The Warren Court and the Fourth Amendment: Weakening Constitutional Protections

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Abstract

The Warren Court has long been praised for its defense of civil liberties including the rights of criminal defendants. Despite this praise the Warren Court actually laid out the reasoning upon which later courts would weaken the protections of the Fourth Amendment. This manuscript examines several ways in which the reasoning by the Warren Court has allowed later courts to broaden the search and seizure powers of the state. These methods include the inability to provide a solid foundation for the exclusionary rule, the increasing number of exceptions to the warrant requirement, the development of the reasonableness standard for Fourth Amendment jurisprudence, and the ability to narrow the scope of what constitutes a search under the Fourth Amendment.

Observers of the Supreme Court have long considered the years of the Warren Court to have been a noteworthy period in American history for the protection of civil liberties, especially for the rights of criminal defendants (Salem, 452; Schwartz, 279). The support that the Warren Court demonstrated for the rights of criminal defendants covered the spectrum of rights protected by the Bill of Rights. Central to this revolution of the rights of criminal defendants were changes the Court made in Fourth Amendment jurisprudence. While the Fourth Amendment had previously been incorporated in Wolf v. Colorado, 38 U.S. 25 (1949), the Supreme Court’s failure to incorporate the exclusionary rule at the same time resulted in little oversight of state courts in how the Fourth Amendment should be interpreted. The cases that the Supreme Court had resolved prior to incorporation of the exclusionary rule established what has been known as the traditional approach to Fourth Amendment jurisprudence. This approach to the Fourth Amendment reads the two clauses of the amendment, the provision to be secure against unreasonable search and seizure and the warrant provision, as being connected. Thus, searches are seen as unreasonable, if they did not involve a warrant. According to the practical application of this approach, Fourth Amendment analysis involved a series of questions that had to be asked by the Court to determine if there was a Fourth Amendment violation. These questions included the following: 1) was the search or seizure of a person or area protected by the Fourth Amendment; 2) was there a warrant based on probable cause which described the things to be searched for or seized with particularity; and 3) if there was no warrant, was there probable cause and did the search or seizure fall within one of the delineated exceptions to the warrant requirement.

Due to the failure to incorporate the exclusionary rule the states did not have to closely follow the traditional approach of the Fourth Amendment which the Supreme Court
Court had developed. The only oversight the Supreme Court provided to state interpretation of the Fourth Amendment was through the infrequent use of the fundamental fairness standard of the Fourteenth Amendment's due process clause as in <i>Rochin v. California</i>, 342 U.S. 165 (1952), when the Court found that police behavior shocked the conscience of the Court. After long years of indifference, the decision to incorporate the exclusionary rule in <i>Mapp v. Ohio</i>, 367 U.S. 643 (1961), opened the door for the Warren Court to expand the protections of the Fourth Amendment. The application of the exclusionary rule and better Supreme Court oversight of how the Fourth Amendment was interpreted made it more difficult for prosecutors to obtain convictions due to the increased suppression of tainted evidence. An indication of this fact is that in 1959 the Court ruled for the government in 60% of all search and seizure cases, but by 1969 the Court ruled in favor of the government only 25% of the time in similar cases (Bookspan, n.4).

What has been ignored by many observers is that despite the Warren Court's actions to more effectively protect the rights of criminal defendants through such vehicles as better oversight of the techniques by which police gathered evidence, the Warren Court also planted the seeds of destruction for the traditional interpretation of the Fourth Amendment. These seeds have allowed later courts to interpret the Fourth Amendment in a way which has given governmental bodies more latitude, not less, in gathering evidence. Subsequent changes started in motion by the Warren Court's actions have resulted in the ability of the Burger Court to rule in favor of the government in 59.9% of search and seizure cases and the Rehnquist Court to rule in favor of the government 82% of the time in similar cases (Booksan, n.4).

The seeds which were planted by the Warren Court may not have been conscious attempts to weaken the Fourth Amendment, but the effects cannot not be ignored. Through the opinions that supported its decisions, the Warren Court opened the door for interpretations of the Fourth Amendment which have broadened the power of the state to engage in search and seizures. This manuscript examines several ways in which the reasoning by the Warren Court has allowed later courts to broaden the search and seizure powers of the state. These methods include the inability to provide a solid foundation for the exclusionary rule, the increasing number of exceptions to the warrant requirement, the development of the reasonableness standard for Fourth Amendment jurisprudence, and the ability to narrow the scope of what constitutes a search under the Fourth Amendment.

The Exclusionary Rule

The decision in <i>Mapp v. Ohio</i> is monumental for holding that the exclusionary rule is constitutionally required in all criminal courts. Justice Tom Clark's majority opinion did not, however, build this monument on a firm foundation since the decision did not clearly state the source or purpose of the exclusionary rule. There are a number of factors which may help to explain why. These include incorporating the exclusionary rule in <i>Mapp</i> when the issue was not properly before the Court. <i>Mapp</i> was granted certiorari as a First Amendment case and the exclusionary rule was not briefed or argued which may have caused a lack of sharpening of ideas in the opinion. Furthermore, without proper briefing or discussion in conference it may have been more difficult for Justice Clark to find reasoning that each Justice would support. Justice Black in his
concurring opinion, for example, added a Fifth Amendment basis for the rule. On top of this, the prior precedents concerning the exclusionary covered a variety of reasons for the rule which Justice Clark tried to take into consideration in his opinion. Regardless of why the opinion was written as it was, the result is that later Courts have been given the flexibility to change the parameters as to when it is appropriate to exclude evidence.

