The Unwelcome Guest: A Status Report Concerning General Searches and Seizures in 1984

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I. INTRODUCTION

One core purpose of the fourth amendment is to ban general searches and seizures.1 Unfortunately, in recent years the Supreme Court has allowed this ban to erode. General searches and seizures are being conducted—often with the approval of the Court—in a variety of settings. As a result, the government has become an unwelcome guest, threatening to destroy the privacy that is the foundation of individual liberty. In 1984, America should reconsider whether this drift away from the ban on general searches and seizures is desirable. The thesis of this article is that the traditional ban is both sound constitutional law and social policy and therefore should be enforced more vigorously.

The discussion is divided into five sections. The first section reviews the legal authorities establishing the ban, while the second section describes the principal types of general searches and seizures. The third section explains the constellation of legal rules that comprise the ban. Section four gives accounts of general searches and seizures in contemporary America, including general paper searches, electronic general searches, and administrative general searches. Finally, suggestions are made regarding ways in which current legal standards might be modified to improve enforcement of the ban on general searches and seizures.

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1. The fourth amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   U.S. Const. amend. IV.
II. Discussion

A. The Ban on General Searches and Seizures

One central purpose of the fourth amendment is to ban general searches and seizures. The ban has been discussed and applied by the United States Supreme Court so many times that it must be considered an axiom of fourth amendment law. A complete exposition of relevant Supreme Court decisions is beyond the scope of this article. Therefore, the following discussion covers only the leading cases.

Legal historians, many of them Supreme Court Justices, have repeatedly documented the fact that the fourth amendment was motivated, in part, by the framers' hatred for general searches and seizures conducted pursuant to colonial writs of assistance and English general warrants. "Writs of assistance" were warrants authorizing customs inspectors to search for smuggled goods wherever they chose until six months after the death of the reigning English monarch. Opposition to these at-large search warrants came to a climax in James Otis's famous 1761 Boston speech attacking writs of assistance. "General warrants" were warrants authorizing English constables to search for seditious publications, to seize them, and to arrest the publishers. Some general warrants authorized at-large searches of unspecified places and persons. Other general warrants specified the place to be searched, but authorized a different type of general search and seizure involving rummaging through the suspect's private documents and possessions. Opposition to general warrants climaxed in the celebrated English cases, Entick v. Carrington, Wilkes v. Wood, and Leach v. Money, which were well known in the colonies.

The Supreme Court made its first major statement concerning the ban on general searches and seizures in Boyd v. United States. Boyd's facts and holding did not involve general searches and seizures; its opinion asserts unequivocally that colonial writs of assis-

3. 19 Howell's St. Tr. 1029 (1765).
4. 19 Howell's St. Tr. 1153 (1763).
5. 19 Howell's St. Tr. 1002 (1765).
tance and English general warrants were "fresh in the memories of those who . . . established our form of government" and that the purpose of the fourth amendment was to ban both of them.

Nearly thirty years later, in *Weeks v. United States*, the Court confirmed the ban on general searches and seizures, stating again that a core purpose of the fourth amendment was to prohibit writs of assistance and general warrants.

[The Fourth Amendment] took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American People, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants . . . . Such practices had also received sanction . . . under the so-called writs of assistance, issued in the American colonies. Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle and not to be invaded by any general authority to search and seize his goods and papers.

In *Go-Bart Importing Co. v. United States*, the Court held that government officers violated the ban on general searches and seizures when on June 6, 1929, prohibition agents arrested Gowen and Bartels, who were suspected liquor dealers, at their place of business on Fifth Avenue in New York City. "They took his [Gowen's] keys and by threat of force compelled him to open a desk and safe, searched and took papers from them, searched other parts of the office and took therefrom other papers, journals, account books, letter files, insurance policies, cancelled checks, index cards and other things . . . ." Claiming the search was an illegal "general exploratory search," the liquor dealers applied for return of the seized items. The request was denied, and the Supreme Court granted certiorari.

In its unanimous opinion, the Court confirmed that the fourth amendment bans general searches:

7. *Id.* at 625.
8. 232 U.S. 383 (1914). *Weeks* is the landmark case imposing the exclusionary rule on the federal courts.
9. *Id.* at 389-90.
11. *Id.* at 349-50.
12. *Id.* at 346.
It [the second clause of the fourth amendment] emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. . . . The need for protection against them is attested alike by history and present conditions.13

The Court then analyzed the search of Go-Bart's office and concluded that it violated the ban on general searches:

[The prohibition agent] compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found.14

On this basis, the Court reversed and remanded with instructions to order the papers returned to the petitioners.15

In the 1960's, the Warren Court applied this ban on general searches and seizures in a series of important cases. In Stanford v. Texas,16 Texas police, looking for "any books, records . . . or . . . written instruments" showing illegal communist activity, searched the home and business office of a mail order book dealer and seized about half the books and private papers found there. The Court held that the search violated the fourth amendment ban on general warrants.

The unanimous Court, speaking through Justice Stewart, declared: "We rest our decision upon just one [ground], without pausing to assess the substantiality of the others. For we think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant."17 The words of the fourth amendment, Stewart continued, "reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the

13. Id. at 357.
14. Id. at 358.
15. The following year, under similar circumstances, the Court again found the search of a liquor dealer's office to be "exploratory and general" and hence contrary to the "firmly rooted proposition that what are called general exploratory searches . . . are forbidden." United States v. Lefkowitz, 285 U.S. 452, 461, 465 (1932).
17. Id. (emphasis added).
unbridled authority of a general warrant."  Finding the warrant to be "constitutionally intolerable," the Court vacated the denial of Stanford's motion to suppress.  

In 1967, the Warren Court applied the ban on general searches and seizures to strike down New York's wiretapping law in Berger v. New York. Pursuant to judicial warrants, New York police bugged the offices of two attorneys for more than a month. Evidence obtained by means of the surveillance was used to convict Berger of conspiracy to bribe the chairman of the New York State Liquor authority. The Supreme Court reversed, holding that the New York statute authorized general searches contrary to the fourth amendment.

New York's broadside authorization . . . actually permits general searches by electronic devices, the truly offensive character of which was first condemned in Entick v. Carrington . . . and which were then known as "general warrants."  

The Court noted two different factors which made the ban on general searches and seizures applicable. First, the statute failed to require a particular description of the things to be seized and thus allowed general searches and seizures of all conversations. "[T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. . . . As with general warrants this leaves too much to the discretion of the officer executing the order."  Second, the statute enabled the police to make general searches and seizures of conversations of innocent persons. "[T]he conversations of any and all persons coming into the area covered by the device will be seized

18. Id. at 481.  
19. Id. at 486.  
20. Stanford v. Texas is important not only for its direct application of the fourth amendment ban on general searches and seizures, but also for its treatment of the historical background of the ban. Id. at 481-84. In the concluding portion of his opinion, Stewart stated:

Two centuries have passed since the historic decision in Entick v. Carrington, almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King.  

Id. at 486.  
22. Id. at 58.  
23. Id. at 59.
On these bases, the Court concluded that the New York statute was facially invalid because it authorized general searches contrary to the core fourth amendment ban: "Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command or the Fourth Amendment. As it is written, we believe that it does."

The Burger Court has also discussed the ban on general searches and seizures on several occasions. In *Andresen v. Maryland*, for example, the court considered and rejected an attorney's claim that the search of his files was a general search. The Court acknowledged the fourth amendment bans on general warrants:

> General warrants of course, are prohibited by the Fourth Amendment. "[T]he problem [posed by the general warrant] is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

The Court concluded, however, that the warrant to search Andresen's offices was not a general warrant and that the documents were properly admitted.

In contrast, the dissenters argued that the search of Andresen's offices violated the ban on general warrants. Brennan's dissent spelled out this contention at some length:

> [T]he warrants under which these papers were seized were im-permissibly general. General warrants are especially prohibited by the Fourth Amendment. The problem to be avoided is "not that of intrusion *per se*, but of a general exploratory rummaging in a person's belongings." . . . The overwhelming quantity of seized material that was suppressed or returned to petitioner is testimony to the unlawful generality of the warrants.

The ban on general searches and seizures was applied again in

24. *Id.*
25. *Id.* at 64. In his concurring opinion, Justice Douglas agreed, stating, "I also join the opinion because it condemns electronic surveillance, for its similarity to the general warrants out of which our Revolution sprang." *Id.*
27. *Id.* at 480.
28. The Court's analysis of this issue was incomplete and its conclusion incorrect. See *infra* notes 127-37 and accompanying text.
29. 427 U.S. at 492-93.
Ybarra v. Illinois.\(^{30}\) On March 1, 1976, after obtaining a warrant to search the Aurora Tap Tavern (and its bartender, Greg), police officers proceeded to the tavern. They frisked all the patrons, including Ybarra, and seized from Ybarra's pocket a cigarette pack containing heroin. On appeal from Ybarra's subsequent conviction, the Supreme Court reversed. The fourth amendment, the Court held, requires "probable cause particularized with respect to [the person searched]."\(^{31}\) Here "the agents knew nothing in particular about Ybarra."\(^{32}\) To allow searches in such situations, the Court concluded, would violate the ban on general searches:

The Fourth Amendment directs that "no warrants shall issue, but upon probable cause ... and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. ... It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in the place.\(^{33}\)

The fourth amendment ban on general searches was tested once more in the 1981 case, Steagald v. United States.\(^{34}\) The Court considered "whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant."\(^{35}\) The government conceded that "an arrest warrant may be thought to have some of the undesirable attributes of a general warrant if it authorizes entry into third party premises."\(^{36}\) The Court agreed: if they were free to enter houses of third parties to execute an arrest warrant, "the police could search all the homes of that individual's friends and acquaintances."\(^{37}\) In such a case, the Court concluded, the arrest warrant would be a general warrant, like a writ of assistance, and banned by the fourth amendment.

[T]he history of the Fourth Amendment strongly suggests that its framers would not have sanctioned the instant search. The Fourth Amendment was intended partly to protect against the

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31. Id. at 91.
32. Id.
33. Id. at 92 n.4.
35. Id. at 205.
36. Id. at 215 n.8.
37. Id. at 215. At this point, the Court cited a lower court case in which police searched 300 homes pursuant to arrest warrants for two fugitives.
abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies . . . . The general warrant specified only an offense—typically seditious libel—and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be. The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executive officials that the evidence available justified an intrusion into any particular home. . . . An arrest warrant, to the extent that it is invoked to enter the homes of third parties, suffers from the same infirmity. Like a writ of assistance, it specifies only the object of a search—in this case, Ricky Lyons—and leaves to the un fettered discretion of the police the decision as to which particular homes should be searched. We do not believe that the framers of the Fourth Amendment would have condoned such a result.38

The list of authorities is extensive.39 Taken together, the cases clearly establish that one core purpose of the fourth amendment was to ban general searches and seizures. But what are general searches and seizures? What are the functional characteristics of the government actions that are prohibited by the Constitution? The next section will attempt to answer these questions.

B. Types of General Searches and Seizures

For purposes of this discussion general searches and seizures will be subdivided into three major types: (1) dragnet searches, those searches that are not sufficiently limited as to the places or persons to be searched, (2) dragnet seizures, those seizures that are not suffi-

38. Id. at 220.

ciently limited as to the persons of things to be seized, and (3) general rummaging, those searches that involve unreasonably intrusive examinations of private matters. The following discussion describes each of these types of general searches and seizures briefly.

1. Dragnet Searches

One type of general search is the dragnet search. In a dragnet search, the "place to be searched" is not sufficiently limited, and the government official is therefore free to search where and whom he chooses. The searches carried out pursuant to colonial writs of assistance, which authorized customs officials to search any premises where they suspected smuggled goods to be concealed, are one prototype of the dragnet search. The searches carried out pursuant to English general warrants like the Wilkes v. Wood warrant, which authorized government officials to search any premises where they suspected seditious publications to be concealed, are a second prototype.

a. Dragnet searches of places—The recent Burger Court case, Steagald v. United States, illustrates the ban on dragnet searches of places. Drug Enforcement Agency (DEA) agents obtained a warrant to arrest Ricky Lyons. In an attempt to find Lyons, they searched Steagald's house and found cocaine. The government argued that the arrest warrant implicitly authorized the agents to search the homes of third parties to locate the arrestee. The court rejected such an implication concluding that it would convert the arrest warrant into a general warrant. Then, like a writ of assistance, it would allow dragnet searches of "all the homes of that individual's friends and acquaintances."

b. Dragnet searches of persons—The Supreme Court has

40. The three types are considered separately here only to provide analytical clarity. In the real world, they often appear in combination. For example, dragnet seizures of things such as papers inherently involve general rummaging. Similarly, dragnet arrests normally result in dragnet searches of the suspects incident to the arrests.

41. The same analysis has been published in Galloway, Fourth Amendment Ban on General Searches and Seizures, 10 SEARCH & SEIZURE L.R. 141, 142-45 (1983).

42. U.S. CONST. amend. IV. Each person is a separate "place to be searched" under the fourth amendment. E.g., Ybarra v. Illinois, 444 U.S. 85 (1979); United States v. Di Re, 332 U.S. 581 (1948). In this article, the phrase "person or place to be searched" will be used at times. As construed in cases such as Ybarra and Di Re, the phrase is synonymous with the fourth amendment phrase "place to be searched."

43. 19 Howell's St. Tr. 1153 (1763).

44. 451 U.S. 204 (1981). See supra notes 34-38 and accompanying text.

