

Marijuana Prohibition and the Shrinking of the Fourth Amendment

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I. INTRODUCTION

This article addresses the effect that criminalization of marijuana (as opposed to drugs in general) may have had on the development of Fourth Amendment law. Many commentators have thought that the “War on Drugs” contributed to a shrinking of protections against unreasonable searches and seizures.¹ Our focus is to determine what role marijuana might have played in that development. The challenge, of course, is to imagine an alternate universe in which other drugs (for example, heroin, cocaine, and methamphetamine) are illegal but marijuana is not. To attempt to meet that challenge, I have focused first on trial and appellate opinions from state and lower federal courts—mainly from the 1960s—and then on Supreme Court cases from 1970 to the present. All of these cases involve adult criminal defendants who have moved to suppress seized marijuana evidence on Fourth Amendment grounds.²

Changes in the social and legal contexts make it useful to address these cases in chronological stages. Part II of this article covers the cases decided prior to 1970, the beginning of the era in which a critical mass of marijuana-related search-and-seizure cases began to appear in the Supreme Court. After a brief

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1. There is much to support the notion that the war on drugs in general is largely responsible for the current state of search-and-seizure law. *See, e.g.*, *Hartness v. Bush*, 919 F.2d 170, 174 (D.C. Cir. 1990) (Edwards, J., dissenting) (noting his “growing concern about the degree to which individual rights and liberties appear to be falling victim to the Government’s ‘War on Drugs’”); Kenneth C. Betts, *Fourth Amendment—Suspicionless Urinalysis Testing: A Constitutionally “Reasonable” Weapon in the Nation’s War on Drugs?*, 80 J. Crim. L. & Criminology 1018 (1990); Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. REV. 631, 649–64 (2004); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1 (1986); Steven Wisotsky, *Crackdown: The Emerging ‘Drug Exception’ to the Bill of Rights*, 38 Hastings L.J. 889 (1987); Steven K. Bernstein, Note, *Fourth Amendment—Using the Drug Courier Profile to Fight to War on Drugs*, 80 J. Crim. L. & Criminology 996 (1990); Christian J. Rowley, Note, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 Utah L. Rev. 601 (1992).

2. The discussion will not include civil rights cases, forfeiture cases, post-conviction cases, juvenile cases, or cases tried in military courts. Searches were made using the terms “mari*uana” and “cannabis.”

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review of the earlier twentieth century cases, Part II focuses on the nature of the cases decided during the 1960s. During that decade, the application of the exclusionary rule to the states coincided with a dramatic increase in recreational marijuana use, producing cases that would move up the pipeline to the Supreme Court. Parts III and IV then undertake a detailed look at the Supreme Court opinions, as these are the cases that define the scope of modern Fourth Amendment protections.

This article's conclusions are twofold. First, Part III examines the substantive law announced in the Court's marijuana-related search-and-seizure cases and concludes that the Court could have developed virtually all of the same rules and standards through cases involving other types of evidence. Marijuana, in other words, was not so unique as to have a direct effect on Fourth Amendment doctrine. Part IV, however, notes that the nature of marijuana and its increased use in the 1960s—just when the Fourth Amendment fully applied to the states for the first time—produced a large number of search-and-seizure cases just as the Supreme Court began to pull back from a relatively robust interpretation of Fourth Amendment rights. This article concludes that the juxtaposition of these factors may have allowed the Court to restrict Fourth Amendment rights more quickly than it otherwise would have done.

II. THE PRE-1970 CONTEXT

To explore the effect of marijuana prohibition on the Fourth Amendment, it is useful to think in terms of five stages: before 1937, from 1938 through 1948, from 1949 through 1960, from 1961 through 1970, and from 1970 to the present. This Part summarizes the pre-1970 stages.

In the early part of the twentieth century, marijuana was not on the national radar screen. Its recreational use³ was associated with Mexican immigrants and other “marginal” populations, especially in the western United States.⁴ Largely prompted by racism, and fearing that use would spread, a number of states

3. Marijuana was an ingredient in some medicines, and (in the form of hashish) was used recreationally by “well-to-do” people in major American cities. *E.g.*, HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 7–8 (James Inciardi ed., 1990); LARRY SLOMAN, REEFER MADNESS 22 (The Bobbs-Merrill Co. 1979) (hereinafter REEFER MADNESS I). The medical use was evidently not a concern, as even the states that criminalized recreational use in the first two decades of the twentieth century did not eliminate medical use. Richard J. Bonnie & Charles H. Whitebread II, *Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1026 (1970).

4. *See generally*, *e.g.*, Bonnie & Whitebread, *supra* note 3, at 1011 (noting that in addition to belief that marijuana was addictive, “[t]he most prominent [reason for criminalization] was racial prejudice . . . [and it was] generally a regional phenomenon present in the southern and western states [and focused upon] Mexican-Americans”); Sean Hogan, *Race, Ethnicity, and Early U.S. Drug Policy*, in 1 THE PRAEGER INTERNATIONAL COLLECTION ON ADDICTIONS: FACES OF ADDICTION, THEN AND NOW 37, 46–47 (Angela Browne-Miller ed., 2009); David F. Musto, *Opium, Cocaine, and Marijuana in American History*, in DRUGS: SHOULD WE LEGALIZE, DECRIMINALIZE, OR DEREGULATE? 17, 25 (Jeffrey A. Schaler ed., 1998).

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criminalized marijuana.⁵ This prohibition, however, could not implicate the Fourth Amendment: the amendment was not applicable to states, and so state officers could not violate it.⁶ In addition, although the Fourth Amendment and the exclusionary rule did apply to federal investigations,⁷ state courts could admit evidence obtained by federal officers in violation of the Fourth Amendment.⁸ Finally, although the Supreme Court had established some basic Fourth Amendment principles,⁹ federal law did not yet criminalize the possession or sale of marijuana. There was thus no opportunity for federal courts to develop Fourth Amendment law in the marijuana context.¹⁰

5. Hogan, *supra* note 4, at 46–49; *accord, e.g.*, Bonnie & Whitebread, *supra* note 3, at 1026–27 (noting fear that marijuana use would spread to white youth). In addition, for a variety of reasons—and without a statistical basis—use of marijuana by Mexican immigrants came to be associated in the minds of some with criminality. Hogan, *supra* note 4, at 47–48 (noting that this was especially true when the Great Depression made competition for low-paying jobs an issue). This fear began to be realized after the prohibition of alcohol, but “use remained slight even in 1934 . . . [and] users were still concentrated regionally in the West and Southwest and socio-economically within the lower-class Mexican-American and Black communities.” Bonnie & Whitebread, *supra* note 3, at 1035. *See also* Musto, *supra* note 4, at 25 (noting that marijuana was introduced by “Mexican immigrants, who had come north during the 1920s to work in agriculture, and it soon extended to white and black jazz musicians”).

6. *See Weeks v. United States*, 232 U.S. 383 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961); *cf. Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (applying Fourth Amendment to states for the first time), *overruled by Mapp*, 367 U.S. 643.

7. *Weeks*, 232 U.S. at 391–92.

8. *E.g.*, *Pena v. State*, 67 S.W.2d 611 (Tex. Crim. App. 1934). This practice did not end until 1956. *Rea v. United States*, 350 U.S. 214 (1956) (using supervisory powers to enjoin federal officers from testifying in state court regarding evidence seized in violation of the fourth amendment). While some state cases discussed search or seizure, none related the discussions to the Fourth Amendment. *See, e.g.*, *Gonzales v. State*, 95 S.W.2d 972 (Tex. Crim. App. 1936) (suppressing evidence where officers previously entered home illegally and subsequently obtained a search warrant); *Pena*, 67 S.W.2d 611 (regarding consensual search by U.S. customs agent); *Gonzales v. State*, 299 S.W. 901 (Tex. Crim. App. 1927) (treating testimony about observations during warrantless search as harmless error); *State v. Franco*, 289 P. 100 (Utah 1930) (regarding officers’ ability to identify substance as marijuana and use of undercover officer); *State v. Stilts*, 42 P.2d 779 (Wash. 1935) (regarding timeliness of motion to suppress evidence of warrantless search under state law). A sixth case, *Hoefler v. Mickle*, 153 P. 417 (Or. 1915), involved seizures of misbranded foods and mentioned marijuana only in quoting the statute.

9. *E.g.*, *Taylor v. United States*, 286 U.S. 1, 6 (1932) (holding presence of odor of whiskey emanating from a garage did not validate warrantless search); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (prohibiting exploratory searches incident to arrest to find evidence of conspiracy to violate liquor laws); *Agnello v. United States*, 269 U.S. 20 (1925) (holding, in the context of a cocaine-related conspiracy to violate the Harrison Act, that such searches are unconstitutional where not contemporaneous with arrest of people in the house); *Carroll v. United States*, 267 U.S. 132 (1925) (establishing the mobile vehicle exception to the warrant requirement in context of alcohol prohibition); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (establishing the fruit of the poisonous tree doctrine).

10. In fact, in the federal courts generally, fewer than fourteen reported cases prior to 1937 even mentioned the drug marijuana or cannabis in any context. Some cases mentioned cannabis when quoting language from the Food and Drug Act, although it was not a focus of the case. *United States v. Forty Barrels & Twenty Kegs of Coca Cola*, 241 U.S. 265 (1916); *United States v. Johnson*, 221 U.S. 488 (1911); *George A. Breon & Co. v. United States*, 74 F.2d 4 (8th Cir. 1934); *United States v. Eleven Cartons of Drug Labeled in Part “Vapex,”* 59 F.2d 446 (D. Md. 1932); *Proper v. John Bene & Sons*, 299 F. 863 (E.D.N.Y. 1924); *United States v. American Druggists’ Syndicate*, 186 F. 387 (C.C.E.D.N.Y. 1911); *United States v. St. Louis Coffee & Spice Mills*, 189 F. 191 (E.D. Mo. 1909); *cf. Savage v. Jones*, 225 U.S. 501 (1912) (suit to restrain state chemist

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The situation had changed by 1938, but only slightly. Although more and more states had criminalized the possession and transfer of marijuana,¹¹ the Fourth Amendment still did not apply to the states. On the federal level, Congress had enacted the Marijuana Tax Act of 1937,¹² creating a context in which searches for, and seizures of, marijuana could raise Fourth Amendment issues. Enforcement of the 1937 Act was immediate and enthusiastic.¹³ Nevertheless, in this period there were fewer than ten reported federal search-and-seizure cases involving marijuana, and none were Supreme Court opinions.¹⁴ These cases broke no new ground, mainly applying existing doctrines to facts that happened to include marijuana¹⁵: the “silver platter” doctrine,¹⁶ warrantless searches of mobile vehicles,¹⁷ standing to object,¹⁸ and probable cause.¹⁹

from enforcing state law regarding misbranded veterinary drugs, where state law mentioned cannabis). Two cases involved medicines that included marijuana as an ingredient; the issue was not the existence of marijuana, and so it can be inferred that marijuana was a legitimate ingredient as long as it was properly reflected in the labeling. *United States v. Antikamnia Chem. Co.*, 231 U.S. 654 (1914) (label for seizure and condemnation of drugs under Food & Drug Act, where cannabis indicia was one of the ingredients in the drugs but the issue was mislabeling regarding another ingredient); *Battle & Co. v. Finlay*, 45 F. 796 (E.D. La. 1891) (trademark dispute regarding a “medicinal preparation” whose ingredients included “extract of cannabis indica”).

11. See generally, e.g., *Bonnie & Whitebread*, *supra* note 3, at 1049–50. “By 1937 every state had enacted some form of legislation relating to marijuana and 35 had enacted the Uniform Act.” *Id.* at 1034. The Uniform Narcotics Drug Act was promulgated in 1932, with an optional provision on cannabis. *Id.* at 1028. After this, “marijuana seizures and arrests in most states rose dramatically.” *Id.* at 1049 (basing this conclusion on admittedly insufficient statistics).

12. Marijuana Tax Act, ch. 553, 50 Stat. 551 (1937) (repealed 1970). For an exhaustive history of the Act, see, for example, *Bonnie & Whitebread*, *supra* note 3, at 1048–63.

13. “From October 1 to December 31, 1937, alone, the [Federal Bureau of Narcotics] made 369 seizures totaling 229 kilograms of [marijuana].” *Bonnie & Whitebread*, *supra* note 3, at 1068. See also *id.* at 1069 (providing statistics).

14. In five cases, officers were searching specifically for marijuana. *Gibson v. United States*, 149 F.2d 381 (D.C. Cir. 1945); *Cannon v. United States*, 158 F.2d 952 (5th Cir. 1946); *Thomas v. United States*, 162 F.2d 301 (5th Cir. 1947); *United States v. Williams*, 161 F.2d 835 (2d Cir. 1947); *Symons v. United States*, 178 F.2d 615 (9th Cir. 1949). However, in one of these cases (*Symons*), the search was by local police acting alone, and in another (*Cannon*) the search was for violations of customs laws, not the Tax Act. In one case, officers were looking for “narcotics” generally. *United States v. Horton*, 86 F. Supp. 92 (W.D. Mich. 1949) (involving, most likely a search for cocaine). In others, the reason for the search was unclear. *Tovar v. Jarecki*, 173 F.2d 449 (7th Cir. 1949); *Talley v. United States*, 159 F.2d 703 (5th Cir. 1947); *United States v. Tempone*, 136 F.2d 538 (2d Cir. 1943). The cases reflected enforcement activity across the United States: California (*Symons*), the District of Columbia (*Gibson*), Illinois (*Tovar*), New York (*Tempone*; *Williams*), Michigan (*Horton*), and Texas (*Cannon*, *Thomas*, *Talley*).