Justice Tom Clark's majority opinion in Mapp emphasized a constitutional basis for the exclusionary rule stating that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendment" (657). A second argument expressed in Justice Clark's opinion finds the exclusionary rule necessary in order to preserve the integrity of the government and court system. This was because "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence" (659). The third theory justifying the exclusionary rule that found its way into Justice Clark's opinion in Mapp was that the exclusionary rule was required as a remedy for constitutional violations. The primary purpose of the exclusionary rule as a remedy was to prevent future constitutional violations by providing a deterrent to police abuses. The exclusionary rule was, therefore, seen as the only effective remedy which deterred Fourth Amendment violations by "removing the incentive to disregard it" (656).

Despite the lack of clarity over the source and purpose of the exclusionary rule in Mapp v. Ohio, the Warren Court was firmly committed to the application of the rule at both the federal and state levels when governmental officials violated the Fourth Amendment. Researchers have called the mid-1960's the high-water mark for the exclusionary rule (Cameron and Lustiger, 118). The problem, however, with Justice Clark's opinion in Mapp is that he allowed for too many possible reasons supporting the exclusionary rule. This has allowed later justices, who have not favored the general rule, to be selective as to why the exclusionary rule should be applied and when evidence needs to be suppressed (Stewart, 1389-92).

The Burger Court developed a fundamentally different approach to constitutional adjudication in the area of the rights of the criminally accused, including the exclusionary rule (Gammon; Seidman). The Warren Court had considered the exclusionary rule a tool that could be used to enforce the Fourth, Fifth, and Sixth Amendments. The Burger Court did not adopt this view. The Burger Court created a hierarchy of rights and considered the most valued to be ones which protected the innocent and the trial process. Rights which protected the guilty, such as the exclusionary rule, were held in low esteem. This caused the Burger Court to weaken the effect of the exclusionary rule. The changes that were made by the Burger Court in cases involving the application of the exclusionary rule were helped by the leadership of Chief Justice Burger who had a long history of skepticism of the rule (Burger). Quite simply, Chief Justice Burger disliked the costs of the exclusionary rule which allowed the guilty to go free. Chief Justice Rehnquist has also had an aversion to finding evidence unusable due to the exclusionary rule (Bradley 1987, 285). The dislike both of these Chief Justices had for the exclusionary rule may alone have had attempts on their behalf to weaken both the rule and the protections of the Fourth Amendment, but the precedents of the Warren Court provided ample opportunities to move in that direction.

In 1974 Chief Justice Burger's approach to the exclusionary rule was accepted by the majority of the Court in United States v. Calandra, 414 U.S. 338 (1974). Calandra
came to the Court after a witness, which had been summoned to appear before a
grand jury refused to answer some questions on the grounds that the questions were
based on the fruits of an unlawful search. In determining if such questions had to be
excluded from grand jury inquiries, the Supreme Court, in an opinion written by Justice
Lewis Powell, ruled that the exclusionary rule was inapplicable. The first thing that was
made clear by the opinion was that the exclusionary rule was no longer considered by the
Supreme Court to be required directly by the Constitution's Fourth Amendment or to
protect judicial integrity. Justice Powell wrote that the exclusionary rule was "a judicially
created remedy designed to safeguard Fourth Amendment rights generally through a
deterrent effect, rather than a personal constitutional right of the party aggrieved" (348).
As a remedy, the sole purpose of the exclusionary rule was to "deter future unlawful
police conduct and thereby effectuate the guarantee of the Fourth Amendment against
unreasonable search and seizures" (347). As a deterrent the rule would not be
automatically applied in future cases. Instead, the rule should be "restricted to those
areas where its remedial objectives are thought most efficiently served" (348).

A second thing that was made clear in the Calandra opinion was that the
cost-benefit balancing approach would become the preferred method of determining
whether the exclusionary rule should be applied. In reaching a balance in Calandra the
Court ruled that the extension of the exclusionary rule to grand juries would seriously
impede their ability to perform their function while the added deterrent effect it would
serve would be "uncertain at best" (351). The Court also noted that the primary deterrent
effect from the exclusionary rule came through the application of the rule to the
prosecution's case-in-chief, therefore little additional deterrence would come from
denying the use of such material in grand jury proceedings.