45. Id. at 215. See supra note 37 and accompanying text.
condemned dragnet searches of persons on several occasions. For example, *Berger v. New York*,46 held New York’s wiretapping statute unconstitutional in part because it allowed dragnet searches of the communications of “all persons” within the reach of the bug. “During such a long and continuous (24 hours a day) period,” wrote Clark for the majority, “the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately . . . .”47 Douglas, in a concurring opinion, agreed that “the traditional wiretap or electronic eavesdropping device constitutes a dragnet, sweeping in all conversations within its scope—without regard to the participants or the nature of the conversations.”48

*Ybarra v. Illinois*49 is even more to the point. There, the government claimed that a warrant to search a tavern authorized the search of the patrons present when the warrant was executed. The Court held that such a dragnet search of the patrons violates the ban on general searches: “‘[O]pen-ended’ or ‘general’ warrants are constitutionally prohibited. . . . It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place.”50

2. Dragnet Seizures

The intent of the fourth amendment was to ban not only general searches but also general seizures, commonly called dragnet or mass seizures. In such seizures, the warrant does not specifically limit the “persons or things to be seized,”51 and government officials are therefore free to seize whom and what they choose. The prototype general seizures occurred pursuant to English general warrants used in seditious libel cases. The warrant in *Wilkes v. Wood*,52 for example, authorized the arrest of unspecified persons guilty of publishing seditious writings. The warrant in *Entick v. Carrington*53 authorized the seizure of all of John Entick’s papers and books.

Clearly, the fourth amendment ban on general searches and seizures applies to dragnet seizures. The Supreme Court has applied the ban in cases involving both dragnet seizures of persons and drag-

47. Id. at 92 n.4.
48. Id. at 59.
50. Id. at 92 n.4. Cf. United States v. Di Re, 332 U.S. 581 (1948) (probable cause to search car does not justify search of persons in car).
51. U.S. Const. amend. IV.
52. 19 Howell’s St. Tr. 1153 (1763).
53. 19 Howell’s St. Tr. 1029 (1765).
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net seizures of things.

a. **Dragnet seizures of persons**—The Court applied the fourth amendment ban on dragnet seizures of persons in *Davis v. Mississippi*. On December 2, 1965, a victim was raped in her Meridian, Mississippi home. The only clues were the victim's general description of her assailant ("a Negro youth") and fingerprints on the window sill where the rapist apparently entered the house. During the next ten days, the police picked up at least twenty-four young black men, including Davis, for fingerprinting and interrogation. Davis's fingerprints matched those on the window, and he was convicted and sentenced to life in prison.

The Supreme Court granted *certiorari* and reversed. In rejecting Mississippi's contention that merely investigatory seizures should be exempt from normal fourth amendment restrictions, the Court invoked the ban on general seizures:

> But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

In his concurring opinion, Harlan also condemned "the 'dragnet' procedures employed in this case."

b. **Mass seizures of things**—The Court has invoked the ban on mass seizures of things in several decisions. In *Kremen v. United States*, for example, FBI agents arrested four men in a cabin. Incident to the arrests, "an exhaustive search of the cabin and a seizure of its entire contents were made . . . ." The Court reversed the ensuing convictions holding, "The seizure of the entire contents of the house and its removal some two hundred miles away to the FBI offices for the purposes of examination are beyond the sanction of any of our cases."
In later decisions, the Court has confirmed the rule against mass seizures of things. Notably, in *Abel v. United States*, the Court stated:

[N]or may the government seize, wholesale, the contents of a house it might have searched, *Kremen v. United States*... *

It is to be noted that this is not a case, like *Kremen v. United States*, 353 U.S. 346, where the entire contents of the place where the arrest was made were seized. Such a mass seizure is illegal.

3. **General Rummaging**

The fourth amendment was also intended to ban general searches that involve insufficiently limited rummaging among a person's private papers or effects. This third component of the ban on general searches and seizures—originating in *Entick v. Carrington*—is complex, interesting, and frequently litigated. The ban has been confirmed on many occasions.

Prohibited general rummaging may result from several different causes. First, illegal general rummaging can occur when searches are undertaken without any specific object. It can also occur when a search warrant fails to describe the objects of the search—the "things to be seized"—with sufficient particularity. Finally, illegal general rummaging may result, in some cases, from the inherent need to examine everything in order to locate the specific things to be seized. The following discussion examines some cases illustrating these patterns.

a. **Searches undertaken without any specific object: general exploratory rummaging**—The ban on general searches has been applied with special force to searches undertaken without any basis for believing that specific seizable objects are present. Such searches are general because they have no particularized object whatever to limit and focus them. The officers simply examine everything in an exploratory fashion, looking for whatever seizable objects may be present. The Supreme Court has condemned such general explora-

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61. *Id.* at 235.
63. 19 Howell's St. Tr. 1029 (1765).
tory searches on numerous occasions.

Two prohibition cases, Go-Bart Importing Co. v. United States\textsuperscript{64} and United States v. Lejkowitz,\textsuperscript{65} are good examples of the Court's treatment. In both cases, prohibition agents arrested suspected liquor dealers at their offices and thoroughly rummaged their offices in an effort to find evidence of bootleg liquor dealings. The Court found the Go-Bart search to be "a lawless invasion of the premises and a general exploratory search."\textsuperscript{66} Similarly, the Court found the Lejkowitz search "exploratory and general:"

The disclosed circumstances clearly show that the prohibition agents assumed the right to search out and scrutinize everything in the room in order to ascertain whether books, papers or other things contained or constituted evidence of respondent's guilt of crime, whether specified in the warrant or some other offense against the Act. Their conduct was unrestrained . . . . Here, the searches were exploratory and general . . . .\textsuperscript{67}

Perhaps the Court's most passionate invocation of the ban on general exploratory rummaging is found in Justice Murphy's classic Harris v. United States dissent:

An unlimited search for anything and everything that might be found, a search of the type that characterizes a general search warrant or writ of assistance . . . was precisely that type of search that took place in this case. . . . Even more glaring than the searches in the Go-Bart and Lejkowitz cases, the search here was a general exploratory one undertaken in the hope that evidence of some crime might be uncovered. . . . The Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw such general warrants . . . .\textsuperscript{68}

The cases in support of the ban against general exploratory rummaging are extensive; they leave no doubt that one purpose of the fourth amendment was to ban searches undertaken without reason to believe that specific seizable objects will be found.\textsuperscript{69}

b. Warrants with defective descriptions of the things to

\textsuperscript{64} 282 U.S. 344 (1931). See supra notes 10-15 and accompanying text.
\textsuperscript{65} 285 U.S. 452 (1932).
\textsuperscript{66} 282 U.S. at 358. See supra text accompanying notes 13-14 for an expanded version of the key Go-Bart language.
\textsuperscript{67} 285 U.S. at 463-65.
\textsuperscript{68} 331 U.S. 145, 183, 185, 188, 191 (1947) (Murphy, J., dissenting).
\textsuperscript{69} See, e.g., Andresen v. Maryland, 427 U.S. 463, 480, 492-93 (1976); Chimel v. California, 395 U.S. 752, 767 (1969); Terry v. Ohio, 392 U.S. 1, 30 (1967): "He [the police officer] did not conduct a general exploratory search for whatever evidence of criminal activity
be seized—When searches are undertaken pursuant to warrants that do not adequately describe the things to be seized, illegal general rummaging may occur. There are at least three variations on this theme.

First, warrants that contain no description of the thing to be seized are banned. *Lo-Ji Sales, Inc. v. New York,* 70 for example, involved a warrant to search an adult bookstore. The warrant authorized seizure of "[t]he following items which the court . . . [had] determined to be [illegally] possessed." However, the Court found that "there were no items listed or described following this statement." 71 Condemning the ensuing "generalized search," 72 the Court concluded: "Our society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era . . . ." 73

The Courts have also banned warrants that contain overly broad descriptions of the things to be seized as illustrated by *Stanford v. Texas.* 74 The Stanford warrant authorized the seizure of all "unlawfully possessed" objects of the following description: "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person . . . is violating [the Texas Suppression Act]." 75 The Court condemned the warrant and ensuing search holding, "[I]t is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." 76 In *Zurcher v. Stanford Daily,* the Court characterized the Stanford warrant as "the functional equivalent of a general warrant" because "it authorized the searchers to rummage among and make judgments about books and papers." 77

Other prohibited warrants are those that require the executing
officers to seize all papers or effects found at a particular place. Such warrants require general rummaging simply to locate the objects to be seized. *Entick v. Carrington* involved a search of this nature. Such warrants are so obviously illegal, however, that they are rare and seldom litigated today.

**c. Searches whose execution requires general rummaging.—**The ban on general searches and seizures may also apply, in some cases, to rummaging undertaken pursuant to a warrant particularly describing the things to be seized. The problem arises when certain “things” can only be found by general rummaging. This problem was recognized by the Court in *Entick v. Carrington,* which indicated that searches for seditious writings would be general and hence illegal even if the warrant only authorized seizure of specific libelous documents.

To date there is no Supreme Court decision striking down a search on this ground alone, although Justices Stewart and Marshall could have applied this component of the ban in *Zurcher v. Stanford Daily.* In that case, the warrant described with particularity the things to be seized, photographs of attacks on police officers. Nevertheless, Stewart concluded that an illegal general search had occurred:

> A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant. . . . [I]n order to find a particular document, no matter how specifically identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches.

Other authorities have supported a ban on general rummaging even pursuant to a warrant containing a particular description of the things to be seized.

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78. 19 Howell's St. Tr. 1029 (1765).
79. Obviously, warrants to seize all papers and/or effects found at certain places are illegal not only because they authorize general rummaging, but also because they authorize mass seizures. *See supra* text accompanying note 57-62.
80. 19 Howell's St. Tr. 1029 (1765).
82. *Id.* at 573 & n.7.
83. *See, e.g., United States v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969) (per Friendly, J.).* "The reason why we shrink from allowing a personal diary to be the object of a search is
To summarize, the fourth amendment ban on general searches and seizures applies to a variety of police practices, including the following:

1. Dragnet searches of
   a. Places or
   b. Persons;
2. Dragnet seizures of
   a. Persons or
   b. Things;
3. General rummaging resulting from
   a. Lack of specific object (general exploratory searches); or
   b. Defective description of things to be seized, *i.e.*
      (1) No description, or
      (2) Overbroad description, or
      (3) Order to seize everything; or
   c. Rummaging necessary to locate specific object.

C. Legal Components of the Ban on General Searches and Seizures

In their effort to ban general searches and seizures, the framers of the fourth amendment created five different legal rules. First, they prohibited "unreasonable searches and seizures." Second, they required "warrants." Third, they required "probable cause." Fourth, they required a particular description of the "place to be searched." Fifth, they required a particular description of the "persons or things to be seized." Each of these requirements was incorporated into the text of the fourth amendment.84

1. Unreasonable Searches and Seizures

The first clause of the fourth amendment includes the prohibition against "unreasonable searches and seizures." This rule is a separate restriction and is, to some degree, functionally independent of the restrictions imposed by the second clause. The rule bans general searches and seizures even when undertaken pursuant to warrants meeting the requirements of the warrant clause.

Nearly a century ago, the Supreme Court recognized that the first clause of the fourth amendment bans general searches and

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84. See supra note 1.
seizures. In *Boyd v. United States*, Justice Bradley discussed both writs of assistance and general warrants and concluded:

In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. . . . [Discussion of James Otis's attack on writs of assistance and Lord Camden's *Entick v. Carrington* opinion omitted.] It may be confidently asserted that its [Entick's] propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

General searches and seizures, in short, are unreasonable and therefore banned by the first clause of the fourth amendment, without reference to the specific requirements of the second clause. But, to make the assurance doubly sure, the framers specified four additional requirements, which appear in the second clause.

2. Warrants

The fourth amendment imposes a warrant requirement subject to certain specific exceptions. This requirement discourages general searches by insuring that the judiciary will provide an advance written specification limiting the scope of the search or seizure. Whenever the warrant requirement is bypassed, general searches are more likely to occur because the executing officers lack written instructions confining the places to be searched and the things to be seized. Indeed, when no warrant is obtained, officers are free to engage in general exploratory rummaging without probable cause and to fabricate probable cause after the fact if they are lucky enough to find seizable items. For these reasons, the absence of a warrant should be viewed as a warning signal, and the courts should examine all warrantless searches with special care to determine whether the execut-

85. 116 U.S. 616 (1886).
86. Id. at 624-27.
87. See, e.g., *Katz v. United States*, 389 U.S. 347, 357-58 (1967). "[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police . . . .' [Citation omitted]. . . . And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" Id.
ing officers actually conducted a general search or seizure.

3. **Probable Cause**

The fourth amendment provides, "[N]o Warrants shall issue, but upon probable cause . . . ." This critically important requirement was intended to play a central role in preventing several different kinds of general searches and seizures. First, it was intended to ban both dragnet searches and dragnet seizures based upon mere suspicion or less. The core evil of colonial writs of assistance was that they allowed customs officials to search any place where they suspected smuggled goods to be located.

The probable cause requirement was also intended to ban general exploratory rummaging in situations where the police have no reason to believe that any particular seizable object is present, but wish instead to search for whatever criminal evidence they may be lucky enough to find. Cases dealing with general rummaging incident to arrest are especially in point here. If the police are free to conduct a full search incident to arrest when they have no reason to believe evidence is present, then the search involves the kind of general exploratory rummaging that has been theoretically prohibited since *Entick v. Carrington.* As Justice Murphy stated in *Harris v. United States,* "Even more glaring than the searches in the *Gobart* and *Lefkowitz* cases, the search here was a general exploratory one. . . . A search of that scope inevitably becomes, as it has in this case, a general exploratory search for 'anything' in connection with the alleged crime or any other crime—a type of search which is most roundly condemned by the Constitution."