15. Some of the cases did not determine search-and-seizure issues. *Tovar*, 173 F.2d 449 (finding Tax Act to be penal statute such that evidence from warrantless search could not be basis for tax assessment); *Thomas*, 162 F.2d 301 (not reaching issue of whether stop and search of car was valid); *Williams*, 161 F.2d 835 (finding harmless error where trial court allowed jury to determine whether search was consensual); *Tempone*, 136 F.2d 538 (affirming trial court’s acceptance of agents’ testimony that search was consensual); cf. *Talley*, 159 F.2d at 703 (5th Cir. 1947) (relying on *Cannon* to find that search was lawful, yet giving no meaningful facts); *United States v. Bell*, 48 F. Supp. 986, 999 (S.D. Cal. 1943) (including search hypothetical involving marijuana).

16. *Symons*, 178 F.2d at 618. The “silver platter” doctrine was originally based upon the holding that the Fourth Amendment did not apply to state and local officers. *Elkins v. United States*, 364 U.S. 206, 210 (1960) (tracing the origins of the doctrine to the 1914 *Weeks* decision). The term comes from *Lustig v. United States*,

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The context began to change, albeit still slowly, between 1949 (when the Supreme Court applied the Fourth Amendment to the states²⁰) and 1961 (when the Court required states to exclude evidence seized in violation of the Fourth Amendment²¹). During these years people in general became more aware of illicit drug use.²² Reflecting public concerns,²³ Congress enacted new criminal legislation in 1951²⁴ and 1956²⁵ that implicated marijuana. In addition, state enforcement of marijuana laws increased.²⁶ Despite this attention, however, marijuana cases were unlikely to affect the development of Fourth Amendment law at the Supreme Court level.

The reality was that there were few marijuana-related Fourth Amendment cases for the Supreme Court to review. First, federal arrests for marijuana “declined continually after 1952,” probably due to a combination of increased state enforcement, federal attention to other drugs, and “a decline in or at least a stabilization of marijuana use by the middle fifties.”²⁷ The 1950s produced forty-five federal circuit court opinions in direct appeals where marijuana-related searches or seizures were at issue,²⁸ but none resulted in a Supreme Court opinion

338 U.S. 74, 79 (1949) (regarding evidence of counterfeiting).

17. *Cannon*, 158 F.2d at 953; *Horton*, 86 F. Supp. 92 at 95.

18. *Gibson*, 149 F.2d at 384.

19. *Horton*, 86 F. Supp. at 99–101.

20. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949). The Court did not, however, require states to adopt an exclusionary remedy. *Id.* at 33.

21. *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* did not apply retroactively, but did apply to cases still pending on appeal. *Linkletter v. Walker*, 381 U.S. 618, 636–40 (1965). *See also, e.g., Danforth v. Minnesota*, 552 U.S. 264, 273 (2008) (explaining the holding in *Linkletter*).

22. *E.g., Bonnie & Whitebread*, *supra* note 3, at 1063.

23. *Id.* at 1063–66.

24. Boggs Act of Nov. 2, 1951, ch. 666, 65 Stat. 767 (repealed 1970) (increasing penalties for all drug offenses and lumping marijuana with narcotic drugs for the first time in federal law).

25. Narcotic Control Act of 1956, ch. 629, 70 Stat. 567 (1956). The NCA “created a new offense by prohibiting illegal importation of marijuana and forbidding knowing receipt, concealment, purchase, sale, and facilitation of transportation or concealment of such illegally imported marijuana.” *Bonnie & Whitebread*, *supra* note 3, at 1077. It also made it a federal crime for an adult to sell any drug to a minor. *Id.* at 1078. Finally, the NCA authorized federal customs and narcotics agents to make warrantless arrests under the statute and allowed the government to appeal trial court rulings suppressing evidence on the basis of an unlawful search or seizure. *Id.* In 1969, the NCA’s presumption that possession of marijuana imparts knowledge that it was illegally imported was held to violate due process. *Leary v. United States*, 395 U.S. 6 (1969).

26. *Bonnie & Whitebread*, *supra* note 3, at 1082.

27. *Id.*

28. In sixteen of these cases, officers set out to search for marijuana. *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961); *Vaccaro v. United States*, 296 F.2d 500 (5th Cir. 1961); *Alvarez v. United States*, 275 F.2d 299 (5th Cir. 1960); *Cervantes v. United States*, 278 F.2d 350 (9th Cir. 1960); *Martinez v. United States*, 279 F.2d 161 (5th Cir. 1960); *Butler v. United States*, 273 F.2d 436 (9th Cir. 1959); *Johnson v. United States*, 270 F.2d 721 (9th Cir. 1959); *United States v. Davis*, 272 F.2d 149 (7th Cir. 1959); *Giacona v. United States*, 257 F.2d 450 (5th Cir. 1958); *Williams v. United States*, 260 F.2d 125 (8th Cir. 1958); *Flores v. United States*, 234 F.2d 604 (5th Cir. 1956); *Wilson v. United States*, 218 F.2d 754 (10th Cir. 1955); *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954); *Rent v. United States*, 209 F.2d 893 (5th Cir. 1954); *Drayton v. United States*, 205 F.2d 35 (5th Cir. 1953); *United States v. Trujillo*, 191 F.2d 853 (7th Cir. 1951). In twelve cases, police set out to

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on the Fourth Amendment.²⁹ In addition, despite the increased state enforcement and the voluntary adoption of an exclusionary remedy in some states,³⁰ the absence of a constitutionally required exclusionary rule meant that relatively few state-court judgments would be eligible for Supreme Court review.³¹

Still, during the 1950s the Court began to restrict the ability of prosecutors to introduce evidence seized in violation of the Fourth Amendment. In 1956, the Supreme Court used its supervisory power to prohibit federal officers from testifying in state court regarding marijuana seized in violation of the Fourth Amendment.³² Four years later, mirroring this change in attitude, the Court

search for drugs other than or in addition to marijuana but found marijuana. *Bourg v. United States*, 286 F.2d 124 (5th Cir. 1961); *Carlo v. United States*, 286 F.2d 841 (2d Cir. 1961); *De Phillips v. United States*, 295 F.2d 477 (9th Cir. 1961); *Teasley v. United States*, 292 F.2d 460 (9th Cir. 1961); *Di Bella v. United States*, 284 F.2d 897 (2d Cir. 1960), *vacated on other grounds*, 369 U.S. 121 (1962); *Fuentes v. United States*, 283 F.2d 537, (9th Cir. 1960); *United States v. Ramirez*, 279 F.2d 712 (2d Cir. 1960); *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959); *Williams v. United States*, 273 F.2d 781 (9th Cir. 1959); *Smith v. United States*, 254 F.2d 751 (D.C. Cir. 1958); *United States v. Walker*, 246 F.2d 519 (7th Cir. 1957); *Jeffers v. United States*, 187 F.2d 498 (D.C. Cir. 1950). In five cases, police set out to look for some item other than drugs but found marijuana. *Kelley v. United States*, 298 F.2d 310 (D.C. Cir. 1961); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *United States v. Stoffey*, 79 F.2d 924 (7th Cir. 1960); *Euziere v. United States*, 266 F.2d 88 (10th Cir. 1959), *vacated and remanded*, 364 U.S. 282 (1960) (remanded for reconsideration in light of *Elkins*); *United States v. Burgos*, 269 F.2d 763 (2d Cir. 1959). The remaining twelve cases involved customs or border searches, searches incident to arrest, or opinions in which the reason for the search was unclear. *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961); *Kelley v. United States*, 298 F.2d 310 (D.C. Cir. 1961); *Rodriguez v. United States*, 292 F.2d 709 (5th Cir. 1961); *Witt v. United States*, 287 F.2d 389 (9th Cir. 1961); *Butler v. United States*, 275 F.2d 889 (D.C. Cir. 1960); *Charles v. United States*, 278 F.2d 386 (9th Cir. 1960); *Ramirez v. United States*, 263 F.2d 385 (5th Cir. 1959); *Rodgers v. United States*, 267 F.2d 79 (9th Cir. 1959); *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957); *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957); *Lott v. United States*, 218 F.2d 675 (5th Cir. 1955); *Scoggins v. United States*, 202 F.2d 211 (D.C. Cir. 1953). For an explanation of why searches incident to arrest are included in the fourth category, see *infra* note 99. This list does not include civil rights cases; forfeiture cases; cases seeking vacation of judgment or post-conviction relief; cases regarding the federal courts' supervisory powers over federal officers if decided prior to January 16, 1956 (the date *Rea* was decided); or cases regarding federal court use of evidence seized by state-level police in violation of the Fourth Amendment if decided prior to January 27, 1960 (the date *Elkins* was decided). Federal trial court opinions also exist but are not included in this count.

29. The only marijuana-related Supreme Court opinions in this era involved the Court's supervisory powers. *Rea v. United States*, 350 U.S. 214 (1956) (discussed *supra* note 8 and *infra* note 32).

30. In 1949, eighteen states had an exclusionary remedy for violations of search-and-seizure rules. See *Elkins v. United States*, 364 U.S. 206, 224 (1960) (Appendix Table I). By 1960, twenty-six states used a total or partial exclusionary rule. *Id.* The exclusionary remedy in a number of these states extended to evidence obtained by federal officers who violated the Fourth Amendment in gathering it. *Id.* at 220.

31. Only one of the state appellate cases involving search and seizure and marijuana was appealed to the Supreme Court, which denied certiorari. *Phillips v. State*, 328 S.W.2d 873 (Tex. Crim. App. 1959), *cert. denied*, 361 U.S. 839 (1959). However, the "adequate and independent state ground" doctrine would prevent the Court from having jurisdiction over most state cases at this time. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945) (noting "the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law"); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 638 (1874). A defendant in state court would not be able to raise the Fourth Amendment issue in the absence of a remedy that makes the issue relevant to a criminal case. The lack of an exclusionary remedy, or its inapplicability to the case at hand, would be the state ground on which the decision allowing use of evidence would rest.

32. *Rea v. United States*, 350 U.S. 214 (1956). In *Wilson v. Schnettler*, 365 U.S. 381, 386 (1961), which involved marijuana, the Court declined to apply *Rea* in the absence of a showing that federal officers were

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eliminated the “silver platter doctrine,”³³ through which most federal courts had admitted evidence seized by state and local police in violation of the Fourth and Fourteenth Amendments.³⁴

The legal and social changes that began in the 1950s gave way to more dramatic events in the following decade. Beginning in the early 1960s, use of marijuana by the American middle class became widespread,³⁵ embodying a demographic shift away from marijuana use mainly by “ethnic minorities and ghetto residents.”³⁶ By the mid-sixties, estimates placed those who had tried marijuana at least once as between eight and twenty-five million people.³⁷ Not surprisingly, arrests involving marijuana increased,³⁸ a situation that was bound to produce more appellate cases raising Fourth Amendment issues.³⁹ Significantly, even if the bulk of these cases arose in state courts, extension of the exclusionary rule to the states in 1961 meant that judgments would now be available for Supreme Court review.⁴⁰ Unless the state provided rights and a remedy more robust than those available under the Fourth Amendment, a holding based on state law was no longer an adequate and independent ground for depriving the Supreme Court of jurisdiction.⁴¹ Thus, the potential for Supreme Court consideration of state search-and-seizure cases increased significantly.

Notwithstanding this potential, it took a while for the effect of these changes to be felt at the Supreme Court level. *Mapp v. Ohio* led to a dramatic rise in state-court cases addressing search and seizure, including those in the context of

actually involved in the search.

33. See *supra* note 16.

34. See *Elkins*, 364 U.S. at 223–24. Although *Wolf v. Colorado*, 338 U.S. 25 (1949) applied the Fourth Amendment to the states, prior to *Elkins* only one circuit, the District of Columbia, had squarely held that *Wolf* did away with the silver platter doctrine. *Id.* at 214.

35. Bonnie & Whitebread, *supra* note 3, at 1096. See also Donald D. Pet & John C. Ball, *Marijuana Smoking in the United States*, 32 FED. PROBATION 8, 13 (1968) (noting the perception that marijuana use was becoming more widespread in the sixties, and citing to newspaper and magazine reports of increased marijuana use among high school and college students).

36. Bonnie & Whitebread, *supra* note 3, at 1096.

37. *Id.* at 1097. According to the Census Bureau, the population of the United States in 1965 was 194,302,963. Historical National Population Estimates: July 1, 1990 to July 1, 1999 (Apr. 11, 2000), <http://www.census.gov/popest/archives/1990s/popclockest.txt> (on file with the *McGeorge Law Review*). In other words, between four percent and twelve percent of the U.S. population had tried marijuana by the mid-sixties.