In the ten years after deciding United States v. Calandra, the Court continued to
insist that the sole purpose of the exclusionary rule was to serve as a deterrent remedy for
future constitutional violations. In doing so, it applied the cost-benefit balancing
approach to determine if the exclusionary rule would serve as a future deterrent. In all of
the following cases the Court found that under the circumstances involved the use of the
exclusionary rule was inappropriate. In the 1974 case of Michigan v. Tucker, 417 U.S.
433 (1974), the Court held that even though the defendant's statements were inadmissible
due to a violation of Miranda, evidence which was discovered as a result of the
statements was admissible. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court
stated that when a search was conducted pursuant to a statute which was later found
unconstitutional, any evidence gained through the search was admissible. In United
States v. Janis, 428 U.S. 433 (1976), the Court held that evidence which was illegally
obtained by state police was admissible in a federal civil tax proceeding since the police
had acted in "good faith" when they obtained the evidence. In 1976 the Court ruled in
Stone v. Powell, 428 U.S. 465 (1976), that in habeas corpus proceedings Fourth
Amendment claims, including claims that the exclusionary rule was not properly applied
could no longer be reviewed. The Court ruled in United States v. Haven, 446 U.S. 620
(1980), that evidence which is inadmissible in the prosecution's case-in-chief can be used
to impeach the defendant at a criminal trial. In all of the above cases the Court found that
the application of the exclusionary rule would contribute too little in the way of an added
future deterrent in relation to its cost of freeing the guilty. The Burger Court also
developed two exceptions to the exclusionary rule. These were the good faith exception

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in United States v. Leon, 468 U.S. 902 (1984), and the inevitable discovery exception in Nix v. Williams, 467 U.S. 431 (1984). In these exceptions the Court found that police efforts to either actually follow the law or to have intentions to follow the law should overcome the costs of excluding evidence. Not only have later courts worked to limit the situations in which the exclusionary rule applies, their unhappiness with the rule has lead to the breakdown of the warrant requirement (Bookspan, 481-82).

The Warren Court must accept partial responsibility for the changes that later courts have made in the exclusionary rule. If it had been more forceful in explaining why the Fourth Amendment demands exclusion when there is a search and seizure violation, it would have been more difficult for later courts to argue that the rule was only a judge made remedy. Likewise, the Warren Court could have been more thorough in explaining the importance of judicial integrity and how the double standard of allowing the government to violate the law through a breach of the Fourth Amendment and still use the evidence can build disrespect for the whole criminal justice system. Such an explanation may have stopped later courts from claiming that the rule should only be applied when it acts as an effective deterrent against future police violations. Finally, the Warren Court could have been clearer in expressing the value that the Fourth Amendment preserves and why even at the heavy cost of exclusion of reliable evidence, the Fourth Amendment which protects all citizens from arbitrary intrusion in their personal affairs out weighs use of such evidence.

Exceptions to the Warrant Requirement

As mentioned, the Warren Court often emphasized its preference for the traditional approach to the Fourth Amendment. That is an interpretation of the Fourth Amendment, which relied on warrants, and the existence of probable cause for valid searches and seizures. The Warren Court's preference for this traditional approach to Fourth Amendment jurisprudence was stated in Katz v. United States, 389 U.S. 347 (1967), where Justice Stewart noted that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (357). Prior to the Warren Court the few exceptions to the need for a warrant were centered around exigent circumstances whereby quick action to secure evidence was required by law enforcement officials and a warrant was impractical. The primary example is provided by Carroll v. United States, 267 U.S. 132 (1925), in which the Court created an automobile exception by reasoning that because cars are mobile a warrant requirement would frustrate valid searches when probable cause existed.

The Warren Court added to the warrant exceptions with the hot pursuit exception in the case of Warden v. Hayden, 387 U.S. 295 (1967). The hot pursuit exception was based on the presence of an exigent circumstance. In his majority opinion, Justice Brennan reasoned that in hot pursuit cases time was of the essence. He stated "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for person and weapons could have insured . . . that the police had control of all weapons which could be used against them or to effect an escape" (299). The Warren Court in Schmerber v. California, 384

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U.S. 757 (1966), also used exigent circumstances to allow police to take a blood sample in a driving under intoxication case because there was probable cause to believe that the suspect was drunk and the evidence was in imminent danger of being destroyed.

It should not be surprising that if a Court known for its support of civil liberties could provide precedents, which enlarged the number of exceptions to the warrant requirement, other courts would follow that example. While the Warren Court did establish precedent, which furthered the exceptions to the warrant requirement, at least its exceptions fit into the traditional approach of Fourth Amendment jurisprudence since they were based on the presence of exigent circumstances and probable cause. Unlike the Warren Court’s actions, exceptions added by later courts have not always centered on the need to act quickly due to exigent circumstances, which would foil the warrant process. Instead, they have been increasingly focused on the need to preserve incriminating evidence (Clymer, 114-15; Christensen). For example, later Courts have found that exceptions such as border searches (United States v. Martinez-Fuerte, 428 U.S. 543 [1976]) and inventory searches of automobiles (South Dakota v. Opperman, 428 U.S. 364 [1976]) require neither exigency nor probable cause and still pass Fourth Amendment scrutiny. Altogether there have been at least 15 exceptions to the warrant requirement, which have been added since the Warren Court (Bradley 1985, 147).