4. **Particular Description of the Place To Be Searched**

The fourth amendment provides that "no Warrants shall issue" without language "particularly describing the place to be searched." Obviously, this requirement was a direct attempt to ban such general dragnet searches of unspecified places and persons as were undertaken pursuant to writs of assistance and general warrants.

5. **Particular Description of the Persons or Things To Be Seized**

Finally, the fourth amendment provides that "no Warrants shall issue" without language "particularly describing . . . the per-

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88. 19 Howell's St. Tr. 1029 (1765).
89. 331 U.S. 145 (1947).
90. *Id.* at 188-89.
sons or things to be seized.” This requirement was a direct effort to ban such general dragnet seizures of unspecified persons and things as were undertaken pursuant to general warrants. It also prevents general exploratory searches by insuring that the police have a specific objective and are not merely rummaging in the hope of finding some unknown evidence. As Justice Stewart stated:

The second distinct objective [of the warrant requirement] is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the “general warrant” abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings. [Citations omitted] The warrant accomplishes this second objective by requiring a “particular description” of the things to be seized.91

To summarize, a central purpose—perhaps the main purpose—of the fourth amendment was to ban general searches and seizures. Such searches and seizures fall into three main classes: (1) dragnet searches of places or persons, (2) dragnet seizures of persons or things, and (3) general rummaging. In their effort to ban general searches and seizures, the framers of the fourth amendment adopted five major requirements imposing basic limits on government power to search and seize.

But how has the ban on general searches and seizures fared in practice? Unfortunately, it has not fared well. The next section will describe several important contexts in which general searches and seizures have prospered and even received judicial approval in recent years.

D. General Searches and Seizures in Contemporary America

A dramatic erosion of the constitutional ban on general searches and seizures has taken place within the past fifteen years, especially since Chief Justice Warren Burger and his conservative colleagues gained control of the Supreme Court in the early 1970’s. The Supreme Court has approved general searches and seizures that should be subject to the ban in a wide variety of important areas, including paper searches, electronic surveillance, searches incident to arrest,

consent searches, administrative searches, and others.

1. General Paper Searches

One of the most intrusive of all general searches is the private paper search in which government agents examine the contents of an individual's personal files and papers. The Supreme Court has repeatedly condemned such searches. This section describes both the background and the recent erosion of the ban on general paper searches.

a. The ban on general paper searches—One core purpose of the fourth amendment ban on general searches and seizures is to prevent general paper searches. The great and seminal case, Entick v. Carrington, involved a general search and seizure of personal papers in the home of John Entick, a suspected publisher of seditious documents. Although paper searches are typically "specific" as to the place to be searched, they are "general" because the government must rummage among and read whatever papers may be present in order to locate the incriminating entries. In effect, most paper searches violate the fourth amendment ban on general rummaging.

Recognition of the fourth amendment ban on general paper searches occurred at least as early as Boyd v. United States, which declared in unequivocal terms that the fourth amendment incorporates the principles laid down by Lord Camden in Entick v. Carrington. Weeks v. United States reaffirmed the ban. Incident to Weeks's arrest for mailing lottery tickets, police officers "searched defendant's room and took possession of various papers . . . found there." The Court condemned the search, stating that the fourth amendment "took its origin in the determination of the framers . . . to protect the people from unreasonable searches and seizures, such


93. Traditionally, searches of private papers have been the subject of a triple constitutional ban involving: (1) the rule against searches for "mere evidence," (2) the privilege against self-incrimination, and (3) the rule against general searches. Erosion of the first two components of the triple ban is discussed in Galloway, The Intruding Eye, supra note 92. The present article discusses only the third component of the triple ban.

94. 19 Howell's St. Tr. 1029 (1765).

95. 116 U.S. 616 (1866).

96. 232 U.S. 383 (1914). See supra notes 8-9 and accompanying text.

97. 232 U.S. at 386.
as were permitted under the general warrants . . . .”98 “[A] man’s house,” the Court asserted, “was . . . not to be invaded by any general authority to search and seize his goods and papers.”99

The Taft Court invoked the ban on general paper searches in *Marron v. United States. 100* In that case, prohibition agents searched a San Francisco speakeasy and seized several business papers. Rejecting the government’s claim that the search was legal because it was incident to the arrest of Marron’s business partner, the Court noted, “General searches have long been deemed to violate fourth amendment rights. It is plain that the Amendment forbids them.”101

In the 1930’s, the Court continued to apply the ban on general paper searches in *Go-Bart Importing Co. v. United States*102 and *United States v. Lefkowitz.*103 In *Go-Bart,* prohibition agents arrested a suspected liquor dealer and searched his office.104 “They took his keys and by threat of force compelled him to open a desk and safe, searched and took papers from them, searched other parts of the office and took therefrom other papers, journals, account books, letter files, insurance policies, cancelled checks, index cards and other things . . . .”105 The Court condemned the search, calling it “a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search . . . .”106

In *Lefkowitz,*107 prohibition agents arrested a mail order liquor dealer and ransacked his office. The Court described the search as follows: “The agents opened all the drawers of both desks, examined their contents, took therefrom and carried away books, papers and other articles. They also searched the towel cabinet and took papers from it. . . . They also took the contents of the [waste] baskets and later pasted together pieces of paper found therein.”108 The Court concluded, “[T]he searches were exploratory and general”109 and therefore “violative of respondents’ rights under the Fourth and

98. Id. at 390.
99. Id.
100. 275 U.S. 192 (1927).
101. Id. at 195.
102. 282 U.S. 344 (1931).
104. See supra notes 10-15 and accompanying text.
105. 282 U.S. at 349-50.
106. Id. at 358.
108. Id. at 460-61.
109. Id. at 465.
In 1965, the Warren Court invoked the ban on general paper searches in *Stanford v. Texas.* A Texas statute outlawed a variety of Communist Party activities and authorized warrants to search for and to seize "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of this Act." A warrant was issued to search the residence and business office of John Stanford, proprietor of a mail order book business, and to seize all "unlawfully possessed" documents of the types listed in the statute. Executing officers searched Stanford's premises for four hours and carried away about half of his books plus "private documents and papers" such as personal correspondence, financial records and insurance policies. A unanimous Court reversed Stanford's subsequent conviction, declaring: "[W]e think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant."

Finally, in *Lo-Ji Sales, Inc. v. New York,* a unanimous 1979 decision, the Burger Court applied the ban against general paper searches. New York police investigators, armed with a warrant authorizing the seizure of unspecified obscene items from Lo-Ji's "adult" bookstore, searched the bookstore for six hours and seized large quantities of books, magazines, movies, and business records. The Supreme Court ordered the evidence suppressed. Chief Justice Burger's majority opinion stated, "This search warrant and what followed the entry on petitioner's premises are reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect." The Court concluded that the "generalized search" was invalid.

The central constitutional evil of the general paper search is the government's examination of the content of one's private written expressions, the visual rummaging among the most private realm of one's mental life. In Judge Friendly's words: "The reason why we shrink from allowing a personal diary to be the object of a search is
that the entire diary must be read to discover whether there are in-
criminating entries." Similarly, Justice Stewart has stated, "[T]he
problem is not that of the intrusion per se, but of a general, explora-
tory rummaging in a person's belongings."120

As previously discussed, the Supreme Court's ban on general
searches among one's private papers has resulted from a variety of
causes. Several cases have involved general exploratory rummaging,
i.e., searches undertaken without any particularized object. In Go-
Bart v. United States121 and United States v. Lefkowitz,122 the exe-
cuting officers ransacked bootleggers' offices in search of whatever
evidence they might find. Other cases involved defective descriptions
of the things to be seized. For example, in Lo-Ji Sales, Inc. v. New
York123 the warrant contained no description of the papers to be
seized. In Stanford v. Texas,124 the warrant's description of papers
to be seized was overly broad. In all such cases, general rummaging
of papers is constitutionally forbidden.

b. Erosion of the ban on general paper searches—In re-
cent years, the Supreme Court has not enforced the ban on general
paper searches vigorously. Two recent cases, Andresen v. Mary-
land125 and Zurcher v. Stanford Daily,126 demonstrate the Court's
unwillingness to hold the line against general paper searches.

In Andresen v. Maryland, the Court upheld a general search of
the legal and business files of Andresen, a Maryland attorney. Mary-
land police suspected Andresen of real estate fraud. They obtained
warrants to search Andresen's law office and corporate office and to
seize papers concerning "Lot 13T" plus "other fruits, instrumentali-
ties and evidence of crime at this [time] unknown."127

The searches that followed were classic general paper searches.
For example, a Maryland investigator spent four hours searching

searches involve dragnet searches or seizures. In Entick v. Carrington, 19 Howell's St. Tr.
1029 (1765), for example, a dragnet seizure of all of Entick's papers was conducted. In Wilkes
v. Wood, 19 Howell's St. Tr. 1153 (1763), dragnet searches of places suspected of holding
seditious writings occurred. In most cases, however, general rummaging is the factor that trig-
gers the fourth amendment ban on general paper searches.
121. 282 U.S. 344 (1931).
127. 427 U.S. at 479.
the files in Andresen's corporate office. Of course, the investigator looked for documents concerning Lot 13T, but he also looked in other files for documents showing other fraudulent transactions. The investigator seized fifty-two items from the corporate office. In response to Andresen's motion to suppress, fifty-one of the items were returned.

Andresen argued that the searches were illegal general searches. In response, the Court acknowledged the ban on general searches, stating, "General warrants, of course, are prohibited by the Fourth Amendment." Moreover, the Court correctly described the ban, quoting Stewart's famous Coolidge passage, "[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." After this promising start, however, the Court's reasoning deteriorated rapidly.

In fact, the majority opinion did not seriously respond to the general search issue. Instead, the general search discussion focused entirely on Andresen's argument that the warrant allowed the investigator to search for evidence of crimes other than those involving Lot 13T. The Court rejected this contention, concluding that the warrant authorized "only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T.'"

This response was irrelevant to the general search issue; Andresen's argument was a red herring. The test for identifying a general warrant has never been whether searches for evidence of "other crimes" are authorized. General warrants normally authorize only the search for evidence of a single crime. The key question is the presence or absence of general rummaging, not whether evidence of "other crimes" may be sought and seized. This question was not discussed in the Andresen opinion. Instead, having responded to Andresen's red herring argument, the Court assumed it had rebutted the general warrant claim.

When the correct test is applied, it is apparent that the Andresen warrant and searches were impermissibly general and therefore contrary to the fourth amendment. The warrant explicitly author-

128. For a description of the search, see 427 U.S. at 466-67.
129. The search of Andresen's law office is not described in detail in the Andresen opinion, but it was presumably similar to the search of the corporate office. Twenty-eight items were seized; seven were returned voluntarily; four were suppressed. Id.
130. 427 U.S. at 480.
131. Id.
132. Id.
ized the search for "books, records, documents, paper, memoranda and correspondence, showing or tending to show a fraudulent intent . . . together with other fruits, instrumentalities and evidence of crime at this [time] unknown."\textsuperscript{134} This description was just as general as that rejected in \textit{Stanford v. Texas}.\textsuperscript{135} There is simply no way to determine which papers fit such descriptions without an exploratory examination of all papers, guilty and innocent. And it was precisely such a "general, exploratory rummaging" that the investigator engaged in during the four hours that he searched Andresen's corporate files.

Marshall, in his dissenting opinion, stated "[T]he business records introduced at petitioner's trial should have been suppressed because they were seized pursuant to a general search warrant."\textsuperscript{136} Brennan, in a separate dissenting opinion, made the same point in greater detail:

\begin{quote}
[T]he warrants under which those papers were seized were impermissibly general. General warrants are especially prohibited by the Fourth Amendment. The problem to be avoided is "... a general, exploratory rummaging in a person's belongings. . . ." The Court recites these requirements, but their application in this case renders their limitation on lawful government conduct an empty promise.\textsuperscript{137}
\end{quote}

Marshall and Brennan were right. The \textit{Andresen} search was a general paper search banned by the fourth amendment. \textit{Andresen v. Maryland} was an incorrect decision, representing a lapse in the Court's enforcement of the ban on general searches.

\textit{Zurcher v. Stanford Daily}\textsuperscript{138} is a second recent case eroding the ban on general paper searches. Nine police officers were injured while trying to disperse demonstrators at the Stanford University Hospital. Two days later, the Stanford Daily published articles and photographs suggesting that a staff member had been present at the demonstration and might have photographed the assailants. On this basis, the police obtained a warrant to search the newspaper's offices and files "for negatives, film, and pictures" showing the events at the

\begin{footnotes}
\item[134.] Andresen \textit{v. Maryland}, 427 U.S. 463, 480 n.10 (1976).
\item[135.] 379 U.S. 476 (1965). In \textit{Stanford}, the warrant authorized seizure of unspecified "written instruments" tending to establish a violation of Texas's Suppression Act. This, the Court held, was a "general warrant." \textit{Id.} at 480. The \textit{Andresen} warrant had precisely the same defective generality.
\item[136.] 427 U.S. at 493.
\item[137.] \textit{Id.} at 492.
\item[138.] 436 U.S. 547 (1978).
\end{footnotes}
hospital. The ensuing search was described in the majority opinion as follows:

The Daily's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. . . . The officers apparently had opportunity to read notes and correspondence during the search; but, contrary to claims of the staff, the officers denied they had exceeded the limits of the warrant. 139

The Stanford Daily sued the police department for damages, claiming the search violated its fourth amendment rights, and the lower courts agreed. However, the Supreme Court reversed, upholding the constitutionality of the search.