38. Pet & Ball, *supra* note 35, at 13. Although arrests were up, “[a]s a result of the rapid spread of marijuana use, full enforcement of the marijuana laws [became] impossible.” Bonnie & Whitebread, *supra* note 3, at 1100. Thus, “two enforcement patterns emerged in the sixties: concentration on ‘sellers’ and selective enforcement.” *Id.*

39. See *infra* Appendices A–D.

40. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). As noted above, *Mapp*’s holding was not applied retroactively, but it did apply to cases still pending when it was decided. See *supra* note 21.

41. See *supra* note 31. See also, e.g., *Michigan v. Long*, 463 U.S. 1032, 1037–1045 (1983) (using a marijuana-related search-and-seizure case to outline the modern approach to determining whether an ambiguous holding was based on state or federal law).

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marijuana.⁴² Federal courts also addressed a significantly increased number of marijuana-related search-and-seizure cases during this period.⁴³ Nevertheless, the Supreme Court heard only three such cases between 1961 and 1970. All involved doctrinal rulings that could have been developed in a context other than marijuana, the most obvious (but not exclusive) context being other illegal drugs.⁴⁴ It was in the 1970s that the Supreme Court began to review a large number of Fourth Amendment cases involving marijuana. For this reason, our inquiry into the effects of marijuana criminalization must focus on the period beginning in 1970. Part III will explore whether marijuana had any direct effect on Fourth Amendment doctrine. Part IV will address indirect effects.

III. MARIJUANA'S DIRECT EFFECT ON FOURTH AMENDMENT DOCTRINE

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act.⁴⁵ Title II, commonly known as the Controlled Substances Act,⁴⁶ pertains to control and enforcement, and its provisions extend to marijuana. Although federal attitudes toward marijuana prohibition were ambiguous in the 1970s,⁴⁷ by the early 1980s attitudes had gelled in favor of enforcing the criminal statutes.⁴⁸ In the years since 1980, marijuana arrests have increased, but only about four percent of users are arrested in any given year.⁴⁹ As of 2007, marijuana

42. See *infra* Chart 1.

43. See *infra* Chart 2.

44. *Lewis v. United States*, 385 U.S. 206 (1966) (regarding consent for undercover officer to enter home); *Aguilar v. Texas*, 378 U.S. 108 (1964), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983) (regarding use of unnamed informant's tip for probable cause); *Ker v. California*, 374 U.S. 23 (1963) (holding Court has power to review substance of state court's Fourth Amendment holding).

45. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

46. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified in 21 U.S.C. §§ 801–947 (2006)).

47. See Musto, *supra* note 4, at 26 (“After the youthful counterculture discovered marijuana in the 1960s, demand for the substance grew until about 1978, when the favorable attitude toward it reached a peak. In 1972 the Presidential Commission on Marihuana and Drug Abuse recommended ‘decriminalization’ of marijuana, that is, legal possession of a small amount for personal use. In 1977 the Carter administration formally advocated legalizing marijuana in amounts up to an ounce.”).

48. During the War on Drugs in the 1980s, the Reagan administration linked marijuana use with groups perceived to be marginal or dangerous, such as Communists and homosexuals. *E.g.*, Eric Schlosser, REEFER MADNESS: SEX, DRUGS AND CHEAP LABOR IN THE AMERICAN BLACK MARKET 24 (2003); RICHARD DAVENPORT-HINES, THE PURSUIT OF OBLIVION 436 (2002). In addition, the number of Americans supporting legalization of the drug decreased. Musto, *supra* note 4, at 26 (reporting on Gallup Poll results). In 1980, fifty-three percent favored legalizing possession of small amounts and forty-three percent supported penalties for marijuana use; in 1986: twenty-seven percent favored legalization as compared to sixty-seven percent who favored penalties. The decline began in late 1970s. *Id.*

49. Jon Gettman, *Marijuana Arrests in the United States (2007): Arrests, Usage and Related Data*, THE BULLETIN OF CANNABIS REFORM 2, 10 (Nov. 5, 2009), http://www.drugscience.org/Archive/bcr/7/Gettman_Marijuana_Arrests_in_the_United_States.pdf (on file with the *McGeorge Law Review*).

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accounted for forty-two percent of drug possession arrests and in 2003 accounted for ninety percent of drugs seized.⁵⁰

Since 1970, the number of marijuana-related search-and-seizure opinions issued by state and lower federal courts has increased so dramatically that the task of reading them all is overwhelming. Fortunately, such a project has been rendered essentially irrelevant by the concomitant increase in the number of Supreme Court opinions that address the Fourth Amendment in the context of marijuana. A survey of Supreme Court cases is the best place to focus our examination of the effect of marijuana prohibition on the development of Fourth Amendment law, as it is the Supreme Court that finally sets the rules.⁵¹

In undertaking this survey, we can begin by asking whether there is anything about marijuana itself—or about the ability to search for and detect marijuana—that gave the Court a unique opportunity to develop Fourth Amendment law. As already noted, the marijuana-related cases the Court considered in the 1960s produced rules that could have been developed in other contexts.⁵² This situation continued to hold true after 1970. Although marijuana was involved in the development of some major Fourth Amendment doctrines,⁵³ the presence of marijuana in a case was usually incidental to the substance of the rules the Court established. With a few possible exceptions addressed below,⁵⁴ the Court's marijuana-related cases either continued or established principles that were or could have been developed in other contexts.

The Court's marijuana-related search-and-seizure cases cover a wide range of doctrines, virtually all of which are applicable to searches for items other than marijuana. Some address predicate or overarching issues such as the lack of reasonable expectation of privacy in “open fields”;⁵⁵ affirmation that the use of

50. U.S. Dep't of Justice, Bureau of Justice Statistics, Key Facts on Drug Arrests, *available at* <http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm#drug>, accessed March 1, 2011 (on file with the *McGeorge Law Review*).

51. This summary excludes the case that pre-dates application of the exclusionary rule to the states, *Rea v. United States*, 350 U.S. 214 (1956). It also excludes a case that is neutral as to doctrine: *Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979) (applying the Fourth Amendment to Puerto Rico).

52. *See supra* note 44.

53. In addition to the doctrines discussed in the following paragraphs, marijuana was involved in the first Supreme Court case to apply *Mapp* to a search and seizure by state officers. *Ker v. California*, 374 U.S. 23, 25 (1963) (establishing the Court's power to review the state court's holding on the substantive Fourth Amendment issue). Marijuana was also involved in cases applying other doctrines. *See, e.g.*, *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (holding the Fourth Amendment applicable to Puerto Rico); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding the Fourth Amendment inapplicable to the search of the Mexican residence of a Mexican citizen with no substantial ties to the United States).

54. *See infra* at notes 83–90.

55. *Oliver v. United States*, 466 U.S. 170 (1984) (holding no reasonable expectation of privacy exists in “open fields”). The Court established an earlier iteration of the doctrine in the context of agents entering woods to search for a still. *Hester v. United States*, 265 U.S. 57 (1924). The Court has applied the doctrine outside of the marijuana context. *See United States v. Dunn*, 480 U.S. 294 (1987) (regarding entry into open fields to peer into open barn door for evidence of methamphetamine production); *Air Pollution Variance Bd. of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (not regarding drugs, but a health inspector's unannounced

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drug-sniffing dogs is not a Fourth Amendment “search”;⁵⁶ the use of hearsay information from unnamed or anonymous informants;⁵⁷ the “totality of circumstances” approach to determining probable cause and reasonable suspicion;⁵⁸ and the modern approach to “standing.”⁵⁹ Other marijuana-related cases address issues regarding the issuance or execution of warrants: the “neutral and detached magistrate” requirement;⁶⁰ the particularity requirement;⁶¹ and knock and announce.⁶² In a third category, marijuana-related cases address broadly applicable “reasonableness clause” doctrines such as warrantless entry to prevent destruction of evidence;⁶³ the “mobile vehicle” exception;⁶⁴ the rules about opening closed containers in mobile vehicles;⁶⁵ searches incident to arrest;⁶⁶

entry to measure smoke opacity).

56. *Illinois v. Caballes*, 543 U.S. 405 (2005). The Court first reached this conclusion in a case involving cocaine, not marijuana. *United States v. Place*, 462 U.S. 696, 706–07 (1983). *See also* *United States v. Sharpe*, 470 U.S. 675 (1985) (focusing on the length of the time vehicles were stopped and not addressing the legitimacy of the officer’s use of his own sense of smell to detect marijuana).

57. Both *Illinois v. Gates*, 462 U.S. 213 (1983), and *Aguilar v. Texas*, 378 U.S. 108 (1964), *overruled by Gates*, 462 U.S. 213, involved marijuana. However, marijuana was incidental to the development of informant guidelines, as illustrated by cases that address the same issue in other contexts. *E.g.*, *Alabama v. White*, 496 U.S. 325 (1990) (involving a stop to investigate possession of cocaine); *Spinelli v. United States*, 393 U.S. 410 (1969), *overruled by Gates*, 462 U.S. 213 (regarding evidence of gambling activities).

58. *United States v. Arvizu*, 534 U.S. 266 (2002) (instructing courts to determine reasonable suspicion in a flexible manner giving deference to officer’s experience and training). While *Arvizu* involved an investigative stop near the U.S.–Mexico border that revealed the presence of marijuana, such a stop could as well have resulted in the officer finding other drugs or undocumented persons. *See id.* at 270–71 (noting that the officer’s observations were consistent with suspicions about a variety of unlawful activities).

59. *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (holding that the defendant lacked a reasonable expectation of privacy in purse in which police discovered marijuana). The *Rawlings* Court merely applied a doctrine developed in a case involving rifle shells and a sawed-off rifle. *Id.* at 104–05 (applying *Rakas v. Illinois*, 439 U.S. 128 (1978)).

60. *Connally v. Georgia*, 429 U.S. 245 (1977). The Court established the requirement earlier in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (regarding evidence of homicide).

61. *Maryland v. Garrison*, 480 U.S. 79 (1987) (setting out guidelines for resolving ambiguities when a warrant meeting the particularity requirement on its face turns out to be inaccurate on site). Although this case involved marijuana, that fact had nothing to do with the discrepancy in the description of the place to be searched. *Id.* at 85.

62. *Wilson v. Arkansas*, 514 U.S. 927, 927 (1995) (holding that “whether officers announced their presence and authority before entering a dwelling [is a] factor[] to be considered in assessing a search’s reasonableness.”). In *Wilson*, the search was for methamphetamine in addition to marijuana. *Id.* at 929.

63. *Kentucky v. King*, 131 S. Ct. 1849 (2011) (allowing such entry where police do not create the exigency through conduct that violates or threatens to violate the Fourth Amendment).

64. *California v. Carney*, 471 U.S. 386 (1985) (holding that a mobile home comes within the mobile vehicle exception); *United States v. Johns*, 469 U.S. 478 (1985) (validating delayed search of packages that could have been searched at the time the vehicles were stopped). The Court first established this doctrine in the context of alcohol prohibition. *Carroll v. United States*, 267 U.S. 132 (1925).

65. *California v. Acevedo*, 500 U.S. 565 (1991) (brown paper bag in trunk of car); *United States v. Johns*, 469 U.S. 478 (1985) (bricks of marijuana in the back of a truck wrapped in dark plastic and sealed with tape); *Robbins v. California*, 453 U.S. 420 (1981), *overruled by* *United States v. Ross*, 102 S. Ct. 2157 (1982), (packages in luggage compartment wrapped in green opaque plastic); *Arkansas v. Sanders*, 442 U.S. 753 (1979), *overruled by Acevedo*, 500 U.S. 565, (suitcase in trunk of taxi); *United States v. Chadwick*, 433 U.S. 1 (1977), *overruled by Acevedo*, 500 U.S. 565, (footlocker in trunk). Items other than marijuana can be kept in

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consent to search;⁶⁷ customs and border searches;⁶⁸ “frisks” of automobile passenger compartments for weapons;⁶⁹ the irrelevance of an individual officer’s subjective mental state;⁷⁰ inventory searches of impounded vehicles;⁷¹ investigative stops;⁷² roving border patrols;⁷³ roving, suspicionless spot-checks for license and vehicle-safety violations;⁷⁴ warrantless searches by school officials;⁷⁵

closed containers. *E.g.*, *United States v. Ross*, 456 U.S. 798 (1982) (brown paper bag containing heroin); *People v. Thompson*, 231 P.3d 289 (Cal. 2010) (bags containing clothing).

66. *Thornton v. United States*, 541 U.S. 615 (2004); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Washington v. Chrisman*, 455 U.S. 1 (1982) (upholding search occurring when officer accompanied arrestee to his room to obtain identification); *New York v. Belton*, 453 U.S. 454 (1981); *Gustafson v. Florida*, 414 U.S. 260 (1973). The Court established the modern doctrine in a case involving the seizure of stolen property. *Chimel v. California*, 395 U.S. 752 (1969). Furthermore, the doctrine kicks in with any valid arrest and does not require probable cause or reasonable suspicion that any particular item will be found. *United States v. Robinson*, 414 U.S. 218, 223–27 (1973).