The fact that the Warren Court’s exceptions complemented the traditional approach to Fourth Amendment jurisprudence does not mean that the Warren Court did not contribute to further deterioration of the Fourth Amendment concerning the exceptions to the warrant requirement, only that it was not as harmful to the traditional interpretation of the Fourth Amendment as those of later courts. In fact, the Warren Court does have to shoulder some of the responsibility for the later exceptions to the warrant requirement because of its initial willingness to interpret the Fourth Amendment in a narrow manner that would permit searches to be done without probable cause.

The Reasonableness Approach

Incorporating the exclusionary rule helped to make the protections of the Fourth Amendment a reality on the streets. No longer could law enforcement officers ignore the requirements of the Fourth Amendment and continue to use the evidence. Incorporation meant that the Warren Court would find it necessary to provide better oversight of how the Fourth Amendment was applied at the state and local levels. The attempt to apply the Fourth Amendment in a consistent manner across the country also meant that the Court would feel added pressure from law and order proponents to limit the effects of the exclusionary rule. As the Warren Court sought to bring more and more governmental activity under the umbrella of the Fourth Amendment provision against unreasonable search and seizure it found that even though a number of governmental activities did invoke the Fourth Amendment, it was difficult to apply the traditional approach to Fourth Amendment jurisprudence to them. As a result, it started to change its stance on the requirements of the Fourth Amendment.

In its largest disturbance of the traditional approach of Fourth Amendment jurisprudence, the Warren Court established and applied a framework by which the probable cause requirement could be written out of the Fourth Amendment. The ripple
The effect of this disturbance would lead future courts to develop a full-blown reasonableness approach to the Fourth Amendment (Wasserstrom; Serr; Sokolowski; Clancy). Movement toward the acceptance of the reasonableness standard was made possible by two decisions of the Warren Court, Camara v. Municipal Court, 387 U.S. 523 (1967) and Terry v. Ohio, 392 U.S. 1 (1968).

It was not the intent of the Warren Court to weaken the protections of the Fourth Amendment in Camara. Instead, the Warren Court meant to enlarge the protections of the Fourth Amendment to cover administrative searches. Justice Byron White wrote the opinion in Camara and made it clear that both the Fourth Amendment and warrant requirement were applicable in administrative inspection cases because "administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment" (534). The Court found that the governmental interest of stopping code violations to be weighty and difficult to accomplish by traditional application of the Fourth Amendment. Justice White stated, "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique besides general searches] would achieve acceptable results" (539). In its attempt to ensure that the goals of code enforcement would not be stymied by the Fourth Amendment, the Court found that the traditional requirements of probable cause would be unreasonable. Therefore, administrative inspections would have to be justified in terms of their reasonableness. The Court believed that the reasonableness of a search should be determined by balancing the purpose of the legislation requiring administrative searches against the invasion of privacy. In reaching this balance Justice White declared:

The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted warrant (539).

Justice White clarified that administrative search warrants would not require particularity and probable cause. Justice White then went on and found that even though the warrant requirement would apply to administrative searches, "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen’s privacy" (537). As a result, administrative warrants could be issued based upon the advancement of the governmental interest as established in the standards of legislation that sought to protect the interests. For example, warrants could be issued based on the nature of the building or business, the passage of time since last inspected, or the condition of the entire area. The purpose of the warrant was to explain the foundation and scope of a search to the individual when property was being inspected.

Justice White also argued that this decision,

[N]either endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interest here at stake and in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable governmental invasions of privacy (539).

Contrary to Justice White’s belief, the reasoning in Camara did dramatically change the nature of the Fourth Amendment. In reality, it set Fourth Amendment jurisprudence on its head by replacing probable cause as the standard for a reasonable
search with an understanding that reasonableness, as determined by a balancing test, defined probable cause. The *Camara* case accomplished this in several ways. First, it allowed warrants to be served with no probable cause. Second, it allowed warrants to be served when there was no individualized suspicion. Third, it rejected the particularity requirement for warrants under the Fourth Amendment. Finally, it allowed searches to be declared reasonable if the governmental interest outweighed the invasion upon an individual’s privacy. Once established these changes in Fourth Amendment jurisprudence would not be an isolated event (Greenberg; Stern, 1390-1405). In fact, it would only take the Court’s next term for it to expand upon the reasonableness approach to the Fourth Amendment.

In 1968, the Warren Court decided *Terry v. Ohio*. In *Terry* the Court’s primary concern may have been to bring “stop and frisk” situations under the umbrella of the Fourth Amendment. Had the Court not acted as it had, the application of the exclusionary rule coming out of *Mapp* would have placed increasing pressure on the Court to weaken the Fourth Amendment requirements for making an arrest for investigative reasons. Despite its good intentions in *Terry*, the Court disturbed the traditional approach to Fourth Amendment jurisprudence by, for the first time, upholding warrantless criminal searches based on a standard of less than probable cause in “stop and frisk” situations. Chief Justice Warren, who wrote the opinion, clarified that the Fourth Amendment did play a role in “stop and frisk” situations because whenever “a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person” (16). He also clarified that when police explored the outer surfaces of a person’s clothes in an attempt to find weapons, a search has taken place. Despite the fact that stop and frisk situations did involve the Fourth Amendment, Chief Justice Warren explained that such cases would not be treated by the traditional approach to the Fourth Amendment:

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether “probable cause” existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . . . But we deal here with an entirely different police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as practical matter, could not be subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment’s general prescription against unreasonable searches and seizures (20).