Was the search of the Stanford Daily files a general paper search? Justice Stewart thought so. "A search warrant," he argued, "allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant." 140 Stewart continued:

[I]n order to find a particular document, no matter how specifically identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one. I thus fail to see how the Fourth Amendment would provide an effective limit to these searches. 141

The majority conceded that general rummaging among books and papers is banned. 142 It concluded, however, that general paper searches can be avoided by proper use of the fourth amendment's specificity and reasonableness requirements:

Nor, if the requirements of specificity and reasonableness are properly applied, policed and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files. . . . The warrant issued in this case authorized

139.  Id. at 551.
140.  Id. at 573 (Stewart, J., dissenting).
141.  Id. at 573 n.7 (Stewart, J., dissenting).
142.  Id. at 564. The Court stated:

[1]n Stanford v. Texas, the Court invalidated a warrant authorizing the search of a private home for all books, records, and other materials relative to the Communist Party, on the ground that whether or not the warrant would have been sufficient in other contexts, it authorized the searchers to rummage among and make judgements about books and papers and was the functional equivalent of a general warrant, one of the principal targets of the Fourth Amendment.

Id.
nothing of this sort.\textsuperscript{143}

This analysis, however, ignores what really happened in the case. The warrant in \textit{Zurcher} authorized the police to rummage at large in the Stanford Daily files; four police officers searched the newspaper’s “photographic laboratories, filing cabinets, desks, and wastepaper baskets.”\textsuperscript{144} There was no way for the officers to locate the items named in the warrant except by rummaging in the files. The Court failed to explain how proper enforcement of the specificity and reasonableness requirements could eliminate general rummaging. In fact, it cannot. General rummaging, as Justice Stewart argued, is unavoidable in file searches of this kind.\textsuperscript{146}

c. \textit{Why the ban on general paper searches should be enforced more vigorously}—In summary, the ban on general paper searches is still theoretically good law, but it has been eroded by recent decisions such as \textit{Andresen} and \textit{Zurcher}. This erosion raises grave issues of social policy. The ban is based on sound policy considerations which are fundamental to the kind of open, free society the United States claims to be. Personal papers involve: (1) core privacy interests the fourth amendment was intended to protect, (2) critical free thought and expression interests the first amendment was intended to protect, and (3) important confidentiality interests the traditional privileges were intended to protect. All these interests have long been accorded the highest priority in our scheme of government. Moreover, searches of personal papers involve unusually wide-ranging invasions of these underlying interests. As such, they are especially dangerous and must be controlled with great care.

For centuries, courts and commentators have recognized that personal papers implicate core privacy interests which merit the most careful protection against government intrusion. In \textit{Entick v. Car- rington}, for example, Lord Camden stated, “Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . .”\textsuperscript{146} Similarly, in \textit{Boyd v. United States}, the Supreme Court

\begin{itemize}
\item \textsuperscript{143} Id. at 566.
\item \textsuperscript{144} Id. at 551.
\item \textsuperscript{145} One feature of the \textit{Zurcher} facts provides a basis for restricting the future impact of the case. The target of the search was photographs, films, and negatives, not documents. Therefore, although rummaging was necessary, it was not necessary for the officers to \textit{read} any documents. The case is more akin to searches for nondocumentary objects and should not be read to authorize searches which require police to determine the content of writings by reading them.
\item \textsuperscript{146} 19 Howell's St. Tr. 1029, 1066 (1765).
\end{itemize}
stated, "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American."

In recent years, the strongest statements concerning the privacy interests in personal papers have been made by Justice Brennan, often in concurring and dissenting opinions. In *Fisher v. United States*, 148 for example, Brennan stated:

> History and principle teach that the privacy protected by the Fifth Amendment extends not just to the individual's immediate declarations, oral or written, but also to his testimonial materials in the form of books and papers. . . . An individual's books and papers are generally little more than an extension of his person. They reveal no less than he could reveal upon being questioned directly. . . . Personal letters constitute an integral aspect of a person's private enclave . . . .

In *State v. Bisaccia*, 150 Chief Justice Weintraub of the New Jersey Supreme Court echoed Brennan's sentiments, stating:

> What they [Lord Camden and Justice Bradley] denounced in those terms was a search among private papers, and this was because of the extraordinary regard the law has for the privacy that reposes in them. . . .

> There is a marked difference between private papers and other objects in terms of the underlying value the Fourth Amendment seeks to protect. As we have said, private papers are almost inseparable from the privacy and security of the individual. . . .

> But a search for other tangibles involves none of the hazards which concerned the courts in *Entick* and *Boyd*. There is no rummaging through a man's private files, no exposure of their intimacies and confidences.

Legal commentators have also noted that private papers implicate core privacy interests and should therefore be given special constitutional protection. McKenna, for example, states:

> Private papers have been said to be "little more than an extension of [the owner's] person," their seizure "a particularly abra-

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147. 116 U.S. 616, 632 (1886).
149. *Id.* at 418, 420, 427 (Brennan, J., concurring).
150. 213 A.2d 185 (1965).
151. *Id.* at 190-92.
sive infringement of privacy," and their protection "impelled by the moral and symbolic need to recognize and defend the private aspect of personality." In this sense, every government procurement of private papers, regardless of how it is accomplished, is uniquely intrusive.\textsuperscript{152}

Government invasions of personal papers undermine not only privacy interests, but also first amendment values which are the very matrix of the democratic process. A fundamental premise of American society is that thought and expression are to be encouraged, not suppressed. Free expression facilitates the emergence of novel and experimental ideas that society needs in order to adapt to new conditions. When free expression is lost, society may become restrictive to the point that necessary changes can come about only through violent and revolutionary means. Governmental power to compel disclosure of private writings imperils the very foundation of democratic society by deterring written expression of deviant and subversive thoughts.

That paper searches imperil first amendment values has been noted by others. For example, protesting against compulsory production of private documents, Justice Douglas has stated, "Inevitably, this [compelled production] will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy."\textsuperscript{153}

Paper searches also undermine policies that underlie several evidentiary privileges long recognized in American law. During the long period when paper searches were banned, most writings could only be obtained by subpoena. The subpoena process gave the possessor of papers a chance to assert any applicable privileges before disclosure. If the court found that the papers were subject, for example, to the attorney-client or doctor-patient privilege, the subpoena was not enforced, and the privileged communication remained secret. Paper searches, in contrast, do not provide a pre-disclosure opportunity to assert applicable privileges. If the possessor of papers named in a warrant attempts to withhold documents on the ground that they are privileged, executing officers are authorized to use force to seize the papers. Thus, the secret is lost before a judicial officer has a


chance to rule on the claim of privilege.\textsuperscript{154}

\textit{Andresen v. Maryland}\textsuperscript{155} provides a pointed illustration. In that case, government officials spent hours examining the contents of documents in attorney Andresen's files. Obviously, such files contained documents subject to the attorney-client privilege. To grant the government power to examine such supposedly confidential communications destroys the ability of attorneys, doctors, and priests to promise nondisclosure and thus deters communications that are critical to the legal, physical, mental, and spiritual interests of citizens.

Paper searches are invidious not only because of the values they imperil, but also because of their unusually intrusive manner of execution. As previously indicated, paper searches normally involve uniquely wide-ranging invasions of privacy and expression values because, in order to locate the papers to be seized, it is necessary to rummage at large through innocent papers.\textsuperscript{156} This danger has been recognized by the Court. Even the \textit{Andresen} majority acknowledged that paper searches involve "grave dangers" not present in other searches. In this regard, Justice Blackmun stated:

\begin{quote}
We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized.\textsuperscript{157}
\end{quote}

Among the commentators who have discussed this issue, McKenna perhaps gives the most explicit warning concerning the dangers involved in the manner of executing paper searches. In arguing that several considerations support a "preferred position" for private papers under the fourth amendment, McKenna states:

\begin{quote}
In addition to the nature of the papers themselves, a second reason for according them strict protection concerns the nature of the search for private papers. The fundamental evil at which the fourth amendment was directed was the sweeping, exploratory search conducted pursuant to a general warrant. A search
\end{quote}

\textsuperscript{154} "The \textit{ex parte} warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object." Zurcher v. Stanford Daily, 436 U.S. 547, 579 (1978) (Stevens, J., dissenting).

\textsuperscript{155} 427 U.S. 463 (1976).

\textsuperscript{156} See supra notes 81-82, 127-37 and accompanying text.

\textsuperscript{157} 427 U.S. 463, 482 n.11 (1976).
involving private papers, it has been noted, invariably partakes of a similar generality, for “even a search for a specific, identified paper may involve the same rude intrusion [of an exploratory search] if the quest for it leads to an examination of all of a man’s private papers.” Thus, both their contents and the inherently intrusive nature of a search for them militates toward the position that private papers are deserving of the fullest possible fourth amendment protection.\(^\text{158}\)

For all the foregoing reasons, the recent erosion of the ban on general paper searches appears to be unsound as a matter of social policy. Paper searches create grave dangers to privacy, free expression, and privileged communications—values that are basic in American society. Moreover, the manner in which such searches must be executed makes these dangers much worse than in conventional searches. In light of these policy concerns, it seems apparent that the traditional ban on general paper searches is sound and should, if possible, be preserved.

2. **Electronic General Searches\(^\text{159}\)**

   a. **Introduction**—Electronic surveillance is one of the most intrusive methods of invading personal privacy ever invented. Most electronic surveillance involve paradigmatic general searches and seizures,\(^\text{160}\) which therefore should be subject to strict fourth amendment limits. Instead, the Supreme Court has nearly eliminated constitutional control over wiretapping and bugging by law enforcement officials. Surveillance considered “incredible” and “repulsive” by “law and order” Justices such as Clark and Frankfurter\(^\text{161}\) may soon become commonplace. These developments involve unsound social policy and bad constitutional law.

   Like general searches and seizures of private papers, electronic surveillance undermines the individual privacy and liberty that are the very foundation of our society. Electronic surveillance has been

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\(^{158}\) McKenna, *supra* note 152, at 68-69.

\(^{159}\) For a more detailed analysis of electronic general searches, see Galloway, *The Uninvited Ear, supra* note 2. The discussion here relies heavily on relevant portions of *The Uninvited Ear* and frequently tracks the language of that article rather closely.

\(^{160}\) For purposes of discussion, electronic surveillance may be divided into two types. “Extended electronic surveillance” involves interception of oral communications over a substantial period of time. “Rifle-shot electronic surveillance” involves interception of a single conversation. Extended electronic surveillance inherently involves general searches and seizures; rifle-shot surveillance does not.

called "the greatest of all invasions of privacy."\textsuperscript{162} It is "the greatest leveler of human privacy ever known."\textsuperscript{168} It "strike[s] at the very heart of the democratic philosophy."\textsuperscript{164} It leaves "not even a residuum of true privacy."\textsuperscript{166} The dangers of bugging and wiretapping have been pointed out by Orwell and many others.\textsuperscript{168}

b. \textit{The ban on electronic general searches}—Of course, electronic interceptions of oral communications are searches and seizures within the meaning of the fourth amendment,\textsuperscript{167} at least when they are carried out without the consent of a party to the communication.\textsuperscript{168} Moreover, it is—or should be—apparent that ex-

\footnotesize

166. \textit{E.g., S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers} (1959); \textit{A. Westin, Privacy and Freedom} (1967). A number of Supreme Court Justices have commented on these dangers.

Lewis Dembitz Brandeis: "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping." \textit{Olmstead v. United States}, 277 U.S. 438, 476 (1928) (dissenting opinion).

Tom C. Clark: "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." \textit{Berger v. New York}, 388 U.S. 41, 63 (1967). Clark’s opinion is entitled to great weight because he had ordered substantially increased electronic surveillance when he was United States Attorney General in 1947.

William J. Brennan: "\textit{The risk [involved in electronic surveillance]} . . . is of a different order. . . . I believe that there is a grave danger of chilling all private, free, and unconstrained communication. . . . There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." \textit{Lopez v. United States}, 373 U.S. 427, 450, 452, 465-66 (1963) (dissenting opinion).

John M. Harlan: "\textit{The practice of third-party bugging undermine[s] that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens of a free society. . . . Recognition of this difference is, at the very least, necessary to preserve the openness which is at the core of our traditions . . . .}" \textit{United States v. White}, 401 U.S. 745, 787, 792 (1971) (dissenting opinion).

William O. Douglas: "Electronic surveillance is the greatest leveler of human privacy ever known. . . . \textit{M}ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters." \textit{United States v. White}, 401 U.S. 745, 756, 765-66 (1971) (dissenting opinion).
168. \textit{Cf. United States v. White}, 401 U.S. 745 (1971) (holding that electronic surveillance with the consent of a party to the communication is not a search or seizure within the meaning of the fourth amendment).
tended electronic surveillance inherently involves general searches and seizures. Such surveillance normally involves "dragnet searches and seizures" of communications by suspects and nonsuspects alike. It also characteristically includes "general auditory rummaging" through private oral communications. Indeed, electronic surveillance is an aggravated general search which is far more intrusive than traditional general searches. Electronic surveillance should therefore be subject to the fourth amendment ban on general searches and prohibited in all but the most extraordinary and compelling cases.