67. *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding advice of freedom to leave is not required for valid consent to search); *Washington v. Chrisman*, 455 U.S. 1 (1982) (regarding turning over baggies of marijuana and full search of room); *Lewis v. United States*, 385 U.S. 206 (1966) (holding undercover status of officer did not vitiate consent). Of course, officers seek consent to search in a wide variety of situations. *E.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (gaining consent in context of traffic stop and finding stolen checks).

68. *United States v. Flores-Montano*, 541 U.S. 149 (2004) (regarding search of automobile fuel tank at international border); *Illinois v. Andreas*, 463 U.S. 765 (1983) (holding no violation of Fourth Amendment where agents re-sealed and then re-opened container); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (regarding right of customs agents to board vessel at sea). Border searches reveal items other than marijuana. *E.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (regarding border search revealing “illegal Mexican aliens”); *United States v. Love*, 413 F. Supp. 1122 (S.D. Tex.) (regarding customs search revealing counterfeit bills), *aff’d*, 538 F.2d 898 (1976), *cert. denied*.

69. *Michigan v. Long*, 463 U.S. 1032 (1983). The “frisk” concept was established in the context of a suspected robbery. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

70. *Ohio v. Robinette*, 519 U.S. 33 (1996). Courts can use this doctrine to validate searches that produced items other than drugs. *See, e.g.*, *People v. Robinson*, 97 N.Y.2d 341, 347, 767 N.E.2d 638, 640 (N.Y. Ct. App. 2001) (gun and bulletproof vest).

71. *Florida v. Wells*, 495 U.S. 1 (1990) (affirming suppression where inventory policies did not extend to opening locked suitcase); *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (upholding search of impounded vehicle). Inventory searches can reveal seizable items other than marijuana or other drugs. *E.g.*, *State v. Wright*, 57 So.3d 465 (La. App. 2011) (regarding inventory search of vehicle that revealed pornographic and other illicit videotapes); *People v. Meyers*, 914 N.Y.S.2d 315 (2011) (upholding inventory search that revealed weapon).

72. *Illinois v. Caballes*, 543 U.S. 405 (2005) (determining that use of drug dog did not unconstitutionally prolong the legitimate traffic stop); *United States v. Sharpe*, 470 U.S. 675 (1985) (holding twenty minute stop to investigate possible drug trafficking reasonable under the circumstances); *Florida v. Royer*, 460 U.S. 491 (1983) (regarding investigative stop of airline passenger). The concept of an investigative stop was validated in the context of a suspected robbery. *Terry v. Ohio*, 392 U.S. 1 (1968).

73. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (invalidating search). *See also* *Bowen v. United States*, 422 U.S. 916 (1975) (declining to apply *Almeida-Sanchez* retroactively to another discovery of marijuana); *United States v. Peltier*, 422 U.S. 531 (1975) (same). Border searches are conducted for purposes other than finding marijuana. *Supra* note 68.

74. *Delaware v. Prouse*, 440 U.S. 648 (1979) (invalidating such searches). Suspicion-based stops for license and equipment violations continue to be valid, however, and may result in evidence other than marijuana. *E.g.*, *State v. Vance*, 790 N.W.2d 775 (Iowa 2010) (regarding suspicion-based stop for license check resulting in seizure of pseudophedrine); *Strick v. Cicchirillo*, 683 S.E.2d 575 (W. Va. 2009) (regarding stop to investigate non-functioning tail light resulting in discovery of driver’s intoxicated condition).

75. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (regarding search of purse that revealed marijuana). Such

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suspicionless drug tests;⁷⁶ and the detention of a building's occupants while awaiting a search warrant.⁷⁷ The remaining cases involve doctrines regarding use of the exclusionary rule: the independent source aspect of the "fruit of the poisonous tree" doctrine⁷⁸ and the good faith exception.⁷⁹

The cases listed above have one thing in common: the fact that marijuana was involved in the search or seizure was incidental to the substance of the rules the Court adopted. Although most of these doctrines represent a restrictive approach to Fourth Amendment rights,⁸⁰ the Court could have established (or did establish) them in the context of other types of evidence. It is logical, therefore, to conclude that the criminalization of marijuana had no influence on content, and thus no direct effect on the shrinking of the Fourth Amendment.

The Court has, however, developed two doctrines that, at first glance, appear to owe their existence to the criminalization of marijuana.⁸¹ That conclusion may be true in one case, but not in the other.

First, had marijuana been legal, the Court might never have had the chance to pin the "search" label on use of a thermal imaging device to detect heat emanating from a residence. *Kyllo v. United States*, which established that rule, involved a search for unusual heat produced by grow-lamps used in marijuana cultivation.⁸² While investigators use thermal imaging devices in non-residential contexts,⁸³ a search of state and lower federal court cases reveals only one domestic use other than the detection of grow-lamps: thermal imaging to

searches can reveal items subject to seizure other than marijuana. *E.g.*, *Porter v. Ascension Parish School Bd.*, 393 F.3d 608 (5th Cir. 2004) (regarding search for drawings that violated school rules); *People v. Johnson*, No. 215591, 1999 WL 33433546 (Mich. Ct. App. Oct. 29, 1999) (unreported) (involving search that revealed handgun).

76. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822 (2002); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989). *See also* *Consolidated Rail Corp. v. Railway Labor Executives' Assn.*, 491 U.S. 299 (1989) (regarding status of suspicionless drug testing in collective bargaining agreement). In all of these cases, the testing was directed at drugs in addition to marijuana.

77. *Illinois v. McArthur*, 531 U.S. 326 (2001). The holding was based in part on the notion that, if free to enter his home, the defendant could destroy evidence. *Id.* at 332. The *McArthur* Court relied in part on the securing of premises validated in *Segura v. United States*, 468 U.S. 796 (1984), which involved a search for cocaine. *Id.* at 333.

78. *Murray v. United States*, 487 U.S. 533 (1988). Courts have applied this doctrine to admit evidence other than marijuana. *E.g.*, *Wilder v. State*, 698 S.E.2d 374, 377-78 (Ga. 2010) (applying doctrine to decline to exclude photos and videotapes), *rev'd*, No. S10G1897, 2011 WL 5303442 (Ga. Nov. 7, 2011).

79. *Arizona v. Evans*, 514 U.S. 1 (1995). The Court first used the doctrine in *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (involving phencyclidine in addition to marijuana). The doctrine is applicable to searches that revealed non-drug evidence. *E.g.*, *Herring v. United States*, 555 U.S. 135 (2009) (gun).

80. The only rights-protective doctrines in the above list are those regarding the "neutral and detached magistrate" and "knock and announce" requirements. *See supra* notes 60 and 62.

81. The "plain smell" doctrine presents a different issue and will be addressed below. *See infra* Part IV.B.

82. *Kyllo v. United States*, 533 U.S. 27 (2001).

83. *E.g.*, *United States v. Valdez-Martinez*, No. 07-10169, 2008 WL 450629 (9th Cir. 2008) (unreported) (involving use of thermal imaging lenses to detect undocumented persons near border).

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ascertain the location of a possible fire.⁸⁴ Although the existence of grow-lamps in a home is probably not *per se* probable cause to search,⁸⁵ their existence can corroborate other evidence and add to probable cause.⁸⁶ Thus, it is significant that use of such devices to scan a home is a “search” requiring a warrant or recognized exception to the warrant requirement. Note, however, that in this situation the criminalization of marijuana did not help *shrink* the Fourth Amendment—*Kyllo* is a case that actually enhances individual privacy.

The second doctrine involves the inspection of domestic curtilage from an aircraft flying or hovering in legal airspace. The Court has held that such aerial viewing is not a “search” for Fourth Amendment purposes.⁸⁷ While both cases involve observation of marijuana, the Court could have addressed the Fourth Amendment issue in the context of aerial inspections of curtilage to find evidence of other common crimes.⁸⁸

This review of the Supreme Court cases leads to the conclusion that the criminalization of marijuana directly influenced the content of virtually no search-and-seizure doctrines. However, this is not to say that marijuana’s criminalization had no effect on search-and-seizure law in general. Part IV will explore the less direct effects.

IV. MARIJUANA AND THE SHRINKING OF THE 4TH AMENDMENT— INDIRECT EFFECTS

The survey undertaken in Part III concluded that, with one possible exception, the criminalization of marijuana had no direct effect on the substance of Fourth Amendment law. Part IV, however, suggests that the timing of the rise in marijuana use, combined with the nature of the drug, contributed indirectly to a diminution of Fourth Amendment rights.

84. *E.g.*, *State v. Shelton*, No. 07-02-0311, 2010 WL 5418997 (N.J. Super. 2010) (unreported) (involving observation of cocaine in plain view once fire personnel entered house to deal with emergency).

85. Grow-lamps can be associated with non-criminal activities. *See, e.g.*, *What Do You Use LED Indoor Lamps For?*, LED GROW LIGHTS REVIEW, <http://ledgrowlightsreview.org/tag/uses-of-grow-lights/> (visited May 23, 2011) (on file with the *McGeorge Law Review*) (suggesting using grow-lights for food and hobby plants).

86. *See, e.g.*, *Kyllo*, 533 U.S. at 29 (involving use of thermal imaging to corroborate investigator’s already-existing suspicion that the suspect was growing marijuana in his home).

87. *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986). On the very day the Court announced the doctrine in the context of marijuana, it also announced the doctrine in the context of an administrative inspection of a manufacturing facility. *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

88. *E.g.*, *Self v. State*, 564 So. 2d 1023 (Ala. Crim. App. 1989), *cert. quashed*, 564 So. 2d 1035 (Ala. 1990) (observation of truck used to transport drugs); *Bartley v. People*, 817 P.2d 1029 (Colo. 1991) (observation of stolen property); *People v. Herrera*, 816 N.Y.S.2d 699, 2006 N.Y. Slip Op. 50450(U) (2006) (observation of perpetrator standing in yard of house); *Commonwealth v. Robbins*, 647 A.2d 555 (1994) (observation of stolen property). *Cf.* *State v. Cottrell*, 198 P.3d 254, 260–62 (2008) (aerial viewing of evidence of hunting violations over non-curtilage land in which owner had a reasonable expectation of privacy under state law).

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The premise of this Part is easy to state, but has several elements. First, beginning in the 1960s, marijuana use was so widespread that police were tripping over the drug even when they were not looking for it exclusively or at all.⁸⁹ Not surprisingly, the ease with which police encountered marijuana led to an increase in the number of marijuana-related search-and-seizure cases. Although most of these cases were prosecuted in state courts,⁹⁰ the exclusionary rule now applied to the states.⁹¹ With the remedy now a federal issue, the Supreme Court had jurisdiction to hear these cases.⁹² All of this resulted in the Court hearing significantly more marijuana-related cases than previously. And, because of the time it takes for a case to work its way through the system, the increase in marijuana-related cases on the Court's docket coincided with the switch from a relatively rights-oriented Court to a rights-restricting Court.⁹³ Although, as noted in Part III, the resulting doctrines were not dependent on marijuana, absent marijuana prohibition the Court may not have had the opportunity to announce new rules and standards as early (or as often) as it did.

This theme will be developed in two steps. The first will explore the ubiquity of marijuana and why the nature of the drug and its manner of use made it easy for police to discover its presence. The second will discuss the effects of timing on the ability of the Court to use marijuana cases in developing Fourth Amendment doctrine.

A. The Drug and its Use

As noted in Part II, marijuana use in the United States became increasingly widespread throughout the 1960s.⁹⁴ It is logical to assume that the growth in the presence of marijuana increased the odds that police would run across the drug in the course of their investigative activities, even if they originally set out to find something else. This conclusion is borne out by examination of the facts in state and lower federal court marijuana cases reported between 1961 and 1970.⁹⁵ In the first category, 127 cases involved searches and seizures in which officers initially set out to look only for marijuana and found it.⁹⁶ In the second category, fifty-

89. *Bonnie & Whitebread*, *supra* note 3, at 1096.

90. *See infra* Chart 3.

91. *Mapp v. Ohio*, 367 U.S. 643 (1961).

92. Contrast the situation prior to federalization of the remedy. *See supra* note 31.

93. *See infra* note 121.

94. *See supra* notes 35–37.

95. The cases were sorted into the following categories based on a reading of the facts. Reasonable minds might differ on the categorization of a particular case. However, the line between cases in which police officers were specifically and only searching for marijuana and all other types of cases is basically clear.

96. *See infra* Appendix A. This category consists of activities focused on marijuana exclusively. This is so because, if marijuana had been legal, police would not have undertaken the activity. Examples of facts in this category include: search warrants listing marijuana as a thing to be seized; warrantless searches where the first intrusion was based on probable cause to think marijuana would be in the place to be searched; and other

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nine cases involved searches and seizures in which officers initially set out to look for other illegal drugs and found marijuana.⁹⁷ The third category, consisting of sixty-one cases, involved searches and seizures in which officers hoped to find some seizable item other than drugs (for example, stolen property) but ended up finding marijuana, alone or in conjunction with other items subject to seizure.⁹⁸ The final category, with eighty-nine cases, involved both searches requiring no individualized suspicion and searches and seizures in which the officers' initial motivations were unclear from the case.⁹⁹ In other words, over the course of the 1960s, there were 127 reported cases in which officials were looking only for marijuana and 209 reported cases in which officials conducted a search for some other reason but found marijuana anyway. The searches originally directed to something other than marijuana predominated in most individual years as well as overall, as shown in Charts 1 and 2.

warrantless activities specifically directed to marijuana (for example, drug-sniffing dogs trained to alert only to marijuana and drug testing absent suspicion only for marijuana). If the activity was meant to discover both marijuana and other items—or was not focused on any item in particular—the case belongs in one of the other categories.

