47, at 19-20. When the proposed federal Constitution was debated in the Virginia Convention, Patrick Henry protested that federal excisemen could use general warrants to search cellars and bedrooms and seize any person without evidence of any crime. Henry protested against suspicionless searches whether or not carried out pursuant to general warrants. Would anybody at the Convention have dared respond: "Settle down Pat, we'll solve our problem, we'll abolish general warrants—we'll just let federal officers conduct the searches whenever and wherever they want without acting pursuant to general warrants. Congress will simply enact a law that permits it." In sum, the search and seizure practices of British authorities were opposed *because of the arbitrary power exercised by customs officers* (emphasis added) and Crown officials. The Fourth Amendment was adopted to deter federal officers from exercising similar unrestrained power. *Id*.

[196]For what Justice Sandra Day O'Connor called the best historical presentation of American Fourth Amendment history *see* William J. Cuddihy, *The Fourth Amendment:*

Second, our contemporary obligation to the past should not arise because we are constituted by our forebearers, but rather the past should derive from the same fundamental principle that comprises our obligations to one another today; our commitment to consensual relationships based on mutually acknowledged equality.[197] Commitment to a consensual egalitarian conception of social relationships requires loyalty, but not subservience, to the past.[198]

Arbitrarily fixing meaning at the intent of the founders robs America of the power to consent. It dismisses two centuries of national dialogue with the Constitution and it ignores the significant growth in our understanding of the "Novus Ordo Seclorum" the Framers established.[199] Why should we who have been molded by that history, not participate in that debate?[200] In his concurrance in *Houghton,* even Justice Breyer conceded that "History is meant to inform, but not automatically to determine, the answer to the Fourth Amendment question."[201]

B. Disrupting the Orderly Development of the Law: The End of Stare Decisis in Fourth Amendment Cases

The question of why precedent should matter so much,[202] has been heatedly debated by scholars for years.[203] The usual response is that the law values certainty.[204] But, given the Court's sometimes quite rapid departure from precedent when it believes a particular precedent is unsound, perhaps the best answer is an institutional one: the Court is most qualified to read cases, especially it's own.[205]

Origins and Original Meaning (unpublished Ph. D. dissertation, Claremont Graduate School: available from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan).

[197]Burt, *supra* note 194, at 1669.

[198]*Id.* at 1697.

[199]Mathias, *supra* note 185, at 176-77.

[200]*Id.* at 177. Justice Marshall stated, "When the Founders used the phrase "We the People" in 1787, they did not have in mind the majority of America's citizens. A civil war, twenty-six amendments, and tremendous social, political, and technological changes have put flesh on the bones of the Constitution, thus altering our reading and our relationship to it. Why should we ignore history when we read the Constitution?" *Id*.

[201]526 U.S. at 307 (Breyer, J., concurring).

[202]Laurence H. Tribe & Michael C. Dorf, Article, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1064 (1990). *See* Ronald Dworkin, *Taking Rights Seriously*, 38 HARV. L. REV. 102 (1977) (for a view that stare decisis is not a rule but a principle that may be outweighed by other principles).

[203]*Id.* at 1064. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987). Most judges, lawyers, and commentators recognize the relevance of at least five types of constitutional argument: arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy. *Id*.

[204]Tribe, *supra* note 202, at 1064.

[205]*Id.*

Rightly or wrongly, constitutional meaning occurs primarily in the interpretation of prior cases.[206]

In 1990, Justice Powell noted that reliance on precedent in general, and on stare decisis in particular, is important in constitutional cases because after two centuries of vast change, the original intent of the Founders is difficult to discern or is irrelevant.[207]

More than any other Justice sitting today, Antonin Scalia is ready to reverse[208] prior Supreme Court precedent.[209] Some scholars believe that Justice Scalia's view on precedent relies on Oliver Wendell Holmes' famous aphorism that "it is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV."[210] Yet others believe, connected to his originalism and traditionalism, he would find this anathema, rejecting the idea that the Constitution must change from age to age.[211] Still, this categorically contradicts his originalist conception of being fully committed to the Framers meaning of the Constitution.[212]