In nearly all cases, extended electronic surveillance unavoidably involves dragnet searches. A wiretap, for example, transmits the communications of everyone using the line. Therefore it amounts to an open-ended search of the words used not only by the criminal suspects, but also by everyone else who may call or be called over that telephone line. Similarly, a bug transmits oral communications of everyone, guilty or innocent, coming within its range. Thus, it searches the words of all guests who happen to be present when the bug is active. In short, extended electronic surveillance normally is a dragnet search of persons, invading the conversational privacy of everyone within range of the transmitting device.

Extended electronic surveillance also normally involves dragnet seizures. The typical wiretap or bug not only transmits, but also records the communications. Thus, it involves the general seizure of all oral communications, whether the speaker is guilty or innocent.

169. The "dragnet" quality of wiretapping was pointed out as early as 1928 in Brandeis' classic Olmstead dissent.

Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded . . . . Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.


Brandeis's point has been confirmed by other Justices. In Osborn v. United States, 385 U.S. 323, 353 (1966), William O. Douglas wrote: "Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope . . . . A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit."

170. In this sense, wiretapping is analogous to the general search condemned in Ybarra v. United States, 444 U.S. 85 (1979), in which the police searched all patrons in a tavern suspected of harboring drug dealers.

171. For the same reason, a wiretap is arguably a dragnet search of places, invading the privacy of all places involved in telephone communications over the tapped line. In contrast, a bug transmits only conversations occurring in one place and does not involve a dragnet search of places.
In *Katz v. United States*, the Court recognized that the recording of communications is a "seizure" within the meaning of the fourth amendment.\(^{172}\) Despite occasional expressions of doubt,\(^{173}\) that common sense rule remains sound law.

Extended electronic surveillance is also a general search because it involves general rummaging among oral communications. Even if government officials have probable cause to suspect that oral communications about crime will occur, in most cases they must monitor all or nearly all conversations in order to locate those that contain admissible evidence. This is particularly true because oral communications, unlike physical evidence, do not exist at the time the warrant is issued. The government must wait and *listen* until they occur. Moreover, unless communications are monitored and recorded when they occur, they are forever lost. To be effective, the uninvited ear must be always alert, and some government official must listen to the content of each conversation. This random monitoring of one's most intimate expressions is general rummaging in its most intrusive form.\(^{174}\)

Clearly, extended electronic surveillance is a general search on several counts. It is a dragnet search, catching the oral communications of all persons within its reach. It is a dragnet seizure of conversations. It is general rummaging, exposing one's most private speech to government review. Furthermore, extended electronic surveillance is an aggravated general search having several intrusive features exceeding even those associated with traditional general searches.

First, electronic surveillance invades an even more intimate sphere of privacy than general paper searches, namely the spontaneous oral utterances that occur in the course of one's personal and family life. Second, government electronic surveillance has a strong

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\(^{172}\) 389 U.S. 347, 353 (1967). "The Government's activities in electronically listening to and recording the petitioner's words . . . constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.*


\(^{174}\) The general rummaging results from a combination of the causes previously described. First, in all cases other than rifle-shot surveillance, the required particular description of the things to be seized is lacking. Because the conversations that are the goal of the surveillance do not exist at the time the warrant is issued, there is nothing specific to describe. The warrant is therefore very broad, much like a command to enter a house every day and seize whatever writings contain evidence of crime. Second, electronic surveillance warrants are functionally the same as warrants to seize all papers. Third, extended electronic surveillance involves general exploratory rummaging, since it is undertaken without any specific object other than to seize whatever evidence may turn up. Fourth, the execution of the surveillance warrant unavoidably involves listening in on all conversations in order to detect which ones contain criminal evidence. *See supra* § II(B)(3).
chilling effect on freedom of expression as protected by the first amendment. Third, unlike warrants which are limited in duration, electronic surveillance—especially bugging—is not. The uninvited ear of a bug stays on and listens to everything that is said for as long as it remains active. This is much more intrusive than a normal physical search.\footnote{175}

The problem is compounded by another characteristic of electronic searches—their secrecy. Traditional searches and seizures put the citizen on notice that his privacy is being invaded. Electronic surveillance, on the contrary, must be secret to be effective. The individual, thus, has no opportunity to guard against exposing nonpertinent communications.

This combination of duration and secrecy can leave the individual without a shred of privacy. For these reasons, extended electronic surveillance should be held unconstitutional in all but the most extraordinary cases. Such surveillance is abhorrent to a nation that wishes to preserve the privacy, liberty, and dignity of its citizens.

When the Supreme Court first dealt with the constitutionality of electronic surveillance in the 1960's, it correctly held that extended electronic surveillance violates the ban on general searches and seizures. The leading case is \textit{Berger v. New York}.\footnote{176} At issue was the constitutionality of a New York statute authorizing electronic surveillance pursuant to judicial warrants. The Court held the statute unconstitutional and strongly suggested that extended electronic surveillance is \textit{per se} unconstitutional.

New York's broadside authorization rather than being 'carefully circumscribed' so as to prevent unauthorized invasions of privacy actually permits \textit{general searches by electronic devices}, the truly offensive character of which was first condemned in \textit{Entick v. Carrington} \ldots . We believe the statute here is equally offensive. \ldots [A]uthorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. \ldots During such a long and continuous (24 hours a day) period the

\footnote{175. \textit{See} \textit{Irvine v. California}, 347 U.S. 128, 145 (1954) (Frankfurter, F., concurring): \textit{We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct in its entirety, is "almost incredible if it were not admitted."} \textit{Id.}}

\footnote{176. 388 U.S. 41 (1967).}
conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation.\footnote{177}{Id. at 58-59 (emphasis added).}

Although the Court mentioned other problems with the New York statute as well, it concluded that extended electronic surveillance is itself a general search prohibited by the fourth amendment.\footnote{178}{Id. at 59.}

The Court was fully aware it was placing substantial constitutional limits on electronic surveillance. In its concluding paragraph, the majority acknowledged and accepted this reality: "It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment."\footnote{179}{Id. at 63.}

On the other hand, the Court acknowledged that rifle-shot surveillance of a single conversation is constitutionally permissible. "In [\textit{Osborn v. United States}] . . . the eavesdropping device was permitted where 'commission of a specific offense' was charged, its use was 'under the most precise and discriminate circumstances' and the effective administration of justice in a federal court was at stake."\footnote{180}{Id. at 64.}

But the New York statute was different. It authorized general searches and thus violated the fourth amendment: "Our concern with the statute here is whether its language permits a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does."\footnote{181}{Id. at 64.}

The holding of \textit{Berger v. New York} was supported by opinions in several other cases decided in the 1960's, notably \textit{Lopez v. United States},\footnote{182}{373 U.S. 427, 441-71 (1963) (opinions of Warren, C.J. and Brennan, J.).} \textit{Osborn v. United States},\footnote{183}{385 U.S. 323 (1966).} and \textit{Katz v. United States}.\footnote{184}{389 U.S. 347 (1967).} These cases indicated that rifle-shot surveillance, i.e., electronic interception of a single conversation involving criminal communications, is constitutional. Nevertheless, they underscored the \textit{Berger} rule that extended electronic surveillance is contrary to the fourth amendment ban on general searches and seizures.

\textbf{c. Erosion of the ban on electronic general searches and}
seizures—Unfortunately, the Supreme Court of the 1970's and 1980's has turned its back on the principles laid down in Osborn, Berger, and Katz. In the year following Berger and Katz, the same year as Richard M. Nixon's successful "law and order" presidential campaign, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 (Crime Control Act),\textsuperscript{188} providing statutory authorization for extended electronic surveillance. Within the next four years, Nixon appointed four "law and order conservatives" to the Court. The later appointments of Stevens and O'Connor added to the conservative shift. Relevant Supreme Court decisions since 1968 have been limited to interpreting the Crime Control Act. These decisions have eviscerated even the limited protections provided by the Act, opening the door to indiscriminate electronic surveillance, and suggesting that the Court is not inclined to enforce the fourth amendment ban on electronic general searches.

The contemporary trend away from enforcement of the fourth amendment ban on electronic general searches and seizures is reflected in a long series of Supreme Court decisions.\textsuperscript{188} A brief discussion of a few typical cases illustrates this new pattern.

Bynum v. United States\textsuperscript{187} demonstrates the Court's willingness to allow electronic dragnet searches. Pursuant to a federal warrant, wiretaps were installed on two telephones in order to listen to narcotics-related conversations of "Bynum and others yet unknown." The agents recorded all conversations during a thirty-four day period, including seventy-one calls made by Bynum's child's babysitter "who was totally innocent of any knowledge of the criminal enterprise . . . . The other party in each of these conversations . . . was not a member of the narcotics conspiracy, and the conversations, which were sometimes the subject of jokes by the monitoring agents, were often of a highly personal and intimate nature."\textsuperscript{188} Similarly, the agents listened to forty-seven conversations later established as innocent and a "substantial number of calls" involving attorneys.\textsuperscript{189} Justice Brennan, in his dissent, stated that "the record fairly bristles with apparent instances of indiscriminate and unwarranted invasions

\begin{itemize}
  \item \textsuperscript{185} 18 U.S.C. §§ 2511-20 (1968).
  \item \textsuperscript{187} 423 U.S. 952 (1975).
  \item \textsuperscript{188} Id. at 955 (Brennan, J., dissenting from denial of petition for certiorari).
  \item \textsuperscript{189} Id.
\end{itemize}
of privacy of nontargets of the surveillance." Nevertheless, the evidence obtained during the Bynum wiretap was used to convict Mr. Bynum of drug dealing, and the Supreme Court denied certiorari.

Scott v. United States, which has been aptly named the "Dread Scott decision," demonstrates the Court's willingness to allow electronic general searches of the rummaging variety. The Crime Control Act requires that electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." The question in Scott was whether the interception of nonpertinent calls was "reasonable" in view of this statutory duty to minimize.

The Court concluded that in many situations such interceptions are reasonable. "Many of the nonpertinent calls may have been very short. Others may have been one-time only calls. Still others may have been ambiguous in nature or apparently involved guarded or coded language. In all these circumstances agents can hardly be expected to know that calls are pertinent prior to their termination." The Court continued, "During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter." Moreover, where clear categories of nonpertinent calls do not appear, "it may not be unreasonable to intercept almost every short conversation because the determination of relevancy cannot be made before the call is completed." On the basis of this analysis, the Court concluded that it was reasonable for the agents to intercept "all the phone conversations over a particular phone for a period of one month."

Such total electronic surveillance of all oral communications, guilty and innocent alike, is rummaging with a vengeance. Yet, the Court upheld the use of the evidence obtained in the Scott wiretap without even mentioning the possibility that the fourth amendment ban on general searches and seizures might be applicable.

190. Id. at 953.
194. 436 U.S. at 140 (emphasis added).
195. Id. at 141 (emphasis added).
196. Id. (emphasis added); cf. Bynum v. United States, 423 U.S. 952, 954 (1975) "[A]gents must inevitably listen briefly to all calls in order to determine the parties to and the nature of the conversation." Id.
197. 436 U.S. at 130 (emphasis added).
The Supreme Court's refusal to enforce the fourth amendment ban on electronic general searches and seizures has brought Orwell's "Big Brother" image from the realm of anti-utopian fantasy much closer to reality. Although no drastic increase in surveillance has yet taken place, the Court has certainly set the stage for widespread bugging and wiretapping. Already, under present law, if the government convinces a magistrate that probable cause exists to believe conversations concerning any of a wide range of criminal activity can be intercepted, a warrant may be obtained for government officials to break and enter one's home, plant a bug, and spy on the individual for a long period.

This is bad news for a nation that cherishes privacy and freedom of expression. When limited to rifle-shot surveillance of a specific communication by a criminal suspect, electronic surveillance is tolerable. Extended surveillance, in contrast, is intolerable. As a matter of sound social policy, it should be eliminated or at least restricted to the most compelling situations. The fourth amendment ban on general searches provides a ready legal justification for imposing the necessary restrictions, and it should be enforced.

Enforcement of the fourth amendment ban on extended electronic surveillance is more than just sound social policy. Viewed in a broad historical perspective, it is one of the most important challenges our society faces. A basic axiom of the framers of the Constitution was that government should be weak so that the people might be free. During the Great Depression, however, the nation opted for large-scale government intervention in economic affairs. As a result, "big government" is here to stay. With it comes the threat that government control will expand from the economic arena into the sphere of personal liberty and privacy. The greatest vigilance is needed to insure that the individual's intimate life is protected from the uninvited ear of the new and powerful government apparatus.

3. General Searches Incident to Arrest

A third important context in which the Supreme Court has allowed the ban on general searches to erode involves searches incident to arrest. While such searches are typically not as obnoxiously intrusive as electronic surveillance and paper searches, they are especially subject to abuse by police to harass classes of persons who happen to be on the government's current hit list. This section will (1) demonstrate that searches incident to arrest are often general searches, (2)
explain the rules developed by earlier Justices to control such searches, and (3) describe the cases in which the Burger Court has discarded these rules and reopened the door to general searches incident to arrest.

a. The ban on general searches incident to arrest—Supreme Court decisions have, for many years, recognized that warrantless searches may, under some circumstances, be undertaken incident to a lawful arrest. The scope of the government's authority to search incident to arrest has been the subject of recurrent controversy, but the authority itself has been assumed by the court since 1914. The rule allowing warrantless searches incident to arrest invites general searches. In fact, most searches incident to arrest are paradigmatic general exploratory searches.