Since the traditional approach to the Fourth Amendment seemed impractical for stop and frisk situations, the Court decided that police conduct should be judged by a standard of reasonableness based on the balancing of the interests involved. The Court weighed the Fourth Amendment liberty interest of individuals to be unimpeded by governmental actions against the general governmental interests of crime control and insuring the safety of law enforcement officers. In reaching a balance between these competing interests the Court found that the brief on the street seizures involved in stop and frisk situations were not as serious an intrusion on the person as full blown arrests.

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and seizures which require probable cause. However, they were still serious enough to invoke the Fourth Amendment. In order to balance the interests involved the Court developed a two-part framework. The first prong examined whether the initial stop was reasonable at its inception. Terry emphasized the need for police to develop specific, articulable facts prior to making a stop. This was meant to have the advantage of controlling police discretion. Police not only had to pay attention to all the reasons which would justify a stop, but they also had to be able to articulate those reasons during any subsequent judicial review. The second step in the Terry framework was a determination that the scope of the search did not exceed the basis for the stop. Therefore, prior to a frisk, an officer would also need a reasonable suspicion that the individual was armed. Only after reaching a decision that there was a reasonable basis for an officer to conclude that an individual who was encountered may present a danger, could the officer proceed with a frisk. Chief Justice Warren warned that these encounters were not to be turned into general searches to advance crime detection or to stop the destruction of evidence. Chief Justice Warren's view that the reasonableness of a stop and frisk would be dependent on the facts available to the officer at the time, favored a case-by-case analysis for future cases.

In making its decision the Court did not establish a bright-line rule to determine when a Terry stop had changed over to become an arrest. It did, however, establish three basic foundations which were meant to provide limitations on the ultimate reach of the decision. The first was that it restricted the types of searches and seizures that Terry would support. Stops had to be brief for the purpose of allowing a police officer to satisfy his or her concerns. The frisk could only be conducted if the crime involved was inherently violent or there was some indication that the individual was armed and could then only be a patdown of the individual's clothing necessary to determine if there was a weapon. The second foundation was that prior to a stop being made it was necessary for the police to have a reasonable suspicion that a crime had been or was about to be committed, and that those suspicions had to be articulable. Finally, the suspicions had to be particularized. They had to be focused on an individual suspect and could not be generalized observations about a neighborhood or individual.

For years after the Warren Court the Supreme Court in decisions such as Ybarra v. Illinois, 444 U.S. 325 (1980), and Minnesota v. Dickerson, 508 U.S. 366 (1993), has consistently upheld the principle that stops and frisks are only meant to protect the officer and public by determining if an individual has weapons. Despite this consistency, the Court in Minnesota v. Dickerson did rule that there was a plain feel exception to the warrant requirement. Under this exception if an officer was lawfully conducting a frisk for weapons and felt something and could readily tell it was contraband, it could be seized and used as evidence at trial.

One of the problems with Terry results from the announcement by Chief Justice Warren that future stop and frisk cases would have to be settled on a case-by-case basis. This has created latitude for later courts to alter Terry's intent to limit stop and frisk to a search for weapons. This has allowed lower courts to take the language used in Terry and enlarge the number of instances in which such searches may legitimately be conducted. Due to judicial declarations, the ability to automatically frisk has increased in many situations even when there have been no personal observations by the officer to believe that a person is armed. The types of offenses which are always considered dangerous
now include drug offenses and burglary. The types of persons and situations which are automatically assumed to be dangerous and justifiably lead to frisks in every encounter include companions of arrestees, persons present when police execute a search warrant, gambling establishments, persons placed in a squad car, and situations which are bad for police (Harris, 22-31). These later scenarios in which Terry has been applied have allowed it to be changed from a technique that protected the safety of police only when an officer could verify an articulable particularized suspicion of possible criminal activity and a possible danger from the suspect, to a blanket doctrine which allows police to automatically frisk an increasing number of categories of people. The Court in United States v. Sokolow, 490 U.S. 1 (1989), also enlarged the scope of Terry steps beyond the traditional standard of reasonable suspicion by ruling that when considered together, a number of innocent activities could create a reasonable suspicion.