97. *See infra* Appendix B. This category consists of activities in which the officer hoped to find one or more drugs and ended up finding marijuana (alone or in conjunction with other items subject to seizure). These are activities that the officers would have undertaken even if marijuana had been legal. Examples include: search warrants listing other drugs (for example, heroin, cocaine, methamphetamine, etc.) among the things to be seized; warrantless searches where the first intrusion was based on probable cause to think other drugs would be in the place searched; and other warrantless activities directed to other drugs (for example, drug-sniffing dogs trained to alert to a variety of drugs; drug testing absent suspicion for a wide variety of drugs).

98. *See infra* Appendix C. As with the previous category, officers would have undertaken the activity even if marijuana had been legal. Examples include search warrants listing some item other than drugs as the thing to be seized; arrest warrants used as the means of entering the arrestee's own home (in which marijuana was then seized in plain view); warrantless searches where the first intrusion was based on probable cause to think some item other than drugs would be in the place searched; other warrantless activities directed toward finding items other than drugs; and warrantless intrusions in which the officer needed to intervene for non-criminal reasons (for example, "community caretaking" entries) but in which marijuana was seized in plain view.

99. *See infra* Appendix D. As with the previous two categories, officials would have undertaken the activity even if marijuana had been legal. Routine searches are those that officials can conduct automatically, without having to show probable cause, reasonable suspicion, or some other specific justification for the intrusion in question. They include: normal border searches; permissible roadblocks (which may lead to observing marijuana in plain view or to reasonable suspicion or probable cause to proceed to additional intrusions); routine searches of probationers or parolees; and searches incident to arrest (which are automatic upon arrest for any crime; the officer need not show even reasonable suspicion that evidence or weapons may be found. *Chimel v. California*, 395 U.S. 752 (1969)).

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CHART 1: STATE COURT CASES, 1961–1970

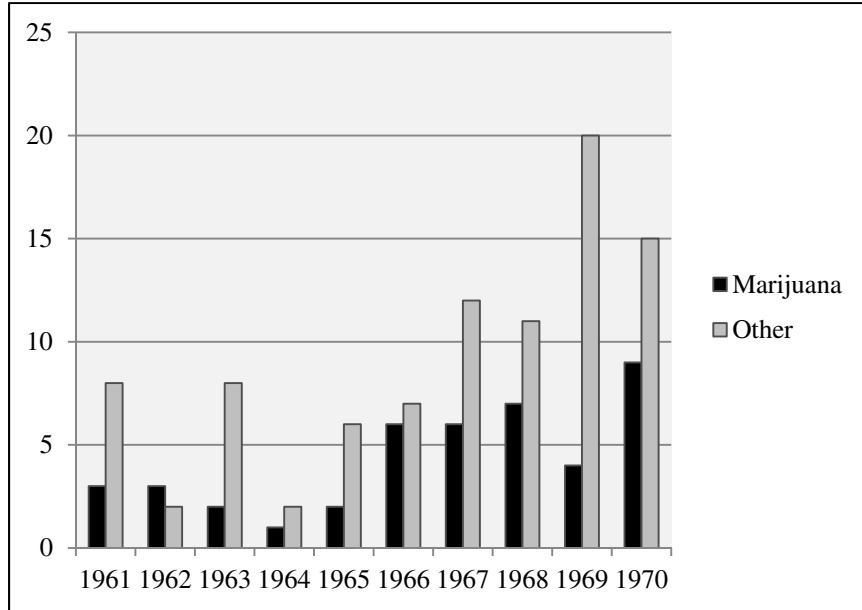
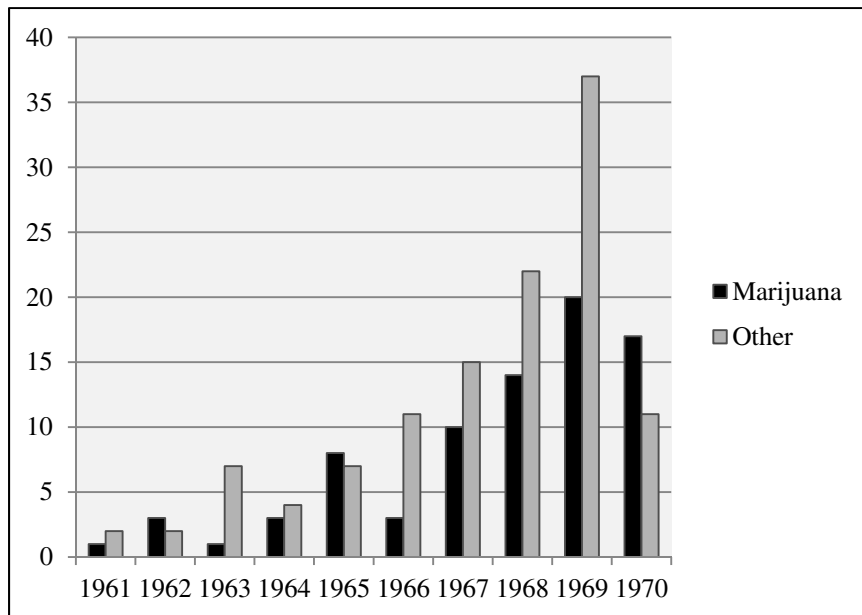


CHART 2: LOWER FEDERAL COURT CASES, 1961–1970



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As the charts indicate, police frequently seized marijuana even when they did not set out to find it. It is likely that widespread use of the drug contributed to the ease with which police ran across it, but the nature of marijuana itself—its distinctive odor in particular¹⁰⁰—was undoubtedly an important factor. Even prior to 1961, courts, including the Supreme Court, recognized “plain smell” as providing or contributing to probable cause based on odors other than marijuana.¹⁰¹ In the 1960s, courts adopted the same approach when the odor of marijuana was put forward as a basis for a search or seizure.¹⁰²

Of course, in the decades following the 1960s, courts continued to find probable cause or reasonable suspicion based on officers having smelled substances other than marijuana.¹⁰³ However, at least at the Supreme Court level, marijuana has played a central role in cases where probable cause or reasonable suspicion was based at least in part on an officer’s “plain smell.”¹⁰⁴ And lower-

100. The odor of marijuana may not, however, be as easy to detect as officers claim it to be. *See generally* Richard L. Doty, Thomas Wudarski, David A. Marshall, & Lloyd Hastings, *Marijuana Odor Perception: Studies Modeled from Probable Cause Cases*, 28 LAW & HUM. BEHAV. 223 (2004) (explaining that little research exists on the human capacity to detect marijuana’s odor despite its widespread acceptance by law enforcement).

101. *E.g.*, *Taylor v. United States*, 286 U.S. 1, 5 (1932) (accepting probable cause based on the odor of whiskey, but invalidating the search for lack of a warrant); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (noting a magistrate “might have found” the smell of burning cocaine to provide probable cause for a search warrant, but declining to validate the warrantless search); *Rodriguez v. United States*, 80 F.2d 646, 647 (5th Cir. 1935) (accepting probable cause based in part on smell of alcohol); *United States v. Sam Chin*, 24 F. Supp. 14, 20 (D. Md. 1938) (accepting probable cause from smell of burning opium); *Pequeno v. State*, 85 So. 2d 600, 602 (Fla. 1956) (accepting odor of fermented mash as establishing probable cause for the crime at issue).

102. *E.g.*, *Miller v. Sigler*, 353 F.2d 424, 427 (8th Cir. 1965); *Romero v. United States*, 318 F.2d 530, 532 (5th Cir. 1963); *People v. Lovejoy*, 91 Cal. Rptr. 94, 96 (Ct. App. 1970); *People v. Sanders*, 277 N.Y.S.2d 487, 493 (App. Div. 1967).

103. *E.g.*, *United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990) (chemicals used to make methamphetamine); *United States v. Curtis*, 430 F.2d 1159 (6th Cir. 1970) (hot mash from an illegal distillery); *United States v. Fattaleh*, 746 F. Supp. 599, 601 (D. Md. 1990) (phencyclidine (PCP) emanating from car); *Fouse v. State*, 43 S.W.3d 158, 164–65 (Ark. Ct. App. 2001) (ether, used to make methamphetamine); *People v. Salvador*, 602 N.E.2d 953 (Ill. Ct. App. 1992) (burning cocaine); *People v. Asencio*, 664 N.Y.S.2d 598 (App. Div. 1997) (gasoline); *State v. Bartley*, 784 P.2d 1231 (Utah Ct. App. 1989) (drip gas). *Cf.* *United States v. Calvo-Saucedo*, No. 10-3019, 2011 WL 343942 (7th Cir. Feb. 4, 2011) (unreported) (smell of caulking contributed to officer’s decision to request consent); *United States v. Rosborough*, 366 F.3d 1145 (10th Cir. 2004) (odor of substance used to cover odor of drugs, smelled in course of consensual search, caused officer to request canine patrol).

104. Although the basis for the search or seizure may not have been the focal issue, a survey of cases from 1951 onward reveals thirteen cases basing probable cause or reasonable suspicion on an officer having smelled marijuana. *See Kentucky v. King*, 131 S. Ct. 1849, 1855 (2011); *Arizona v. Evans*, 514 U.S. 1, 4 (1995); *United States v. Johns*, 469 U.S. 478, 482 (1985); *United States v. Sharpe*, 470 U.S. 675, 679 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Washington v. Chrisman*, 455 U.S. 1, 4 (1982); *New York v. Belton*, 453 U.S. 454, 455–56 (1981); *Robbins v. California*, 453 U.S. 420, 451 (1981) (Stevens, J., dissenting), overruled on other grounds by *United States v. Ross*, 456 U.S. 798, 824 (1982); *Trapper v. North Carolina*, 451 U.S. 997, 999–1000 (1981) (Brennan, J., dissenting from denial of certiorari) (noting that state court had found probable cause based on smell of marijuana); *Rawlings v. Kentucky*, 448 U.S. 98, 103 (1980) (noting state court found probable cause based in part on smell of marijuana); *Delaware v. Prouse*, 440 U.S. 648, 650 (1979); *United States v. Morrison*, 429 U.S. 1 (1976); *United States v. Bowen*, 422 U.S. 916, 917 (1975); *Donaldson v. Calif.*, 404 U.S. 968 (1971). *Cf.* *Carey v. Phipus*, 435 U.S. 247, 248–49 (1978) (noting

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court cases show that officers continue to find it easy to detect the presence of marijuana while engaged in other lawful investigative enterprises. Police in search-and-seizure cases claim to have smelled burned or burning marijuana,¹⁰⁵

smell of marijuana in context of civil suit for expulsion of high-school student); *United States v. Chadwick*, 433 U.S. 1, 3 (1977) (regarding substance used to mask smell of marijuana). Eleven cases involved probable cause or reasonable suspicion based on the officer having smelled liquor, alcohol, or fermenting mash. *See Illinois v. Lidster*, 540 U.S. 419, 422 (2004); *Florida v. Wells*, 495 U.S. 1, 2 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582, 585 (1990); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *South Dakota v. Neville*, 459 U.S. 553, 554 (1983); *United States v. Ventresca*, 380 U.S. 102, 111 (1965); *Schmerber v. California*, 384 U.S. 757, 768–69 (1966); *Heller v. Connecticut*, 389 U.S. 902 (1967) (Fortas, J., dissenting from denial of certiorari); *Chapman v. United States*, 365 U.S. 610, 611–12 (1961); *Jones v. United States*, 357 U.S. 493, 494 (1958); *Breithaupt v. Abram*, 352 U.S. 432, 433 (1957); *United States v. Karo*, 468 U.S. 705, 720–21 (1984); *Johnson v. United States*, 333 U.S. 10 (1948) (odor of burnt opium). *Cf. Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) (involving citizen smelling alcohol on driver's breath and calling police); *Duncantell v. Texas*, 439 U.S. 1032, 1032–33 (1978) (Brennan, J., dissenting from denial of certiorari) (suggesting that officer smelling alcohol on suspect's breath did not provide probable cause to open matchbox); *Gustafson v. Florida*, 414 U.S. 260, 266 n.4 (1973) (noting state's argument that failure to smell alcohol provided probable cause to search for other cause of driver's intoxication).