For several reasons, searches incident to arrest typically involve general rummaging. First, as the subsequent case discussion will demonstrate, such searches are often undertaken without probable cause or even articulable suspicion that any seizable objects are present. Instead, the police rummage at large through the individual's personal effects in quest of anything that may be used against him. The rummaging is purely exploratory when no probable cause exists to believe that seizable items are present. General exploratory rummaging is, of course, one of the core evils that the ban on general searches was intended to prevent.

Second, searches incident to arrest are usually undertaken without a search warrant and, therefore, also without a particular description of the place to be searched and the things to be seized. The absence of a particularized warrant increases the risk that the searches will be general. The danger, once again, is that the government agents will engage in general exploratory rummaging and then simply use whatever they find—typically drugs or concealed weapons—to obtain a criminal conviction. The Supreme Court has acknowledged many times that searches incident to arrest are often general searches and has held on at least three separate occasions, that searches incident to arrest were illegal general searches.

In Go-Bart Importing Co. v. United States, the Court condemned the ransacking of a liquor dealer's office incident to his arrest.

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200. The fourth amendment ban on general rummaging is discussed in § II(B)(3) supra.
201. See supra § II(B)(3)(b).
It [the second clause of the fourth amendment] emphasizes the purpose to protect against all general searches . . . 203

[The prohibition agents] made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. 204

Similarly, in United States v. Lefkowitz, 205 the Court repudiated the rummaging of another liquor dealer’s office incident to his arrest, stating:

[T]he prohibition agents assumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of the respondent’s guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained . . . . [T]he searches were exploratory and general . . . . 206

More recently, in Chimel v. California, 207 the Court invalidated a search of a home incident to the owner’s arrest for theft, explaining:

The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists . . . . “After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant . . . .” 208

In order to reduce the obvious danger that general searches will occur, past courts imposed tight restrictions on searches incident to arrest. These restrictions were summarized in the landmark Warren Court case, Chimel v. California. 209 In Chimel, the police obtained a warrant authorizing the arrest of Chimel for burglary of a coin shop. The police then arrested Chimel and searched the entire three-bedroom home where the arrest occurred. Condemning the

203. 282 U.S. at 357.
204. Id. at 358.
206. Id. at 463-64, 465.
208. Id. at 761, 767 (quoting Learned Hand’s famous statement in United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926)).
search as "indistinguishable from what might be done under a general warrant,"210 the Court reversed Chimel's conviction and held that warrantless searches incident to arrest must be limited to the arrestee's person and the area within his immediate control.

For purposes of this discussion of general searches, the most important aspect of the Chimel case was the analysis used by the Court to reach this result. The Court's premise—which is also a fundamental axiom of fourth amendment law—was that a search is unreasonable, and hence illegal, unless the scope of the search is "strictly tied to and justified by" the circumstances which rendered its initiation permissible."211 In other words, to satisfy the fourth amendment, a warrantless search must be justified by some pragmatic need, and the scope of the search is limited to what is required to satisfy that need.212 Chimel's functional mode of analysis was not new; the same point had been made in earlier cases such as Weeks v. United States213 and Trupiano v. United States.214

The Chimel opinion provides a detailed discussion of how this functional analysis can be used to establish proper limits for searches incident to arrest. Such searches are justified, according to the Court, by two pragmatic needs: (1) the need to prevent the destruction or concealment of evidence and (2) the need to prevent the arrestee from grabbing a weapon and using it to escape or to injure the arresting officers.215 In most cases, these needs justify a search of the arrestee's person and the area within his immediate control. They do not, however, justify broader searches of areas beyond the arrestee's control because the arrestee cannot reach such places to either grab a weapon or to get rid of evidence. Searches incident to arrest, in short, must be "reasonably limited" by the 'need to seize weapons' and 'to prevent the destruction of evidence' . . . ."216

The following hypothetical illustrates the proper application of

210. Id. at 767.
211. Id. at 762.
212. This means, of course, that searches for evidence incident to arrest should not be allowed when police have no reason to believe evidence is present.
214. 334 U.S. 699, 708 (1948):
A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant.
215. 395 U.S. at 763.
216. Id. at 764.
the limit on searches incident to arrest. Suppose police arrest a person for a traffic offense such as speeding. To what extent is a search incident to arrest functionally justified? Because there is no reason whatever to suspect that evidence of a crime is present, the "need to prevent concealment or destruction of evidence" provides no justification whatever for a search. Any search for evidence in these circumstances would be purely exploratory. The only pragmatic justification for a search incident to arrest would be to prevent seizure of a weapon within easy reach. As the California Supreme Court has pointed out, this need can be met by a frisk or pat-down. There is no need for a full body search and especially no need for a search of containers that could not conceal a weapon nor be quickly seized and opened by the arrestee. In short, if police have no reason to believe evidence is within easy reach, searches incident to arrest should be strictly limited to locating weapons, and full intrusive searches of the arrestee and his possessions are not proper.

b. Erosion of the ban on general searches incident to arrest—Unfortunately, the Burger Court has repudiated Chimel's functional analysis of searches incident to arrest in two important cases, opening a major loophole in the ban on general searches. The first case was United States v. Robinson, a widely criticized 1973 decision in which Rehnquist wrote the majority opinion. Robinson involved the warrantless search of an automobile driver incident to an arrest for driving without a currently valid license. Although the police officer had no reason to believe and, in fact, did not believe that the search would turn up either weapons or evidence, he conducted a pat-down, removed a crumpled cigarette pack from the arrestee's pocket, opened it, and found heroin capsules. The heroin was admitted into evidence at trial, and Robinson was convicted of possession of heroin. The Court upheld the search and affirmed the conviction.

The Court held that the right to search the person arrested follows automatically from the fact of arrest and does not depend on the probability that seizable items will be found. After referring

219. This grant of an automatic, unqualified right to search the arrestee was, of course, contrary to the Chimel-Trupiano requirement that the search be justified either as a search for weapons or as a search based on probable cause to believe evidence is present. See supra notes 211-16 and accompanying text. Justice Rehnquist attempted to reconcile the cases by arguing that the Chimel approach only applies to searches of the area within the arrestee's control, not to searches of the arrestee's person. 414 U.S. at 225. This distinction was later repudiated in
several times to the "unqualified" right to search a person arrested, the Robinson opinion continued:

The authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . . [The arrest] being lawful, a search incident to the arrest requires no additional justification.

In other words, searches of persons incident to arrest are per se reasonable and no specific pragmatic need must be shown. "It is the fact of the lawful arrest which establishes the authority to search." Robinson permits general exploratory searches of persons incident to custodial arrests. The search is allowed despite the absence of probable cause or even suspicion that incriminating evidence or a weapon is present. Such a search is a general exploratory search which involves general rummaging through everything in the possession of the person arrested in search of anything which might be used to convict. That exploratory rummaging of this nature violates the fourth amendment's ban on general searches has long been recognized.

The fact that Robinson invites general exploratory searches is clear from several passages in the Court's opinion. Testimony concerning the police department regulations that governed the Robinson search established, "[W]hen a police officer makes 'a full custody arrest,' . . . the officer is trained to make a full 'field type search' " defined as follows:

Basically, it is a thorough search of the individual. We would expect in a field search that the officer completely search the individual and inspect areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes . . . . [W]e expect him to remove anything and examine it to determine exactly what it is . . . . [W]e expect the officer to examine anything he might find on the subject.

Obviously, this is a paradigmatic illustration of general exploratory rummaging.

220. 414 U.S. at 225, 229-30.
221. Id. at 235.
222. Id.
223. Id. at 222 n.2.
224. The officer who conducted the Robinson search admitted, "I didn't think about what I was looking for. I just searched him." Id. at 236 n.7.
In the 1981 case, *New York v. Belton*, the Supreme Court opened the door even wider for general searches incident to arrests by holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." The Court indicated that the right to make such a search is unqualified, requiring no specific functional justification. It is an automatic right incident to the arrest. Such a search can be made even when there is no specific reason to believe that the passenger compartment contains either weapons or evidence. It is astonishing that the *Belton* Court held that the automatic, unqualified authority to search the passenger compartment incident to the arrest of its occupant includes the authority to examine the contents of all containers in the compartment. Briefcases, purses, packages, bags—all these can be opened and searched without probable cause.

The searches of automobile passenger compartments authorized by *New York v. Belton* are classic general searches. They are paradigms of general exploratory rummaging, without a specific object. The particular description of the "things to be seized" required by the fourth amendment is missing; hence, the search is not limited or focused. The officer may randomly examine everything in the hope of finding some evidence of crime. Such searches without probable cause have long been recognized as general searches presumptively banned by the fourth amendment.

The Burger Court's refusal to enforce the prohibition against general exploratory searches incident to arrest is regrettable because such searches involve a "red flag" situation presenting well-known dangers of police abuse. Police have almost unlimited discretion to make arrests, and most officers are fully aware of the ease with which probable cause can be "fabricated" after the fact to support an arrest. As a practical matter, police frequently use their power as a way to harass those who happen to be on their current enemies list—especially racial minorities, gays, and longhairs.

The *Robinson* and *Belton* cases, in effect, grant police an automatic, unqualified right to one general exploratory search whenever they are able to find or are willing to fabricate grounds for an arrest. Everything in the person's immediate control is thus subject to a po-

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226. *Id.* at 460.
227. *Id.* at 461-62.
228. 453 U.S. at 460 The opinion is explicit on this point: "[T]he police may also examine the contents of any containers found within the passenger compartment." *Id.*
lice search even when there is no basis for suspecting the presence of weapons or evidence. And if the police are smart or lucky enough to apprehend the arrestee in a car, it is "open season" on everything in the passenger compartment. These developments are plainly unsound both as a matter of constitutional law and as a matter of social policy. A return to Chimel's requirement that searches incident to arrest be based on demonstrable, pragmatic need is advisable to curb the recent expansion of general searches incident to arrest.

4. Other General Searches and Seizures

The recent erosion of the ban on general searches and seizures has given rise not only to general paper searches, electronic general searches, and general searches incident to arrest, but also to a wide variety of other general searches and seizures as well. The following is a brief discussion of three additional kinds of general searches and seizures approved in recent Supreme Court cases: (1) limited intrusions, (2) general consent searches, and (3) administrative general searches.

a. Limited intrusions—Perhaps the most fundamental of all fourth amendment requirements is the probable cause requirement. The amendment explicitly states, "no Warrants shall issue, but upon probable cause," and the Supreme Court has held that warrantless searches are subject to the same requirement.229 "Probable cause" is sufficient information to support a reasonable belief than an individual has committed a crime or that evidence of a crime is present.230 As previously stated, the probable cause requirement is a basic component of the ban on general searches and seizures, since it prevents dragnet searches and seizures based on mere suspicion as well as general exploratory rummaging.

Prior to 1967, it was generally assumed that searches or seizures on less than probable cause were illegal. In 1968, Terry v. Ohio231 upheld the government's right to conduct "frisks" on less than probable cause. The Court admitted that frisks are searches within the meaning of the fourth amendment. The majority concluded, however, that because frisks are less intrusive than traditional searches and because there is a strong practical need for stops


and frisks, such searches should be allowed if police have a reasonable, articulable suspicion that criminal activity is afoot and that the suspect is armed. Probable cause, in short, is not required to justify a frisk.\footnote{232}

\textit{Terry v. Ohio} opened a potentially enormous loophole in the probable cause requirement. In the aftermath of \textit{Terry}, a debate took place as to the scope of the new doctrine and the size of the loophole. Liberal Justices argued that \textit{Terry} was a narrow one-of-a-kind case creating a unique exception to the probable cause requirement based upon the highly unusual need for stops and frisks. Conservative Justices, in contrast, contended that whenever (1) a particular search or seizure is "less intrusive" than traditional full searches and custodial arrests and (2) the need outweighs the invasion of privacy, the search or seizure should be allowed on less than probable cause.

As the years passed, the broad reading of \textit{Terry} gained momentum, and the list of "limited intrusions" allowed on less than probable cause expanded. \textit{Davis v. Mississippi},\footnote{233} suggested that detention for fingerprinting might be allowed without probable cause. \textit{United States v. Van Leeuwen}\footnote{234} upheld temporary detention of mailed packages on less than probable cause pending investigation of suspicious circumstances. \textit{United States v. Brignoni-Ponce}\footnote{235} approved stops of cars near borders based upon a reasonable articulable suspicion that illegal aliens are present. Furthermore, \textit{Delaware v. Prouse}\footnote{236} upheld stops of motorists based only upon reasonable articulable suspicion that the car is unregistered or the driver unlicensed.

In \textit{Michigan v. Summers},\footnote{237} the debate among the Justices intensified and the conservatives prevailed. At issue was the power of police officers to detain a suspect on less than probable cause while they searched his premises pursuant to a search warrant. While acknowledging that "every seizure having the essential attributes of a formal arrest is unreasonable unless it is supported by probable cause,"\footnote{238} the majority nevertheless asserted that seizures without probable cause are allowed where the intrusion is limited and justi-
fied by a substantial law enforcement interest. Stewart, Brennan, and Marshall dissented, arguing that Terry should be restricted to stops and frisks and vehicle stops near borders. More generally, the dissenters contended that exceptions to the probable cause requirement should be rare and should not be created unless the invasion of privacy is "extremely limited."239

Michigan v. Summers creates an alarmingly broad exception to the probable cause requirement. The Court is apparently now prepared to approve a broad range of searches and seizures on less than probable cause whenever the Court considers them "less intrusive" than traditional full custody arrests and believes the need outweighs the harm.