So why is Justice Scalia so open to overruling past cases? The paradox lies in what some believe to be his quick use of abstract principles that are insensitive to practical realities and his cavalier attitude toward the views of past Justices who had thought carefully about the issues.[213]

The Court in *Houghton* has for all intents and purposes overruled *Di Re*[214] making a passenger's "mere presence" in an automobile enough justification to require a search of the passenger's belongings when there is only probable cause to

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[206]*Id.* The Court has nominally based even its boldest innovations in constitutional law upon precedent. For instance, Justice Stone argued that state-sanctioned discriminatory practices against "discrete and insular minorities" merit a diminished presumption of constitutionality neither because he believed such discrimination was intrinsically evil, nor because the structure of the Constitution marks discrete and insular minorities as special but rather, because he located this principle in prior cases. *Id*. (citing United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938)).

[207]Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990).

[208]*See* Strauss, *supra* note 191, at 1699 ("[w]e knew from the start that Justice Scalia was not a great fan of stare decisis").

[209]Burt, *supra* note 194, at 1685. *See* United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (calling for the overruling of Feres v. United States, 340 U.S. 135 (1950)); Puerto Rico v. Barnstad, 483 U.S. 219 (1987) (overruling Kentucky v. Dennison, 65 U.S. 66 (1861)); Solorio v. United States, 483 U.S. 435 (1987) (overruling O'Callahan v. Parker, 395 U.S. 258 (1969)); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-65 (1987) (Scalia, J., concurring in part and dissenting in part) (questioning Cooley v. Board of Wardens, 53 U.S. 299 (1852)); Welch v. Texas Dep't of Highways and Pub. Tansp, 483 U.S. 468 (1987) (overruling Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184 (1964).

[210]O. W. Holmes, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

[211]Burt, *supra* note 194, at 1686-87.

[212]*Id.* at 1688.

[213]*Id.* at 1700.

[214]332 U.S. 581 (1948).

search the driver. Moreover, the Court has overruled the true holding in *Ross*,[215] which concluded that the historical evidence that permits a warrantless search "is defined by the object of the search and where the places in which there is probable cause to believe that it may be found."[216] By so doing, the Court has also overruled its previous view of what history had informed them to be the correct view of an exception to the warrant requirement based on probable cause for persons.[217] "The People" and individualized probable cause are gone and the police have now taken the place of the neutral magistrate in deciding what is reasonable.[218]

C. The New Lexicon: Define Away Fourth Amendment Protections

In every language there are assumptions that give meaning to a text. The external world and cultural experiences also supply an extra-textual meaning to a language. But, people speak to each other or write novels or laws or journal articles because they accept that they are each supplying the same irreducible meaning.[219] The Court in *Houghton* seems to be redefining the irreducible meanings that as a society we have all agreed upon.

We the people of the United States of America agree to the irreducible meaning of the concepts upon which our nation was founded. First, that all men are "endowed with certain unalienable rights[220] that among these are life, *liberty* and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed".[221] Second, We the people, agree that those who won our independence believed that the final end of the State was to make men free to develop their faculties. We agree that in government the deliberative forces should prevail over the arbitrary, that the value of liberty is both an end and a means and that liberty is the secret of happiness and courage the secret of liberty.[222] Finally, we all agree upon the irreducible meaning that the Framers of the Constitution conferred, as against the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.[223]

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[215]456 U.S. 798 (1982).

[216]*Id.* at 824.

[217]526 U.S. at 307. The Court's decision in Ross was based on a similar historical inquiry. *Id*.

[218]Maclin, *supra* note 47, at 13 (stating that the warrant requirement tells us, and the police, that unsupervised searches should not be the norm, that warrantless intrusions must be justified by more than convenience (cost-benefit analysis), and that police discretion should be restrained).

[219]Tribe, *supra* note 202, at 1204-07.

[220]Other state constitutions also reflect agreement. "All men are born free and equal, and have certain natural, essential and unalienable rights." MASS. CONST. (1778).

[221]THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

[222]Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting).