105. *United States v. Ford*, No. 08-5248, 2010 WL 4877840 (4th Cir. Nov. 30, 2010) (unreported); *United States v. Walters*, No. 08-3101, 2009 WL 5126982 (D.C. Cir. Dec. 01, 2009) (unreported); *United States v. Guzman-Padilla*, 573 F.3d 865 (9th Cir. 2009); *United States v. Franklin*, 547 F.3d 726 (7th Cir. 2008); *Kingsland v. City of Miami*, 382 F.3d 1220 (11th Cir. 2004); *United States v. Cotton*, No. 02-3805, 2003 WL 1192863 (8th Cir. March 17, 2003) (unreported); *United States v. McCoy*, 200 F.3d 582 (8th Cir. 2000); *United States v. Dennis*, No. 96-4086, 1997 WL 282870 (10th Cir. May 28, 1997) (unreported); *United States v. Parker*, 72 F.3d 1444 (10th Cir. 1995); *United States v. Nielsen*, 9 F.3d 1487 (10th Cir. 1993); *United States v. Pierre*, 932 F.2d 377 (5th Cir. 1991); *United States v. Crotinger*, 928 F.2d 203 (6th Cir. 1991); *United States v. Ashby*, 864 F.2d 690 (10th Cir. 1988); *United States v. Dolson*, 673 F. Supp. 2d 842 (D. Minn. 2009); *United States v. Villaseñor Gutierrez*, No. 2:07-CR-091, 2007 WL 4053250 (D. Utah Nov. 13, 2007) (unreported); *United States v. Robinson*, No. 1:07-CR-1, 2007 WL 2138635, (E.D. Tenn. July 23, 2007) (unreported); *United States v. Langel*, No. CRIM. 06-CR-00424-REB, 2007 WL 1229316 (D. Colo. Apr. 24, 2007); *United States v. Hall*, No. CR03-3037, 2004 WL 22272170 (N.D. Iowa July 2, 2003) (unreported); *United States v. Williams*, No. 00-40057-DES, 2001 WL 138890 (D. Kan. Feb. 15, 2001) (unreported); *State v. Cowling*, 34 So. 3d 717 (Ala. Crim. App. 2009); *State v. Gargus*, 855 So. 2d 587 (Ala. Crim. App. 2003); *State v. McGuire*, 479 P.2d 187 (Ariz. Ct. App. 1971); *People v. Cowan*, No. D-054635, 2010 WL 2029017 (Cal. Ct. App. May 24, 2010) (unreported); *People v. Lloyd*, No. B175755, 2005 WL 1492427 (Cal. Ct. App. June 24, 2005) (unreported); *People v. Newman*, 92 Cal. Rptr. 205 (Ct. App. 1971); *People v. Fitzpatrick*, 84 Cal. Rptr. 78 (Ct. App. 1970); *Millet v. United States*, 977 A.2d 932 (D.C. Cir. 2009); *State v. Betz*, 815 So. 2d 627 (Fla. 2002); *State v. Williams*, 967 So. 2d 941 (Fla. Dist. Ct. App. 2007); *State v. T.P.*, 835 So. 2d 1277 (Fla. Dist. Ct. App. 2003); *State v. K.V.*, 821 So. 2d 1127 (Fla. Dist. Ct. App. 2002); *State v. Wells*, 516 So. 2d 74 (Fla. Dist. Ct. App. 1987); *People v. Stout*, 477 N.E.2d 498 (Ill. 1985); *People v. Holdridge*, 454 N.E.2d 769 (Ill. App. Ct. 1983); *People v. Creed*, 339 N.E.2d 305 (Ill. App. Ct. 1975); *State v. Hawkins*, 766 N.E.2d 749 (Ind. App. Ct. 2002); *State v. Fewell*, 152 P.3d 1249 (Kan. Ct. App. 2007); *State v. Gordon*, 646 So. 2d 995 (La. Ct. App. 1994); *Wilson v. State*, 921 A.2d 881 (Md. Ct. Spec. App. 2007); *People v. Taylor*, 564 N.W.2d 24 (Mich. 1997); *State v. Allinder*, No. A-08-0068, 2009 WL 304879 (Minn. App. Feb. 20, 2009) (unreported); *State v. Ortega*, 749 N.W.2d 851 (Minn. Ct. App. 2008); *State v. Thomas*, No. 98-516, 2008 WL 2245718 (Minn. Ct. App. June 3, 2008) (unreported); *Dies v. State*, 926 So. 2d 910 (Miss. 2006); *State v. Olson*, 489 P.2d 663 (Mont. 1979); *State v. Nishina*, 816 A.2d 153 (N.J. 2003); *State v. Stratton*, No. 04-06-1088, 2009 WL 1373598 (N.J. Super. Ct. App. Div. May 19, 2009) (unreported); *People v. Anderson*, 741 N.Y.S.2d 63 (App. Div. 2002); *State v. Carpenter*, 632 S.E.2d 538 (N.C. Ct. App. 2006); *State v. Overby*, 590 N.W.2d 703 (N.D. 1999); *State v. Alge*, No. E-99-053, 2000 WL 426208 (Ohio Ct. App. Apr. 21, 2000) (unreported); *State v. Dietry*, No. 03CA0052, 2004 WL 1160151 (Ohio Ct. App. May 26, 2004) (unreported); *State v. Shaw*, No. 02CA00020, 2002 WL 1821918 (Ohio Ct. App. July 29, 2002) (unreported); *State v. Cross*, 543 P.2d 48 (Or. 1975); *People v. Parisi*, 511 P.2d 447 (Or. Ct. App. 1973); *State v. Devine*, 495 P.2d 51 (Or. Ct. App. 1972); *Parker v. State*, 206

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unburned marijuana,¹⁰⁶ and the odor of marijuana lingering on a subject's clothing.¹⁰⁷ People evidently often smoke marijuana while driving, or have it in

S.W.3d 910 (Tex. Crim. Ct. App. 2006); *State v. Steelman*, 125 S.W.3d 447 (Tex. Crim. App. 2003); *Beck v. State*, No. 03-99-00326-CR, 1999 WL 1243112 (Tex. Ct. App. Dec. 23, 1999) (unreported); *State v. Garcia*, 164 P.3d 1254 (Utah Ct. App. 2007); *State v. Duran*, 131 P.3d 246 (Utah Ct. App. 2005); *State v. Spurgeon*, 904 P.2d 220 (Utah Ct. App. 1995); *State v. South*, 885 P.2d 795 (Utah Ct. App. 1994); *Askew v. Commonwealth*, No. 0616-08-1, 2009 WL 742726 (Va. Ct. App. March 24, 2009) (unreported); *Cherry v. Commonwealth*, 605 S.E.2d 297 (Va. Ct. App. 2004); *Commonwealth v. Jones*, No. 0857-97-3, 1997 WL 557005 (Va. Ct. App. Sept. 9, 1997) (unreported); *State v. Cook*, 86 Wash. App. 1010 (Ct. App. 1997).

106. *Tubbs v. Harrison*, No. 09-6152, 2010 WL 2511540 (10th Cir. June 23, 2010) (unreported); *United States v. Perdona*, 621 F.3d 745 (8th Cir. 2010); *United States v. Kellam*, 568 F.3d 125 (4th Cir. 2009); *United States v. Crumb*, No. 08-3207, 2008 WL 2906770 (6th Cir. July 29, 2008) (unreported); *United States v. Foster*, 376 F.3d 577 (6th Cir. 2004); *United States v. Humphries*, 372 F.3d 653 (4th Cir. 2004); *United States v. Walker*, No. 03-5048, 2003 WL 22674824 (10th Cir. Nov. 13, 2003) (unreported); *United States v. Almaraz*, No. 01-20250, 2002 WL 261441 (5th Cir. Jan 31, 2002) (unreported); *United States v. Gill*, Nos. 94-30370, 95-30031, 95-30043, 1996 WL 121739 (10th Cir. April 10, 1996) (unreported); *United States v. Treleven*, Nos. 93-30227, 93-30228, 1994 WL 502624 (9th Cir. Sept. 13, 1994); *United States v. Melendez-Okamura*, No. 92-2244, 1993 WL 301003 (10th Cir. Aug. 2, 1993) (unreported); *United States v. Blasco*, 702 F.2d 1315 (11th Cir. 1983); *United States v. Haley*, 669 F.2d 201 (4th Cir. 1982); *United States v. Odneal*, 565 F.2d 598 (9th Cir. 1977); *United States v. Gorthy*, 550 F.2d 1051 (5th Cir. 1977); *United States v. Torres*, 437 F.2d 1299 (5th Cir. 1976); *United States v. Thoms*, No. 3:10-CR-069-JWS-JDR, 2011 WL 1212244 (D. Alaska March 21, 2011) (unreported); *United States v. Colon*, No. 10 CR 498 RPP, 2011 WL 569874 (S.D.N.Y. Feb. 8, 2011) (slip opinion); *United States v. McChesney*, No. 1:08-CR-24-TS, 2009 WL 4638846 (N.D. Ind. Dec. 2, 2009) (slip opinion); *United States v. Jackson*, No. 1:09-CR-91, 2009 WL 6371616 (E.D. Tenn. Oct. 29, 2009) (unreported); *United States v. Corica*, No. 2:09CR19, 2009 WL 3584130 (N.D. W.Va. Oct. 28, 2009) (slip opinion); *Douglas v. United States*, Nos. 2:05-CR-07, 2:06-CV-236, 2009 WL 2043882 (E.D. Tenn. July 2, 2009) (unreported); *United States v. Barnett*, No. 2:08-CR-100-FTM-29SP, 2009 WL 426023 (M.D. Fla. Feb. 19, 2009) (unreported); *United States v. Lewis*, No. 1:08-CR-062, 2008 WL 5003412 (S.D. Ohio Nov. 20, 2008) (unreported); *United States v. Ellis*, No. 2:07-CR-223, 2008 WL 2704532 (D. Utah July 3, 2008) (unreported); *United States v. Montemayor*, No. CRIM A 307-CR-281-G, 2008 WL 268280 (N.D. Tex. Jan 31, 2008) (unreported); *United States v. Hodges*, No. CRIMA 5:07CR 55 WDOHL, 2007 WL 3027360 (M.D. Ga. Oct 15, 2007) (unreported); *United States v. Michael*, No. CR 06-1833 MCA, 2007 WL 2712964 (D. N.M. June 22, 2007) (unreported); *United States v. Downs*, No. 97-10034-01, 1997 WL 624947 (D. Kan. Sept. 22, 1997) (unreported); *Jackson v. State*, No. CR-09-1580, 2010 WL 5130749 (Ala. Crim. App. Dec. 17, 2010); *State v. Perry*, No. CR-09-1329, 2010 WL 5130859 (Ala. Crim. App. Dec. 17, 2010); *State v. Crocker*, 97 P.3d 93 (Alaska Ct. App. 2004); *Lustig v. State*, 36 P.3d 731 (Alaska Ct. App. 2001); *State v. Gonzalez*, No. 1 CA-CR 09-0474, 2010 WL 2602039 (Ariz. Ct. App. June 29, 2010) (unreported); *State v. Escobedo*, No. 2 CA-CR 2007-0311, 2008 WL 4767194 (Ariz. Ct. App. Oct. 31, 2008) (unreported); *People v. Bedard*, No. D055581, 2010 WL 4261924 (Cal. Ct. App. Oct. 27, 2010) (unreported); *People v. Benjamin*, 91 Cal. Rptr. 2d 520 (Ct. App. 1999); *People v. Miller*, 108 Cal. Rptr. 788 (Ct. App. 1973); *Nieminski v. State*, No. 2D10-1087, 2011 WL 1599572 (Fla. Dist. Ct. App. April 29, 2011); *State v. Reed*, 712 So. 2d 458 (Fla. Dist. Ct. App. 1998); *Taylor v. State*, 384 So. 2d 1310 (Fla. Dist. Ct. App. 1980); *People v. Kazmierczak*, 604 N.W.2d 667 (Iowa 2000); *State v. Toevs*, No. 100,065, 2008 WL 5401488 (Kan. Ct. App. Dec. 19, 2008) (unreported); *Lindeman v. Commonwealth*, Nos. 2002-CA0001676-MR, 2002-CA-001686-MR, 2004 WL 758287 (Ky. Ct. App. Apr. 9, 2004) (unreported); *State v. Tate*, 33 So.3d 292 (La. Ct. App. Feb. 9, 2010); *Commonwealth v. Lawrence L.*, 792 N.E.2d 109 (2003); *People v. Julkowski*, 335 N.W.2d 47 (Mich. Ct. App. 1983); *Mason v. State*, 42 So. 3d 629 (Miss. Ct. App. 2010); *Vaughn v. State*, 972 So. 2d 56 (Miss. Ct. App. 2008); *Fultz v. State*, 822 So. 2d 994 (Miss. Ct. App. 2002); *State v. Morse*, 132 P.3d 528 (Mont. 2006); *People v. Brown*, 764 N.Y.2d 430 (App. Div. 2003); *People v. Shakemma*, 855 N.Y.S.2d 871 (Dist. Ct. 2008); *State v. Gonzales*, No. WD-07-060, 2009 WL 105636 (Ohio Ct. App. Jan. 16, 2009) (slip opinion); *State v. Hale*, No. 2004-L-105, 2006 WL 90357 (Ohio Ct. App. Jan. 13, 2006) (unreported); *State v. Steen*, No. 21871, 2004 WL 1057647 (Ohio Ct. App. May 12, 2004) (unreported); *State v. Wallace*, 563 P.2d 1237 (Or. Ct. App. 1977); *State v. Childers*, 511 P.2d 447 (Or. Ct. App. 1973); *Commonwealth v. Williams*, 615 A.2d 416 (Pa. Super. Ct. 1992); *Davis v. State*, Nos. 2-