Of course, searches and seizures on less than probable cause are general "dragnet" searches and seizures.240 The framers of the fourth amendment sought to ban dragnet searches and seizures on mere suspicion by requiring, inter alia, that all searches and seizures be based upon probable cause. The Supreme Court's new rule allowing limited intrusions to be conducted without probable cause has opened the door for widespread general searches and seizures upon mere suspicion.

b. General consent searches—Consent searches are searches undertaken by the government pursuant to the consent of the individual whose person or property is searched. To be valid, consent must be voluntary. If voluntary consent is given, the search is legal even without a warrant, probable cause, a particular description of the place to be searched, or a particular description of the things to be seized. Consent searches are problematic because searches that do not comply with these normal fourth amendment requirements are very likely to be general searches.

Justice William O. Douglas, in his dissenting opinion in United States v. Matlock,241 pointed out the fact that consent searches are likely to be general searches.

[Consent] to invade the house . . . provides a sorry and wholly inadequate substitute for the protections which inhere in a judicially granted warrant . . . . [H]ere the police procured without a warrant all the authority which they had under the feared general warrants, hatred of which led to the passage of the Fourth Amendment. Government agents are now free to rum-

239. Id. at 710.
240. See supra text accompanying notes 42-43.
mage about the house, unconstrained by anything except their own desires. [Footnote omitted.] Even after finding items which they may have expected to find . . . , they prolonged this exploratory search in pursuit of additional evidence.242

The leading case eroding the fourth amendment’s safeguards against general consent searches was Schneckloth v. Bustamonte.243 The most important issue in that case was whether consent searches should be governed by rules concerning waivers of constitutional rights. Under well-settled law, the minimum requirement for a waiver is a conscious relinquishment of a known right.244 Thus, if normal waiver rules were applied to consent searches, the government would have to prove that the consenting individual was aware he had a constitutional right to refuse and freely chose to forego that right.

On the face of it, consent searches appear to be a classic context for application of waiver rules. The fourth amendment creates a right to be free from searches without a particularized warrant based on probable cause. Consent to search is a relinquishment of that right. The right of privacy protected by the fourth amendment is one of the most prized and fundamental of all constitutional rights. Therefore—like the right to counsel, the right to a jury trial, and the privilege against self-incrimination—this right to be free from government searches should be protected by the rule that only a conscious relinquishment of a known right will suffice for a waiver.

The Burger Court in Schneckloth, however, concluded that normal waiver requirements do not apply to consent searches. The Court held that the government need not show that the individual was aware of his right to refuse; it only has to show that consent was not coerced. If after examining the “totality of the circumstances,” a court concludes that consent was voluntary, a search within the scope of that consent is legal and all criminal evidence found is seizable and admissible.245

The Court established new law in Schneckloth. No prior cases had specifically discussed whether waiver rules should be applied to consent searches, although the reasoning of prior waiver cases was broad enough to cover consent searches. The Burger Court chose to water down fourth amendment protections by exempting consent

242. Id. at 187-88 (Douglas, J., dissenting).
245. 412 U.S. at 226.
searches from normal waiver rules. Moreover, the Court's main explanation for treating fourth amendment rights differently from other constitutional rights was unconvincing, even lame. The rights involved in earlier waiver cases, the Court asserted, were all concerned with fairness at trial. Thus, the Court concluded that it is appropriate to confine waiver requirements to rights involving fairness at trial and exempt fourth amendment rights.

But why? The Court's opinion does not provide a satisfactory answer. In fact, there is no good pragmatic reason for exempting consent searches from normal waiver requirements. There is no real reason why government officials could not routinely read Miranda-type warnings and obtain signed statements of knowledge and consent from those whose person or property are to be searched. The Court states, however, that such a procedure is not practical. This conclusion has no basis in light of post-Miranda studies showing that the Miranda warnings have not substantially reduced responses to custodial police interrogations.

Schneckloth is an especially bad case because consent searches, like searches incident to arrest, present a red flag situation involving well-known dangers of abuse. In the typical consent search situation, the individual is alone with the police, extremely vulnerable, and easily intimidated. Police can use veiled threats to obtain consent, even suggesting that the individual might as well consent because the search is inevitable anyway. Moreover, because the police control who is present and because no record is kept, police can simply invent consent, knowing that they will normally prevail in any subsequent "swearing contest" about what happened at the scene of the search.

The Schneckloth facts pointedly illustrate the weakness of the voluntary consent test. The record reeks with indicia of a roust. Sunnyvale, California police officers stopped six Mexican-Americans who were attempting to drive through Sunnyvale at 2:40 a.m. Several police cars arrived at the scene. The police ordered the four men out of the car and requested consent to search the car. The request was wholly gratuitous because the car was stopped only because of a faulty headlight. What were the occupants to do? If they refused, the police might arrest them or search them anyway. Clearly, the situation was replete with coercion.

246. Id. at 231 "[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." Id.

247. These studies are summarized in Kamisar, LaFave & Israel, Basic Criminal Procedure 631-35 (5th ed. 1980).
Of course, no one other than the participants knows whether voluntary consent was actually given. But, we do know that the police proceeded to conduct a thorough general exploratory search of the car, going to the extreme of taking the back seat out of the car! Under the seat they found a torn-up paper which, when pieced together, turned out to be the stolen welfare check upon which Bustamonte's conviction was based. And, despite all the obvious clues that coercion was present, the police were able to win the swearing contest on the issue of consent.

*Schneckloth* is unsound and should be reconsidered. As previously explained, consent searches are paradigmatic general exploratory searches. If police can cajole or intimidate an individual into granting consent, they are then free to rummage at will—without a warrant, probable cause, or particularized object—seeking anything that may be used to convict. A core purpose of the fourth amendment is to limit general exploratory rummaging of this nature.

The *Schneckloth* rule unnecessarily abandons the fundamental values implicit in the ban on general searches. The use of stricter waiver rules offers a better accommodation of both privacy interests and law enforcement needs. A simple notice and signed waiver requirement would minimize illegal general searches without preventing legitimate consent searches. The Burger Court's failure to adopt this easily available solution reveals, once again, its unfortunate lack of commitment to the constitutional ban on general searches.

c. **Administrative general searches**—Supreme Court decisions in recent years have opened the doors for several kinds of administrative general searches, including (1) administrative inspections and (2) administrative inventories.248

Unlike police searches to capture and prosecute criminals, administrative inspections are government searches designed to protect the public from, for example, health and safety hazards. For many years, government entities, especially at the local level, have enacted rules to protect the public from unsanitary conditions, defective wiring, unsafe structures, and a host of other conditions that endanger urban residents. These regulations have been enforced by area-wide inspection programs involving searches of all or most premises

248. Before proceeding with the discussion, the author wishes to concede that administrative inspections on less than probable cause are justifiable on both pragmatic and historical grounds and therefore should be allowed. However, because administrative inspections are classic dragnet searches, some effort should be made to accommodate the policy underlying the ban on general searches by requiring that administrative searches be conducted in a manner that eliminates unnecessary invasions of personal privacy.
within designated geographical regions such as major subdivisions of cities.

The Supreme Court has recognized the government's authority to conduct administrative inspections without traditional probable cause in a series of cases going back nearly thirty years. The first important case on this issue was *Frank v. Maryland*, which held that administrative searches are not subject to the requirements of the warrant clause. A decade later, in *Camara v. Municipal Court* and *See v. City of Seattle*, the Court overruled *Frank* and held that the protections of the warrant clause are applicable to administrative inspections.

The *Camara* opinion, however, added one crucially important innovation: the government need not show probable cause that criminal evidence is present in a specific place to justify a search of that place. The Court held that it is enough if the government shows probable cause that violations exist within a larger geographical area. When such area-wide probable cause exists, the government is entitled to search the individual premises within that area.

From the point of view of traditional fourth amendment law, the problem with administrative inspections is that they comprise dragnet general searches. Like writs of assistance, administrative search warrants allow the government to search wherever it wishes within a properly designated area. Consequently, they run afoul of the ban on general searches.

In contrast to most general searches approved by the Supreme Court in recent years, administrative inspections appear to be a necessary kind of government activity. Consequently, a limited exception to the ban on dragnet searches is probably appropriate. The problem, however, is that the Supreme Court has not imposed adequate limits to insure that the valid public need is met in a manner that minimizes unnecessary invasions of personal privacy. Section E will discuss appropriate limits.

Recent Supreme Court decisions have also opened the door for general searches and seizures in the context of administrative inventory searches. The most noteworthy case is *South Dakota v. Opperman*, which approved the search of an impounded car without a

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250. 387 U.S. 523, 528 (1967).
252. Id. at 538.
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warrant, probable cause, or any particular idea of what items were present. Indeed, the Court’s dicta even indicated that the government may routinely perform such inventory searches as long as standard procedures are followed.254

Obviously, automobile inventory searches like the search in Op-perman are general searches. In fact, they involve general searches and seizures three times over. First, they are dragnet searches because they occur without probable cause or even suspicion that evidence of crime is present, whenever a car is impounded. Second, they involve mass seizures of the items in the cars. Third, and most important, they involve general exploratory rummaging of all the contents of the car. For these reasons, inventory searches violate the ban on general searches and seizures and should be curtailed.

In summary, the fourth amendment rule against general searches and seizures has eroded recently in a wide variety of areas. The Supreme Court has shown a new tolerance for general paper searches, electronic general searches, general searches incident to arrest, limited intrusions, general consent searches, and administrative general inspections and inventories. Although much more could be said,255 the discussion thus far sufficiently shows that the Supreme Court has not enforced the rule against general searches and seizures vigilantly in recent years.

E. How to Improve Enforcement of the Ban on General Searches and Seizures

The purpose of this section is to suggest some legal principles that can be used to renew and strengthen the ban on general searches and seizures. The best way for courts to begin improving enforcement of the ban is to apply more rigorously the very requirements set forth explicitly in the fourth amendment.

1. Reasonableness

Clearly the framers considered general searches and seizures per se unreasonable and intended to prevent them. Absolute bans, however, are rare in American constitutional law. A principle should be adopted which accommodates both the rule against general searches and seizures and other important interests that might be

arrestee’s shoulder bag prior to lockup).

254. 428 U.S. at 376.

255. Other relevant topics include administrative searches of “highly regulated industries,” border searches, pen registers, mail covers, and bank record examinations.
defeated by an absolute ban.

Fortunately, a workable accommodating principle is readily available. In other areas of constitutional law, the Supreme Court has adopted a strong but rebuttable presumption of unconstitutionality as its main weapon for protecting fundamental rights, thus preventing absolute barriers to urgently needed government action. In order to overcome the presumption, the government must satisfy "strict" or "exacting" judicial scrutiny. That is, the government must show that its action is a substantially effective means of furthering a compelling interest and that no less onerous alternative is available. One way to improve enforcement of the rule against general searches and seizures without creating an inflexible ban is to subject general searches and seizures to strict scrutiny. Such a standard is necessary if the framers' intent to ban general searches and seizures is not to be completely vitiated.

Of course, strict scrutiny is not a monolith. The strictness of the courts' scrutiny depends in part on how fundamental the right is. The Supreme Court has required the strictest scrutiny of prior restraints and discrimination against racial minorities because it is clear that the central purpose of the first amendment and equal protection clause is to ban these evils. General searches and seizures should be subject to an equally strong presumption of unconstitutionality, since it is equally clear that a central purpose of the fourth amendment is to ban them.

The level of scrutiny should be especially strict when the government action involves rummaging of written or oral expression. General rummaging of private expressions should be subject to the courts' most exacting scrutiny because such rummaging violates two of the most basic values protected by the Bill of Rights. First, it violates the rule against general searches. Since Entick v. Carrington, the ban on general searches has applied with special force to government examination of private expressions. Second, expression-rummaging has a severe chilling effect on free expression, deterring even the most private written and oral communication. The simultaneous infringement of fourth amendment privacy and


259. 19 Howell's St. Tr. 1029 (1765).
first amendment free expression values should trigger the strictest scrutiny. Expression-rummaging should be allowed, if at all, only when necessary and sufficient to achieve a compelling purpose.

Application of strict scrutiny to general searches and seizures would be a major advance over the Supreme Court's present method of analysis. Strict scrutiny would curtail the most obnoxious features of general paper searches and electronic general searches. Furthermore, because general exploratory rummaging incident to arrest is neither necessary nor the least onerous means to further any legitimate, let alone compelling, government need, strict scrutiny would close the enormous loopholes created by Robinson and Belton. Strict scrutiny would provide a principled method for limiting exceptions to the probable cause and warrant requirements. It would require that administrative inspections and inventories be conducted in the least intrusive manner and only in cases of substantial need.

2. Particular Description of the Things To Be Seized

The fourth amendment's requirement of a particular description of the thing to be seized was intended to prevent both mass seizures and general exploratory rummaging. Courts should use this requirement more aggressively to prevent general searches and seizures.

Courts should recognize that the particular description requirement reflects a more basic requirement implied by the fourth amendment: searches and seizures are presumptively unconstitutional unless the government's goal is to seize some specific object known in advance and capable of particular description. The fourth amendment plainly presupposes that searches are improper if they are undertaken without any specific seizable object in mind.