[223]277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

The dissent in *Houghton* believes that based on its imaginative footnote in *Di Re*[224] the Court had changed the focus from Di Re's status as mere occupant of the vehicle and the importance of individualized suspicion, to a case concerning "reasonableness" of the intrusion.[225] This redefinition of the meaning of *Di Re* allowed the Court to expand the *Carroll* Doctrine and remove immunities from a search by mere presence in an automobile.[226]

The Court also redefines the meaning of words. Container, usually defined as a receptacle, in *Houghton* includes a purse, usually defined as a woman's handbag used for carrying money and personal items.[227] The distinction drawn between a suitcase[228] and a very personal belonging, a purse, that women wear is gone.[229] Even Justice Breyer in his concurrence felt uneasy with this new synonymous definition. Moreover, Justice Breyer also seemed to intuit that a purse was more like a man's billfold[230] than a receptacle. Reconfiguring the holding of previous Courts and redefining the Fourth Amendment is putting the exclusionary rule in jeopardy. With similar cases being heard before state courts[231] today, the magnitude of *Houghton* will be felt momentarily.

The Constitution succeeded in solving the pressing problems the young nation faced in 1787. It was designed to prevent tyranny, rather than promote efficiency. It was designed to focus governmental power on its legitimate objectives . . . to remain fenced out of our houses and the private precincts of our lives.[232] Let us hope that Justice Breyer is correct and the Court's "newly minted" test confines itself only to

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[224]332 U.S. 581 (1948).

[225]526 U.S. at 311 n.2.

[226]*Id*. at 300. The dissent stated that it saw no reason to extend *Carroll* in this way. *Id*. (Stevens, J., Souter, J., Ginsburg, J., dissenting).

[227]THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1989).

[228]United States v. Robbins, 453 U.S. 420 (1973); *Sanders*, 422 U.S. at 753; United States v. Mendenhall, 446 U.S. 544 (1980); *Ross*, 456 U.S. at 798; Florida v. Royer, 460 U.S. 491 (1983); Michigan v. Long, 463 U.S. 1032 (1983); United States v. Place, 463 U.S. 696 (1983); United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Bostick, 501 U.S. 429 (1991).

[229]*Houghton*, 526 U.S. at 295.

[230]*Id*. at 308.

[231]United States v. 404,905.00 in United States Currency, 182 F.3d 643 (8th Cir. 1999); United States v. Buckner, 179 F.3d 834 (9th Cir. 1999); United States v. Zabala, 52 F. Supp. 2d 377 (S.D.N.Y. 1999); Avery v. Mitchell, 1999 U.S. Dist. LEXIS 5670 (E.D. Pa. Apr. 20, 1999); United States v. Hambrick, 1999 U.S. Dist. LEXIS 10384 (W.D. Va. July 7, 1999); People v. Hart, 1999 Cal. App. LEXIS 776 (Cal. App. 3d Dist. Aug. 23, 1999); People v. Cartwright, 72 Cal. App. 4th 1362 (Cal. App. 1999); Baldwin v. Reagan, 715 N.E.2d 332 (Ind. 1999); State v. Lux, 1999 ME 136 (Me. 1999); State v. Salvato, Hamilton County App. No. C-980939, 1999 Ohio App. LEXIS 3716 (Ohio Ct. App., Hamilton County Aug. 13, 1999); State v. Hirning, 592 N.W.2d 600 (S.D. 1999); Newman v. State, 1999 Tex. App. LEXIS 5043 (Tex. App. Dallas July 9, 1999); Gallegos v. State, 1999 Tex. App. LEXIS 5042 (Tex. App. Dallas July 9, 1999); Hayes v. Commonwealth, 514 S.E.2d 357 (Va. App. 1999); State v. Matejka, 1999 Wisc. App. LEXIS 966 (Wis. Ct. App. Sept. 2, 1999).

[232]Mathias, *supra* note 185, at 179.

Fourth Amendment automobile exceptions to the exclusionary rule, and will not extend to our bodies or our homes. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[233]

[233] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928). (Brandeis, J., dissenting).