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the car, or use it shortly before driving, and thus many cases involve police detecting the odor after stopping a vehicle for other reasons.¹⁰⁸ Given the probability that all drivers will violate traffic laws at some point, there are good odds that “plain smell” can turn a traffic stop into an arrest for a marijuana offense. Similarly, the smell of marijuana on clothing or in a room might provide probable cause for a more extensive search than originally contemplated. The

07-121-CR, 2-07-122-CR, 2-07-123-CR, 2008 WL 1867995 (Tex. Ct. App. Apr. 24, 2008) (unreported); Garcia v. State, No. 13-01-510-CR, 2003 WL 367563 (Tex. Ct. App. Feb. 20, 2003) (unreported); McGee v. State, 23 S.W.3d 156 (Tex. Ct. App. 2000); Red v. State, No. 14-99-00818-CR, 2000 WL 1228703 (Tex. Ct. App. Aug. 31, 2000) (unreported); Rovnak v. State, 990 S.W.2d 863 (Tex. Ct. App. 1999); State v. Ensley, 976 S.W.2d 272 (Tex. App. 1998); State v. Wright, 977 P.2d 505 (Utah Ct. App. 1999); State v. Crowell, No. WM-95-001, 1995 WL 386486 (Utah Ct. App. Sept. 28, 1995) (unreported); State v. Guzman, 965 A.2d 544 (Vt. 2008); Bunch v. Commonwealth, 658 S.E.2d 724 (Va. Ct. App. 2008); Taylor v. Commonwealth, No. 2856-04-2, 2006 WL 536193 (Va. Ct. App. Mar. 7, 2006) (unreported); State v. Cole, 906 P.2d 925 (Wash. 1995); State v. Fry, 174 P.3d 1258 (Wash. Ct. App. 2008); State v. Friel, No. 14666-9-III, 1996 WL 339847 (Wash. Ct. App. June 20, 1996) (unreported); State v. Johnson, 904 P.2d 1188 (Wash. Ct. App. 1995).

107. *Perdoma*, 621 F.3d 745; *Humphries*, 372 F.3d 653; *Walker*, 2003 WL 938459; *McCoy*, 200 F.3d 582; *Haley*, 669 F.2d 201; *Fitzpatrick*, 84 Cal. Rptr. 78; *Betz*, 815 So. 2d 627; *Reed*, 712 So. 2d 458; *Lindeman*, 2004 WL 758287; *Gordon*, 646 So. 2d 995; *Lawrence L.*, 792 N.E.2d 109; *Vaughn*, 972 So. 2d 56; *Fultz*, 822 So. 2d 994; *Nishina*, 816 A.2d 153; *Wallace*, 563 P.2d 1237; *Cross*, 543 P.2d 48; *McCoy*, 23 S.W.3d 156; *Beck*, 1999 WL 1243112; *Crowell*, 1995 WL 386486; *South*, 885 P.2d 795; *Askew*, 2009 WL 742726; *Bunch*, 658 S.E.2d 724; *Guzman*, 965 A.2d 544. Note, however, that evidence may show that odors associated with other drugs also permeate clothing. See, e.g., *United States v. Matteucci*, 842 F. Supp. 442, 447 (D. Or. 1994) (noting testimony that “methamphetamine which is poorly manufactured has an odor which is similar to the odor of cat urine and will linger on clothing and permeable materials, as well as other objects”).

108. A large number of cases involving an officer’s “plain smell” involved automobiles or trucks. See, e.g., *Ford*, 2010 WL 4877840; *Walters*, 2009 WL 5126982; *Guzman-Padilla*, 573 F.3d 865; *Kellam*, 568 F.3d 125; *Franklin*, 547 F.3d 726; *Crumb*, 2008 WL 2906770; *Foster*, 376 F.3d 577; *Ellis*, 2008 WL 2704532; *Walker*, 2003 WL 22674824; *Cotton*, 2003 WL 1192863; *Almaraz*, 2002 WL 261441; *McCoy*, 200 F.3d 582; *Dennis*, 1997 WL 282870; *Parker*, 72 F.3d 1444; *Nielsen*, 9 F.3d 1487; *Melendez-Okamura*, 1993 WL 301003; *Pierre*, 932 F.2d 377; *Crotinger*, 928 F.2d 203; *Ashby*, 864 F.2d 690; *Torres*, 437 F.2d 1299; *Colon*, 2011 WL 569874; *McChesney*, 2009 WL 4638846; *Jackson*, 2009 WL 5371616; *Corica*, 2009 WL 3584130; *Dolson*, 2009 WL 4572841; *Douglas*, 2009 WL 2043882; *Barnett*, 2009 WL 426023; *Lewis*, 2008 WL 5003412; *Ellis*, 2008 WL 2704532; *Montemayor*, 2008 WL 268280; *Villasenor Gutierrez*, 2007 WL 4053250; *Hodges*, 2007 WL 3027360; *Robinson*, 2007 WL 2138635; *Michael*, 2007 WL 2712964; *Langel*, 2007 WL 1229316; *Hall*, 2004 WL 22272170; *Williams*, 2001 WL 138890; *Downs*, 1997 WL 624947; *Jackson*, 2010 WL 5130749; *Perry*, 2010 WL 5130859; *Cowling*, 34 So. 3d 717; *Gargus*, 855 So. 2d 587; *Adams*, 815 So. 2d 578; *Escobedo*, 2008 WL 4767194; *Bedard*, 2010 WL 4261924; *Cowan*, 2010 WL 2029017; *Lloyd*, 2005 WL 1492427; *Newman*, 92 Cal. Rptr. 205; *Millet*, 977 A.2d 932; *Hawkins*, 766 N.E.2d 749; *Williams*, 967 So. 2d 941; *T.P.*, 835 So. 2d 1277; *K.V.*, 821 So. 2d 1127; *Betz*, 815 So. 2d 627; *Wells*, 516 So. 2d 74; *Taylor*, 384 So. 2d 1310; *Stout*, 477 N.E.2d 498; *Houldridge*, 454 N.E.2d 769; *Toeves*, 2008 WL 5401488; *Thomas*, 2008 WL 2245718; *Fewell*, 152 P.3d 1249; *Lindeman*, 2004 WL 758287; *Tate*, 33 So. 3d 292; *Gordon*, 646 So. 2d 995; *Wilson*, 921 A.2d 881; *Kazmierczak*, 604 N.W.2d 667; *Taylor*, 564 N.W.2d 24; *Julkowski*, 335 N.W.2d 47; *Parisi*, 511 P.2d 447; *Allinder*, 2009 WL 304879; *Ortega*, 749 N.W.2d 851; *Mason*, 42 So. 3d 629; *Dies*, 926 So. 2d 910; *Fultz*, 822 So. 2d 994; *Stratton*, 2009 WL 1373598; *Shakemma*, 855 N.Y.S.2d 871; *Carpenter*, 632 S.E.2d 538; *Overby*, 590 N.W.2d 703; *Gonzalez*, 2009 WL 104535; *Hale*, 2006 WL 90357; *Dietry*, 2004 WL 1160151; *Steen*, 2004 WL 1057647; *Shaw*, 2002 WL 1821918; *Alge*, 2000 WL 426208; *Childers*, 511 P.2d 447; *Devine*, 495 P.2d 51; *Williams*, 615 A.2d 416; *Red*, 2000 WL 1228703; *Beck*, 1999 WL 1243112; *Rovnak*, 990 S.W.2d 863; *Wright*, 977 P.2d 505; *Spurgeon*, 904 P.2d 220; *Guzman*, 965 A.2d 544; *Askew*, 2009 WL 742726; *Bunch*, 658 S.E.2d 724; *Taylor*, 2006 WL 536193; *Jones*, 1997 WL 557005; *Cook*, 1997 WL 243495 (Wash. Ct. App. 1997).

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searches leading to these arrests—and thus the arrests themselves—would not occur if marijuana were legal.

The ease with which officers can detect the presence of marijuana while engaged in other lawful investigative enterprises has produced a body of cases in the state and lower federal courts available for review by the Supreme Court. Part IV.B explores the effect of timing on the Court's use of some of these cases to restrict Fourth Amendment rights.

B. The Effect of Timing

The increasingly widespread use of marijuana throughout the 1960s—and the fact that police were evidently stumbling upon it serendipitously—combined with the application of the exclusionary rule in state courts to increase both the sheer number of marijuana-related search-and-seizure cases and the number of jurisdictions whose appellate courts were forced to grapple with them. Between 1949 (when the Fourth Amendment was first applied to the states) and 1961 (when the exclusionary rule was first applied to the states), approximately 166 appellate cases reviewed the propriety of marijuana-related searches and seizures.¹⁰⁹ While six of these cases arose in Florida,¹¹⁰ North Carolina,¹¹¹ Oklahoma,¹¹² and Washington,¹¹³ the vast majority were from two states: California (115 cases¹¹⁴) and Texas (45 cases¹¹⁵). Between 1961 and 1970, on the

109. Some cases involved exclusionary rules, while others involved the use of other mechanisms, such as mandamus or injunctions, to raise the issues. *See* cases cited *infra* notes 110–115. The listed cases do not include those in which the defendant waived the right to object to the search. *See* *People v. Dosier*, 4 Cal. Rptr. 309 (1960); *People v. Williams*, 341 P.2d 741 (Cal. Ct. App. 1959); *People v. Grayson*, 341 P.2d 820 (Cal. Ct. App. 1959); *People v. Banks*, 338 P.2d 515 (Cal. Ct. App. 1959); *People v. Postell*, 338 P.2d 454 (Cal. Ct. App. 1959); *People v. Thome*, 333 P.2d 394 (Cal. Ct. App. 1958); *Gonzales v. State*, 320 S.W.2d 837 (Tex. Crim. App. 1959); *Phillips v. State*, 328 S.W.2d 873 (Tex. Crim. App. 1959); *Benavidez v. State*, 296 S.W.2d 774 (Tex. Crim. App. 1956); *Salinas v. State*, 266 S.W.2d 388 (Tex. Crim. App. 1954); *Spencer v. State*, 250 S.W.2d 199 (Tex. Crim. App. 1952). The lists also exclude cases where the defendant utilized the wrong mechanism to raise the issue. *See* *People v. Lopez*, 337 P.2d 570 (Cal. Ct. App. 1959); *People v. Cole*, 312 P.2d 701, (Cal. Ct. App. 1957); *People v. Superior Court*, 289 P.2d 813 (Cal. Ct. App. 1955).

110. *Shay v. State*, 70 So. 2d 363 (Fla. 1954); *Escobio v. State*, 64 So. 2d 766 (Fla. 1953).

111. *State v. Grant*, 103 S.E.2d 339 (N.C. 1958).

112. *Pennington v. State*, 302 P.2d 170 (Okla. Crim. App. 1956); *Rainbolt v. State*, 260 P.2d 426 (Okla. Crim. App. 1953).

113. *State v. Henker*, 314 P.2d 645 (Wash. 1957).

114. *People v. Ingle*, 348 P.2d 577 (Cal. 1960); *People v. Macias*, 4 Cal. Rptr. 256 (Dist. Ct. App. 1960); *People v. Machado*, 4 Cal. Rptr. 110 (Dist. Ct. App. 1960); *People v. Burke*, 301 P.2d 241 (Cal. 1956); *People v. Beard*, 294 P.2d 29 (Cal. 1956); *People v. Kitchens*, 294 P.2d 17 (Cal. 1956); *People v. Rios*, 294 P.2d 39 (Cal. 1956); *People v. Winston*, 293 P.2d 40 (Cal. 1956); *People v. Blodgett*, 293 P.2d 57 (Cal. 1956); *People v. Martin*, 293 P.2d 52 (Cal. 1956); *People v. Gorg*, 291 P.2d 469 (Cal. 1955); *People v. Simon*, 290 P.2d 531 (Cal. 1955); *People v. Prieto*, 12 Cal. Rptr. 577 (Dist. Ct. App. 1961); *People v. Davis*, 10 Cal. Rptr. 610 (Dist. Ct. App. 1961); *People v. Fitch*, 11 Cal. Rptr. 273 (Dist. Ct. App. 1961); *People v. Jackson*, 12 Cal. Rptr. 748 (Dist. Ct. App. 1961); *People v. Megliorino*, 13 Cal. Rptr. 635 (Dist. Ct. App. 1961); *People v. Perez*, 11 Cal. Rptr. 456 (Dist. Ct. App. 1961); *People v. Rayford*, 11 Cal. Rptr. 427 (Dist. Ct. App. 1961); *People v. Stewart*, 10 Cal. Rptr. 879 (Dist. Ct. App. 1961); *People v. Strellich*, 11 Cal. Rptr. 807 (Dist. Ct. App. 1961); *People v.*