Searches undertaken without a particularized, articulable objective necessarily involve the kind of general exploratory rummaging the framers intended to ban. Consequently, courts should look with disfavor on all searches undertaken without an objective capable of particular description. For example, searches incident to arrest should not be allowed unless the government can explain what specific seizable items its officers were looking for even if after the fact. Similarly, a strong presumption of unconstitutionality should apply whenever the government seeks authority to search for items not yet in existence, such as future oral communications, given that such nonexistent objects and communications cannot be particularly described.

Moreover, courts should seriously apply the traditional rules
developed to insure that the particular description requirement is met. Obviously, warrants having no description of the things to be seized should be banned. Less obviously, but perhaps more importantly, warrants containing the equivalent of a general residuary clause should be rejected. These types of warrants name a specific objective, but authorize searches for "other evidence of crime" or "evidence of other similar crimes." They lead to general exploratory rummaging just as surely as warrants containing no description of the things to be seized, and should be prohibited. Similarly, courts should be skeptical of warrants authorizing searches for general classes of objects rather than specific items.

In recent years, the Supreme Court has all too frequently fallen into the trap of stating that the particular description requirement is satisfied if the police do their best to describe the objective of the proposed search. The Court's language has suggested that if the objective is incapable of particularized description, no such description is required. At its extreme, this concept mocks the framers' intention to ban general searches. If the objectives of a search are incapable of particularized description, then the warrant itself cannot effectively limit the scope of the search, and the result in most cases is precisely the kind of rummaging the framers intended to ban.

3. Probable Cause

The probable cause requirement, another bulwark of the ban on general searches and seizures, should also be enforced more aggressively. First and most important, the Supreme Court should put an end to the dangerous recent trend of permitting searches and seizures based on less than probable cause. Nothing could be clearer than the framers' intent to ban searches and seizures based on less than probable cause. Such searches and seizures are precisely the kind of dragnet proceedings the framers intended to prohibit. Implied exceptions have always been disfavored, especially where fundamental rights are at stake. There is nothing in the language or history of the fourth amendment to suggest that the framers intended that searches and seizures be allowed without probable cause simply because they are arguably less intrusive than a full custody arrest. To the contrary, the framers plainly intended that no searches and seizures be undertaken without probable cause.

The Supreme Court should reconsider the broad dicta in Michigan v. Summers. The probable cause requirement should be re-
stored to the status of a general rule, as the framers intended. Exceptions should be rare and should be recognized only in situations of compelling governmental need. Otherwise, the probable cause requirement will become the exception, applicable only to full custody arrests, and the floodgates will be opened to general searches and seizures in all other cases.

Second, most general searches and seizures should be allowed, if at all, only upon a heightened showing of probable cause. Numerous Justices and commentators have noted that probable cause is a variable concept. Notably, Justice Stewart has stated:

The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion . . . . Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort [bugging of attorney's office].

Similarly, a commentator on paper searches has written:

If searches involving a comparatively low degree of intrusion can be conducted pursuant to warrants on something less than probable cause, there is no logical impediment to requiring a higher standard of probable cause to justify a search of a highly intrusive character.

Generally, when the government seeks permission to undertake general searches, the normal probable cause requirement should be heightened. Permission to search should be granted, if at all, only upon a "clear and convincing" showing that it is "highly probable" that seizable items are present in a specific location. This policy is particularly necessary when the government wishes to engage in "expression-rummaging," i.e., general examination of written or oral communications. At the minimum, a stricter probable cause requirement is needed to protect the basic first and fourth amendment interests at stake.

4. Particular Description of Place To Be Searched

In order to keep general searches within reasonable boundaries, courts should substantially tighten the requirement that the place to be searched be particularly described. For example, when the government requests permission to engage in a search that involves general rummaging, courts should require an especially narrow descrip-

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262. McKenna, supra note 152, at 75.
tion of the place to be searched. Thus, searches of private papers should be allowed, if at all, only when the government can specify with some precision where the target documents are located within a suspect's files. This would substantially minimize the invasion of innocent private writings. To illustrate, the search of an attorney's files in *Andresen v. Maryland* would have been far less intrusive if the warrant had restricted the search to files concerning the particular parcel of land suspected of being involved in the alleged real estate fraud. If the government knows the particular drawer, book, or file the target document is in, the warrant should restrict the search to that location. If the government cannot specify the location of the target document precisely, the warrant should generally be denied in order to avoid broad scale general rummaging of private papers.

Similarly, magistrates should require an especially strict description of the place to be searched when authorizing electronic bugs. If bugging an office is sufficient, bugging a home should not be allowed. If bugging a home is to be allowed, areas of special privacy, bedrooms and bathrooms, for example, should be off limits. Even if the government insists that it needs a free hand to plant bugs in zones of maximum privacy, good reason exists to deny authority to conduct the search. The human costs in terms of indignity, resentment, and loss of privacy in allowing such a search outweigh the gains in all but the rarest cases.

5. **Warrants**

The warrant requirement is a cornerstone of the ban on general searches. The fourth amendment provides, "[N]o 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." Thus, if a warrant is to be granted, then prior to searching the government must articulate what item is to be seized, where it is, and how the government knows the item is there. Each of these requirements helps prevent general searches.264

The Court should reconsider its impetuous and ill-considered expansion of exceptions to the warrant requirement. The Court has been too willing to approve warrantless searches on the basis of justifications that are unconvincing, even de minimis.265 The warrant re-

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264. See supra text accompanying notes 87-91.
requirement deserves better enforcement than it receives especially because exceptions are so likely to lead to the general searches that the framers intended to ban. At a minimum the general rule against warrantless searches should be supported by a strong presumption that warrantless searches are illegal and that some strong, real need must be shown to justify them. Sham justifications should no longer be tolerated.

Moreover, if warrantless searches are to be allowed, available prophylactic rules should be adopted to insure that they do not involve general searches. Executing officers should at least be required to prepare, as soon as possible after the search, an affidavit explaining what the object of the search was, where they thought the item would be, why they thought it would be there, how the search was conducted, and what was found. Although far from foolproof, the affidavit would at least provide a contemporary record for the later determination of whether an illegal general search took place.

6. Safeguards Against General Rummaging

The fourth amendment ban on general rummaging needs further articulation and clarification in order to be effective. The ban on general exploratory rummaging, i.e., searching randomly without any object, is rather well understood. The ban on general rummaging, however, does more than prohibit general exploratory searches; it also prohibits general rummaging incident to some searches in which the police are seeking known objectives.

Many cases illustrate this point. Entick v. Carrington, for example, indicated that searches for specific seditious writings involved illegal rummaging. Stanford v. Texas rejected government rummaging for writings relevant to Communist activities. Chimel v. California nullified the rummaging of a house for items (including coins and tokens) stolen from a coin shop. In addition, Lo-Ji Sales, Inc. v. New York declared unconstitutional the rummaging of a bookstore for obscene publications. In all these cases, the Court banned general rummaging even though it was not purely exploratory.

Thus, general rummaging is often illegal even though the officers know what they are looking for. Many valid searches, how-

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266. 19 Howell’s St. Tr. 1029 (1765).
ever, involve a certain amount of general rummaging. The typical narcotics search, for example, involves rummaging among the physical objects in the place being searched in order to locate the drugs. Unless the precise location and appearance of the item to be seized are known, some rummaging is necessary. How can the rule against general rummaging be reconciled with the fact that rummaging does occur with the Court's approval in some cases?

This kind of conundrum is common in the field of constitutional law. Here, two valid principles related to rummaging appear to contradict each other in some cases. On the one hand, the ban on general rummaging is undoubtedly a basic rule of fourth amendment law. On the other hand, general rummaging is a necessary ingredient of many valid searches. The two principles need to be accommodated.

Once again, the most promising method of accommodation is to apply a presumption of unconstitutionality and to allow general rummaging only when it is the least onerous means for achieving an important objective. An intermediate level of end scrutiny is probably more appropriate in order to make room for the kind of rummaging inevitably incident to a normal search. Punishment of serious crime would provide the important government interest that would justify such unavoidable rummaging, but rummaging should be prohibited when any less onerous means is available. A lessor standard will not adequately guard against general rummaging. Arguably, punishment of minor crime should not be accepted as a sufficient justification for general rummaging.

7. Restrictions on General Consent Searches

The problem of general consent searches must be dealt with in a manner different from other general searches and seizures. On the one hand, consent searches can involve highly intrusive general exploratory rummaging. This is the case when consent is obtained and the search undertaken without either a warrant, probable cause, or a particular description of the place to be searched or the thing to be seized, indeed without any specific object whatever. On the other hand, as the Court pointed out in *Faretta v. California*,270 people should not be imprisoned in their rights; they should be allowed to give consent and to forego exercise of their rights if they wish. This is especially true when the individuals involved wish to dispel suspicion and establish their innocence by allowing an immediate search.

270. 422 U.S. 806 (1975).
It is clear, however, that the power to engage in consent searches is subject to serious abuse. Most individuals can be intimidated into giving apparently voluntary consent because they are afraid to say no to the police. Moreover, police officers can invent consent where none has been given and rely on their ability to win the subsequent "swearing contest" against the defendant concerning whether consent was given. In short, a red-flag situation exists which cries out for prophylactic rules to prevent abuses.

How should these interests be accommodated? In this context, the strong presumption that general searches are unconstitutional does not offer a sound solution, since it would prevent most consent searches altogether. But some safeguard is plainly needed to prevent general searches without bona fide consent. Fortunately, a sound solution is readily available in the form of stricter requirements for obtaining consent.

The key to the resolution of the competing interests here is to insure that the individuals involved clearly understand that they have a constitutional right to refuse consent. It does not matter whether this is viewed as an application of normal waiver rules or simply as a preventive rule designed to curtail general searches. Police should be required to give persons both oral and written notice of the right to refuse consent and then to obtain from them a written statement of consent. Standard notice forms should be prepared, comparable to those used for Miranda waivers, explaining the right to refuse, the effects of refusal, and the fact that any evidence found during the search may be used at trial.

This approach offers a sensible accommodation of the competing interests. The notice requirement would assure that consent is both informed and real, thus eliminating many, if not all, invalid consent searches. At the same time, it would neither prevent valid consent searches nor imprison suspects in their civil rights.

The majority in Schneckloth v. Bustamonte contended that a Miranda-type notice requirement would be impracticable in the context of consent searches. This contention, however, was plainly specious, a mere make-weight to support the majority's ill-considered determination to facilitate consent searches. Given the obvious danger of general exploratory rummaging incident to fabricated consent, a notice requirement is the least the Court should do to keep a proper balance between privacy and law enforcement needs in this area.

A fundamental purpose of the fourth amendment is to ban general searches and seizures, including dragnet searches, dragnet seizures, and general rummaging. To carry out this purpose, the framers of the Bill of Rights imposed the reasonableness, warrant, probable cause, and particularity requirements for government searches and seizures. The framers' hope was that the judicial branch would assume responsibility for enforcing these requirements and become the bulwark against unjustified government searches and seizures, comparable to those carried out in England and the colonies pursuant to general warrants and writs of assistance. All this is axiomatic fourth amendment theory established in numerous cases decided during the nearly two hundred years since the Bill of Rights took effect.

Unfortunately, the Supreme Court has not performed its constitutional duty vigilantly in recent years. Instead it has allowed the ban on general searches and seizures to erode. The modern Court has repeatedly approved general searches and seizures and invented new rules that invite government officials to conduct general searches and seizures. It has explicitly ratified general searches of papers involving obnoxiously intrusive rummaging of private written communications. It has given at least tacit approval to extended electronic surveillance, despite the plain fact that such surveillance involves aggravated dragnet searches, dragnet seizures, and general exploratory rummaging of private oral communications. It has placed the judicial stamp of approval on general rummaging of personal effects incident to arrests and consent, even though these contexts involve well-known dangers of discrimination and abuse. It has confirmed the government's power to conduct dragnet administrative searches and has failed to impose easily available safeguards in this area. Further, it has failed to enforce the ban on general searches and seizures in a variety of other settings as well.

The Court and the country should now reconsider whether these developments are sound. In this age of big government, we face a grave danger that individual privacy and liberty will be washed away by the tidal wave of demands for law, order, and social control. In fact, one of the greatest issues facing contemporary America is whether civil liberties can survive in an increasingly totalitarian environment. As Justice William O. Douglas warned, "We are rapidly
entering the age of no privacy."\textsuperscript{272} "[T]here begins to emerge," according to Douglas, "a society quite unlike any we have seen—a society in which the government may intrude into the secret regions of a man's life at will."\textsuperscript{273} If nothing is done, Big Brother is just around the corner, and the 1980's may see the transformation of Orwell's anti-utopian fantasy into a grim reality.

The ban on general searches and seizures is still sound social policy and should remain orthodox black-letter constitutional law. It is not too late for the Supreme Court to restore the ban to its traditional place of first priority in our legal system. The Court should once again learn to recognize general searches and seizures when they occur and then vigorously enforce the fourth amendment ban that is the bedrock of American civil liberties. If the Court refuses, then the onus falls on others—voters, legislators, executive officers, and law enforcement personnel—to take the initiative in reinstating the ban and to preserve the nation from the repressive totalitarianism Orwell has predicted.

\textsuperscript{272} Osborn v. United States, 385 U.S. 323, 341 (1971) (dissenting opinion).

\textsuperscript{273} Id. at 343.