The intent of the Warren Court in Terry was similar to its intent in Camara in that it meant to enlarge the protections of the Fourth Amendment to a situation which had previously been unregulated by the amendment. Due to its reasoning Terry, had the same effect as Camara and allowed later courts to further upset the traditional approach to the Fourth Amendment by broadening the situations that would separate reasonableness from either warrant or probable cause requirements (Pollack, 809-26). This was because Terry extended the balancing test to cases not covered by the warrant and probable cause requirements of the Fourth Amendment. In perhaps the greatest weakness of the opinion, it gave no hints as to how wide an array of situations to which this analysis might be extended. This opening up of a second channel of Fourth Amendment jurisprudence without clear direction or limitations for later courts has caused Scott Sundby to comment: "Although commentators have advanced many explanations as to why current fourth amendment analysis is in disarray, they have overlooked the primary cause. The Court in Camara and Terry embraced the reasonableness balancing test in a manner that conceptually weakened probable cause and failed to provide any long-term guidance or limits for the future role of reasonableness" (Sundby, 399). The decisions in Camara and Terry have allowed later courts to apply the balancing test to move beyond administrative searches and stop and frisks to consider other situations and the governmental interests involved and weigh them accordingly against privacy concerns. In doing so, these decisions diminished the priority the Fourth Amendment had placed on the privacy of citizens. The traditional approach based on the heightened expectation of probable cause in which the government was only allowed to intrude on a citizen's privacy when the citizen has engaged in suspicious activity has given way to the more relaxed balancing test. This has expanded the acceptable range of governmental behaviors to allow intrusions in a growing number of situations when the governmental interest is deemed important regardless, at times, of a lack of individualized suspicion concerning a particular citizen. Starting in 1985 with New Jersey v. T.L.O., 469 U.S. 325 (1985), this approach has been applied to an increasing number of instances in which the Fourth Amendment is relevant to a factual situation, but where the governmental interests outweighed individual interests. In T.L.O. the Court upheld the ability of a school official to conduct a warrantless search of a student's purse to try to find evidence of a school violation. Justice White wrote for the Court that all searches must be reasonable, and that while "the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances
neither is required" (340). In this case the Court thought it appropriate to balance the pupil’s legitimate expectation of privacy with the school’s equally legitimate need to maintain an environment which could foster learning. In reaching a conclusion, the Court found that the school setting was one which required exemption from both the warrant and probable cause requirements.

Since New Jersey v. T.L.O. the Court has expanded the settings in which governmental searches or seizures are reasonable despite the lack of a warrant or probable cause to include drug testing of treasury employees (National Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989)), railroad employees (Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989)), and public school students playing sports (Vermont School District 477 v. Acton, 515 U.S. 646 (1995)) or involved in any extracurricular activities (Board of Education v. Earls, 122 S.Ct. 2559 (2002)). It also has found both drunk driving check points (Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)) and a custom official’s warrantless search of mail (United States v. Ramsey, 431 U.S. 606 (1977)) to be reasonable. Not only has the Court been willing to expand the reasonableness of governmental searches in these situations it has also made it easier to include other situations under the reasonableness umbrella. It did so in Skinner v Railway Labor Executives’ Association, by finding that exceptions to the warrant requirement of the Fourth Amendment could be made “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable” (619). This special needs analysis of the Fourth Amendment is now a subject of scholarly attention (Nuger; Buffalo). The Court ruled that when a special need was present, reasonableness would be determined by balancing an individual’s privacy interest against the practicality of using the warrant and probable cause requirement in that particular context.

Narrowing the Definition of a Search

In Katz v. United States, 389 U.S. 347 (1967), the Court effectively overruled a fifty year precedent by declaring that the Fourth Amendment protected people, not places, thus protecting conversations which were meant to be private from electronic eavesdropping. The language that the Warren Court used in Katz v. United States has proven to have been a double-edged sword. Justice Stewart’s majority opinion made it clear that the Fourth Amendment went beyond the traditional protection of property rights of only applying to constitutionally protected areas and, instead, was meant as a protection for persons. In this regard, Justice Stewart noted that what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected” (351). Therefore, the Court ruled that electronic surveillance on a phone booth by government agents did constitute a search since it “violated the privacy upon which [Katz] justifiably relied” (352). Justice Harlan’s concurring opinion in Katz has proven to be more influential to later courts which have applied Katz to other factual situations. Justice Harlan went further in establishing a framework by which it could be determined if new situations fell within the protections of the Fourth Amendment. Justice Harlan reasoned that the Fourth Amendment would provide a person protection from unreasonable search and seizure when two requirements were met: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the
expectation be one that society is prepared to recognize as "reasonable"" (361, Harlan concurring).

While the Warren Court may have used Katz to enlarge the protections of the Fourth Amendment, the same reasoning allowed later courts to narrow those protections. This was because to successfully invoke the protections of the Fourth Amendment a person not only had to have a personal expectation of privacy, society also had to respect that expectation. By not recognizing a standardized method for determining what personal expectations of privacy society was willing to accept in Katz, the conclusion has been dependent on the shifting social and political views of the members of the Court. Unlike the Warren Court, the Burger and Rehnquist Courts have not found society as willing to respect the privacy expectations of individuals. There have been two primary methods by which these later courts have used the reasoning in Katz to narrow the Fourth Amendment (Bookspan, 489-495). The first is through a finding that society is not willing to respect personal expectations of privacy. A second is by concentrating on the nature of the initial intrusion rather than the subjective expectations of privacy. The results of both methods of narrowing the interpretation of the Fourth Amendment are the same. If a governmental action does not constitute a search under the framework used by the Court, the Fourth Amendment is not applicable and governmental actions do not need to pass the reasonableness test.

Due to softer support of the exclusionary rule and the view that it releases criminals when there is hard evidence to demonstrate their guilt, later Courts have been less inclined to find that society is willing to respect an individual's expectation of privacy. An example of this trend is provided by California v. Ciraolo, 476 U.S. 207 (1986). In Ciraolo police got an anonymous tip that Ciraolo was growing marijuana in his backyard. They were unable to observe the yard because it was shielded by a 6-foot outer and 10-foot inner fence. Working off a desire to see in the backyard a police officer who was trained in air surveillance flew over Ciraolo's home at 1,000 feet and took pictures which provided the probable cause to get a search warrant. At trial, Ciraolo sought to suppress the marijuana discovered when the warrant was served because he believed the aerial surveillance without a warrant constituted an illegal search. Applying the framework of Katz, Chief Justice Burger, speaking for the majority of the Court, found that there was no Fourth Amendment violation. While Chief Justice Burger found that Ciraolo clearly had a subjective intent to maintain his privacy, he went on to state that the Fourth Amendment only applies when a person has a "constitutionally protected reasonable expectation of privacy" (211). The critical question then became whether Ciraolo's expectation of privacy was indeed reasonable from society's perspective. While admitting that the area under question was within the curtilage of the house, the area normally protected under the Fourth Amendment, Chief Justice Burger ignored Justice Stewart's statement in Katz that what a person tries to preserve as private, even in an area accessible to the public, might be constitutionally protected. Instead, Chief Justice Burger quoted Katz and stated "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" (213). The Chief Justice then wrote that since private and commercial flights in the public airways is common and that "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed" (231-214), there was no need for a warrant to conduct aerial surveillance.

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In the years after the Warren Court, the Supreme Court has in some instances even refused to use the Katz framework to provide Fourth Amendment protection from other types of electronic interference with an individual’s privacy. In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court ruled that there is no legitimate expectation of privacy in the telephone numbers that a person dials. The Court believed that not only was it doubtful that anyone would have an expectation of privacy in the phone numbers they dialed, individuals should realize that by calling a phone number they have voluntarily given over the number to the phone company who keeps a record of the number. Furthermore, even if an individual did have a personal expectation of privacy in the phone numbers they used, society would not be willing to respect the expectation. As a result, law enforcement officials will not be violating the Fourth Amendment if they use a pen register and track all the phone numbers that an individual dials without getting a warrant. In *United States v. Knotts*, 460 U.S. 276 (1983), the Court ruled that governmental use of an electronic beeper that was attached to the bumper of a vehicle allowing the government to track the defendant’s route did not constitute a search. The Court held that since the beeper primarily allowed the police to follow a vehicle on public roads individuals could not have an expectation of privacy on such roads. Furthermore, use of an electronic beeper provides police with no more information than they would have if they relied on traditional forms of surveillance for following someone on the road and since the Fourth Amendment did not apply in that situation it did not in this one either.

Another method by which later courts have diminished the protections of the Fourth Amendment in their interpretation of Katz from that of the Warren Court has been to concentrate on the nature of the intrusion rather than on the individual’s expectation of privacy. *United States v. Place*, 462 U.S. 696 (1983), provides an example. In *Place* agents working for the Drug Enforcement Administration (DEA) temporarily seized a suitcase without a warrant to allow a dog to sniff it for possible drugs. Although there was no probable cause for the seizure, the police did have articulable suspicions. The majority of the Court did find that there was a reasonable expectation of privacy in a person’s luggage, but it went on to rule that a canine sniff is not a search. It reasoned that because a canine sniff does not require opening of luggage or rummaging through the contents it was less intrusive than a search. Plus, a sniff was also less intrusive since it only disclosed whether there were contraband items in the form of narcotics contained in the suitcase. The Court reasoned that, despite the fact that police did not have the prerequisite probable cause needed for a broader search, the limited intrusion by a dog was acceptable because it stops individuals from the embarrassment and inconvenience inherent in broader searches. The evidence in *Place* was, however, thrown out because the time necessary to get a dog was considered unreasonable. This weakens the framework that Justice Stewart had used in *Katz*. It does so because in *Katz* Justice Stewart focused on the extent to which a person tried to increase their expectation of privacy, while the *Place* reasoning permits a minimum level of intrusion before governmental actions will even be considered to be a search and then ties that level of intrusion to the nature of the item of the search. Thus, if the purpose of the search is contraband, there is a lesser expectation of privacy which has to be respected. This scenario contradicts the purpose of the Fourth Amendment which was to stop arbitrary intrusions into personal privacy.

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The rational of *Place* was more fully developed in *United States v. Jacobsen*, 466 U.S. 109 (1984). *Jacobsen* came to the Court after Federal Express employees opened a damaged box and then cut a tube made from silver duct tape that was found inside. Inside the tube they found plastic bags filled with white powder. The employees then placed the plastic bags back into the silver tubes and called the DEA. When federal agents arrived they pulled the plastic bags from the silver tubes and conducted a field test of the white powder which proved to be cocaine. The agent then rewrapped the package and got a warrant to search the residence to which it was addressed and arrested Jacobsen, the occupant. At trial Jacobsen objected to the admission of the cocaine, arguing that the field test was an enlargement of the original private search. When the case came before the Court, it expanded on *Place* and found that a “chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy” (123).

The cases in which later Courts have applied the reasoning and language of *Katz* have greatly enlarged the area of permissible governmental activity under the Fourth Amendment using two methods. The first is by diminishing the broad number of areas of subjective expectation of privacy that individuals have by ruling that it is not reasonable to have society respect those expectations. If an individual knows that his expectations of privacy will not be honored, then their subjective expectations diminish as well and neither prong of Justice Harlan’s framework from *Katz* can be supportive of limiting governmental intrusion. An example of where expansion of this line of reasoning could possibly lead us may currently be found in the Department of Justice’s recent announcement that it planned to monitor conversations between suspected terrorists and their attorneys. Regardless of whatever Sixth Amendment problems may exist in the decision, if the Attorney General announces that the Department of Justice will monitor conversations between suspected terrorists and their attorneys, there is no expectation of privacy. Thus, there can be no Fourth Amendment violation. Enlargement of the *Katz* framework along these lines would allow the government to greatly expand its surveillance activities by simply announcing its plans ahead of time and thereby preempting any reasonable expectation of privacy that an individual could claim.

The second method by which the framework from *Katz* has been used to enlarge the legitimacy of governmental activity is by linking the definition of whether a search occurred to the nature of the item searched. By finding that there is a diminished expectation of privacy in contraband items, the Court has enlarged the reasonableness of governmental activity involving search and seizure. The end result is that unlike the original reasoning in *Katz* in which a person could seek to retain a privacy expectation and possible Fourth Amendment protection even in an area accessible to the public, now under *Katz* a search occurs only when individuals have a reasonable and legitimate expectation of privacy in their activities. However, because the Court doesn’t believe that society is willing to respect expectations of privacy when illicit activity is involved, inspections of illicit activities may not be defined as a search. The fact that the Court has moved in this direction is demonstrated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), when it declared, “the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise ‘illegitimate’” (338). Should this become that primary approach of the Supreme Court, one must wonder what is the purpose of the Fourth Amendment.
Conclusions

When the Warren Court first incorporated the Fourth Amendment’s exclusionary rule to the states in *Mapp* it interpreted the amendment in the traditional manner. In this way it tied together the first clause of the Fourth Amendment stating that there would be no unreasonable searches with the second clause of the amendment which requires particularity and probable cause for the issuance of warrants. This interpretation only allows searches to be constitutionally valid if there is a search warrant, or the search fits one of the exceptions to the warrant requirement and probable cause existed for the search. The Warren Court did add an exception to the warrant requirement, but the largest damage it did to the traditional approach was by endorsing language which separated the two clauses of the Fourth Amendment. By the end of the Warren Court, the Court had established the precedents necessary for the development of a different model of interpretation for the Fourth Amendment. Under this new model, the reasonableness model, the Court has read the first clause of the Fourth Amendment to present a general proscription against unreasonable search and seizure. Thus, reasonableness can be completely independent of warrants or those things which make a warrant reasonable, probable cause and particularity. It should be noted that the Warren Court did not use the reasonableness standard in situations where the primary focus was the gathering of evidence in a criminal investigation. While the Warren Court may not have found any full blown searches, outside of the administrative area, to be reasonable if the government lacked particularity, it did open the door to such attempts by disturbing the status quo. This was done by finding that some governmental interests, such as the protection of police, outweighed intrusions on individual privacy. Opening this door ever so slight has allowed later courts who have disliked the exclusionary rule to open the door wider. Movement in this direction was not inevitable and as *Kyllo v. United States*, 533 U.S. 27 (2001) and *Ferguson et al. v. City of Charleston et al.*, 532 U.S. 67 (2001) have demonstrated has not been without limits. In *Kyllo* the Court again endorsed the sanctity of the home disallowing the use of thermal imaging devices to see heat emissions inside of a home without a warrant and in *Ferguson* the Court found that a state hospital’s performance of urine tests to obtain evidence of a patient’s use of cocaine for law enforcement was unreasonable. In other cases, however, the weakening the protections of the Fourth Amendment was the result of conscious decisions by later courts which have built upon the precedents of the Warren Court.

While the decisions of the Warren Court did provide a framework for changes in Fourth Amendment jurisprudence, scholars have suggested other factors which have caused later courts to enhance the power of the government in Fourth Amendment cases. Chief among the factors are the increasing concern with drugs (Salzburg; Wisotzky) and the desire of the Court to ensure that criminals who commit heinous or reprehensible crimes not go free (McNiss, 220; Kamisar). Despite these factors being present, the decisions of the Warren Court made it easier for later courts to not only read the probable cause and particularity standards out as Fourth Amendment requirements, but to also reinterpret the Fourth Amendment to emphasize a number of important governmental goals which must be weighed and balanced against any impact they may have on individual liberties. In reaching this balance they have given increasing weight to

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governmental interests at the expense of individual liberties. By creating a constitutional framework that was open ended, the Warren Court allowed future courts the opportunity to fill in the details in ways that the Warren Court itself may have rejected. This has permitted a narrowing of what constitutes a search under the Fourth Amendment and it has allowed later courts to concentrate on the product of a search and whether there was a reasonable expectation of privacy in that item rather than an examination of the context of the search and whether the person believed themselves to be subject to a search.

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