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Valdez, 10 Cal. Rptr. 664 (Dist. Ct. App. 1961); *People v. Vegazo*, 13 Cal. Rptr. 22 (Dist. Ct. App. 1961); *People v. Amos*, 5 Cal. Rptr. 451 (Dist. Ct. App. 1960); *People v. Baca*, 7 Cal. Rptr. 864 (Dist. Ct. App. 1960); *People v. Boyce*, 6 Cal. Rptr. 859 (Dist. Ct. App. 1960); *People v. Brown*, 7 Cal. Rptr. 717 (Dist. Ct. App. 1960); *People v. Campos*, 7 Cal. Rptr. 513 (Dist. Ct. App. 1960); *People v. Cervantes*, 2 Cal. Rptr. 107 (Dist. Ct. App. 1960); *People v. Fisher*, 7 Cal. Rptr. 461 (Dist. Ct. App. 1960); *People v. Galceran*, 2 Cal. Rptr. 901 (Dist. Ct. App. 1960); *People v. Gonzales*, 5 Cal. Rptr. 920 (Dist. Ct. App. 1960); *People v. Gonzales*, 8 Cal. Rptr. 704 (Dist. Ct. App. 1960); *People v. Haggard*, 4 Cal. Rptr. 898 (Dist. Ct. App. 1960); *People v. Hurst*, 6 Cal. Rptr. 483 (Dist. Ct. App. 1960); *People v. Langley*, 5 Cal. Rptr. 826 (Dist. Ct. App. 1960); *People v. Lewis*, 9 Cal. Rptr. 659 (Dist. Ct. App. 1960); *People v. Nebbitt*, 7 Cal. Rptr. 8 (Dist. Ct. App. 1960); *People v. Okamoto*, 2 Cal. Rptr. 182 (1960); *People v. Pompa*, 2 Cal. Rptr. 659 (1960); *People v. Roland*, 6 Cal. Rptr. 895 (Dist. Ct. App. 1960); *People v. Tisby*, 5 Cal. Rptr. 614 (Dist. Ct. App. 1960); *Gascon v. Superior Court*, 337 P.2d 201 (Cal. Ct. App. 1959); *People v. Adame*, 337 P.2d 477 (Cal. Ct. App. 1959); *People v. Alcala*, 337 P.2d 558 (Cal. Ct. App. 1959); *People v. Anders*, 333 P.2d 854 (Cal. Ct. App. 1959); *People v. Bernal*, 345 P.2d 140 (Cal. Ct. App. 1959); *People v. Clifton*, 337 P.2d 871 (Cal. Ct. App. 1959); *People v. Collier*, 336 P.2d 582 (Cal. Ct. App. 1959); *People v. Daley*, 342 P.2d 335 (Cal. Ct. App. 1959); *People v. Dillard*, 335 P.2d 702 (Cal. Ct. App. 1959); *People v. Garcia*, 341 P.2d 351 (Cal. Ct. App. 1959); *People v. Hollins*, 343 P.2d 174 (Cal. Ct. App. 1959); *People v. King*, 346 P.2d 235 (Cal. Ct. App. 1959); *People v. Martinez*, 336 P.2d 988 (Cal. Ct. App. 1959); *People v. Mateo*, 341 P.2d 768 (Cal. Ct. App. 1959); *People v. Nelson*, 340 P.2d 718 (Cal. Ct. App. 1959); *People v. Pettyjohn*, 342 P.2d 416 (Cal. Ct. App. 1959); *People v. Rodriguez*, 345 P.2d 330 (Cal. Ct. App. 1959); *People v. Simpson*, 339 P.2d 156 (Cal. Ct. App. 1959); *People v. Underhill*, 338 P.2d 38 (Cal. Ct. App. 1959); *People v. White*, 334 P.2d 963 (Cal. Ct. App. 1959); *Markham v. Superior Court In and For Los Angeles County*, 331 P.2d 1000, Cal. Ct. App. 1958); *People v. Ball*, 328 P.2d 276 (Cal. Ct. App. 1958); *People v. Barnett*, 320 P.2d 128 (Cal. Ct. App. 1958); *People v. Cahill*, 328 P.2d 995 (Cal. Ct. App. 1958); *People v. Diggs*, 326 P.2d 194 (Cal. Ct. App. 1958); *People v. Faulkner*, 333 P.2d 251 (Cal. Ct. App. 1958); *People v. Gorg*, 321 P.2d 143 (Cal. Ct. App. 1958); *People v. Hanley*, 319 P.2d 706 (Cal. Ct. App. 1958); *People v. Harvey*, 319 P.2d 689 (Cal. Ct. App. 1958); *People v. Jackson*, 331 P.2d 63 (Cal. Ct. App. 1958); *People v. Melody*, 331 P.2d 72 (Cal. Ct. App. 1958); *People v. Miller*, 328 P.2d 506 (Cal. Ct. App. 1958); *People v. Olson*, 333 P.2d 192 (Cal. Ct. App. 1958); *People v. Robinson*, 333 P.2d 120 (Cal. Ct. App. 1958); *People v. Smith*, 333 P.2d 208 (Cal. Ct. App. 1958); *People v. Spicer*, 329 P.2d 917 (Cal. Ct. App. 1958); *People v. Torres*, 322 P.2d 300 (Cal. Ct. App. 1958); *People v. Washington*, 330 P.2d 67 (Cal. Ct. App. 1958); *People v. Weathers*, 328 P.2d 222 (Cal. Ct. App. 1958); *People v. Wiley*, 328 P.2d 823 (Cal. Ct. App. 1958); *People v. Zubia*, 333 P.2d 349 (Cal. Ct. App. 1958); *People v. Brittain*, 308 P.2d 38 (Cal. Ct. App. 1957); *People v. Dupee*, 311 P.2d 568 (Cal. Ct. App. 1957); *People v. Dupree*, 319 P.2d 39 (Cal. Ct. App. 1957); *People v. Galle*, 314 P.2d 58 (Cal. Ct. App. 1957); *People v. Johnson*, 317 P.2d 1000 (Cal. Ct. App. 1957); *People v. McFarren*, 317 P.2d 998 (Cal. Ct. App. 1957); *People v. Moore*, 315 P.2d 357 (Cal. Ct. App. 1957); *People v. Robarge*, 312 P.2d 70 (Cal. Ct. App. 1957); *People v. Sanson*, 319 P.2d 422 (Cal. Ct. App. 1957); *People v. Walters*, 306 P.2d 606 (Cal. Ct. App. 1957); *Montgomery v. Superior Court In and For Alameda County*, 304 P.2d 206 (Cal. Ct. App. 1956); *People v. Acosta*, 298 P.2d 29 (Cal. Ct. App. 1956); *People v. Colonna*, 295 P.2d 490 (Cal. Ct. App. 1956); *People v. Denne*, 297 P.2d 451 (Cal. Ct. App. 1956); *People v. Dominguez*, 300 P.2d 194 (Cal. Ct. App. 1956); *People v. Dore*, 304 P.2d 103 (Cal. Ct. App. 1956); *People v. Gonzales*, 297 P.2d 50 (Cal. Ct. App. 1956); *People v. Goodo*, 304 P.2d 776 (Cal. Ct. App. 1956); *People v. Harris*, 304 P.2d 178 (Cal. Ct. App. 1956); *People v. Harvey*, 299 P.2d 310 (Cal. Ct. App. 1956); *People v. Jiminez*, 300 P.2d 68 (Cal. Ct. App. 1956); *People v. Johnson*, 294 P.2d 189 (Cal. Ct. App. 1956); *People v. Martin*, 295 P.2d 33 (Cal. Ct. App. 1956); *People v. Montes*, 303 P.2d 1064 (Cal. Ct. App. 1956); *People v. Moore*, 296 P.2d 91 (Cal. Ct. App. 1956); *People v. Ortiz*, 305 P.2d 145 (Cal. Ct. App. 1956); *People v. Schraier*, 297 P.2d 81 (Cal. Ct. App. 1956); *People v. Silva*, 295 P.2d 942 (Cal. Ct. App. 1956); *People v. Stewart*, 301 P.2d 301 (Cal. Ct. App. 1956); *Trowbridge v. Superior Court In and For Los Angeles County*, 300 P.2d 222 (Cal. Ct. App. 1956); *Wirin v. Parker*, 302 P.2d 69 (Cal. Ct. App. 1956); *People v. MacCagnan*, 276 P.2d 679 (Cal. Ct. App. 1954).

115. *Rodriguez v. State*, 350 S.W.2d 854 (Tex. Crim. App. 1961); *Nava v. State*, 340 S.W.2d 955 (Tex. Crim. App. 1960); *Garcia v. State*, 340 S.W.2d 803 (Tex. Crim. App. 1960); *Collins v. State*, 339 S.W.2d 913 (Tex. Crim. App. 1960); *Stevenson v. State*, 334 S.W.2d 814 (Tex. Crim. App. 1960); *Flores v. State*, 334 S.W.2d 306 (Tex. Crim. App. 1960); *Sikes v. State*, 334 S.W.2d 440 (Tex. Crim. App. 1960); *Jones v. State*, 332 S.W.2d 560 (Tex. Crim. App. 1960); *Giacona v. State*, 335 S.W.2d 837 (Tex. Crim. App. 1960); *Robles v. State*, 330 S.W.2d 454 (Tex. Crim. App. 1959); *Rodriguez v. State*, 329 S.W.2d 282 (Tex. Crim. App. 1959);

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other hand, state appellate courts addressed marijuana-related search-and-seizure issues in 202 direct appeals from thirty-two separate states.¹¹⁶ In the lower federal courts, from 1949 through 1960, the data show forty-five direct appeals that resulted in opinions involving searches and seizures where marijuana was found, an average of 4.09 cases per year. In contrast, Appendices A through D show 114 such federal cases from 1961 to 1970 in reported and unreported opinions, for an average of 12.6 cases per year.

In addition to the increase in number after 1961, the jurisdictional variety of marijuana-related prosecutions probably produced a change in the types of cases. By its nature, state law enforcement takes in a broader range of crimes and comprehends a wider scope of situations than does federal law enforcement.¹¹⁷ Similarly, unlike a federal agency with nationally unified administration, state law enforcement is balkanized. Each law-enforcement entity—state police, county sheriffs, and city police—is likely to have different job qualifications, training protocols, and enforcement mechanisms, leading to a variety of abilities and inclinations to obey constitutional guidelines. The resulting diversity in approaches to search and seizure created a plethora of new Fourth Amendment problems for courts to consider—a wider variety of situations than a purely federal caseload would permit. In this regard, it is significant that in all but one of the years between 1964 and 1970, state-court search-and-seizure opinions

Leal v. State, 332 S.W.2d 729 (Tex. Crim. App. 1959); Betancourt v. State, 324 S.W.2d 215 (Tex. Crim. App. 1959); Fields v. State, 323 S.W.2d 439 (Tex. Crim. App. 1959); Baray v. State, 321 S.W.2d 87 (Tex. Crim. App. 1958); Sirvello v. State, 316 S.W.2d 753 (Tex. Crim. App. 1958); Sanders v. State, 312 S.W.2d 640 (Tex. Crim. App. 1958); Glaze v. State, 310 S.W.2d 88 (Tex. Crim. App. 1958); Rose v. State, 308 S.W.2d 52 (Tex. Crim. App. 1957); Roberts v. State, 301 S.W.2d 154 (Tex. Crim. App. 1957); Garcia v. State, 298 S.W.2d 831 (Tex. Crim. App. 1957); Helton v. State, 300 S.W.2d 87 (Tex. Crim. App. 1957); De Leon v. State, 297 S.W.2d 140 (Tex. Crim. App. 1957); Giacona v. State, 298 S.W.2d 587 (Tex. Crim. App. 1957); Palacio v. State, 299 S.W.2d 944 (Tex. Crim. App. 1957); Orosco v. State, 298 S.W.2d 134 (Tex. Crim. App. 1957); Armendariz v. State, 294 S.W.2d 98 (Tex. Crim. App. 1956); Gomez v. State, 293 S.W.2d 657 (Tex. Crim. App. 1956); Doran v. State, 290 S.W.2d 510 (Tex. Crim. App. 1956); Hughes v. State, 289 S.W.2d 768 (Tex. Crim. App. 1956); Thomas v. State, 288 S.W.2d 791 (Tex. Crim. App. 1956); Palacio v. State, 283 S.W.2d 765 (Tex. Crim. App. 1955); French v. State, 284 S.W.2d 359 (Tex. Crim. App. 1955); Torres v. State, 278 S.W.2d 853 (Tex. Crim. App. 1955); Ringo v. State, 275 S.W.2d 121 (Tex. Crim. App. 1955); Gonzales v. State, 272 S.W.2d 524 (Tex. Crim. App. 1954); Jones v. State, 264 S.W.2d 722 (Tex. Crim. App. 1954); Brown v. State, 263 S.W.2d 261 (Tex. Crim. App. 1953); Vallee v. State, 256 S.W.2d 846 (Tex. Crim. App. 1953); Johnson v. State, 254 S.W.2d 131 (Tex. Crim. App. 1952); Hernandez v. State, 255 S.W.2d 219 (Tex. Crim. App. 1952); Lujan v. State, 248 S.W.2d 477 (Tex. Crim. App. 1952); Sutton v. State, 247 S.W.2d 89 (Tex. Crim. App. 1952); Austin v. State, 244 S.W.2d 820 (Tex. Crim. App. 1952); Garza v. State, 246 S.W.2d 635 (Tex. Crim. App. 1951).

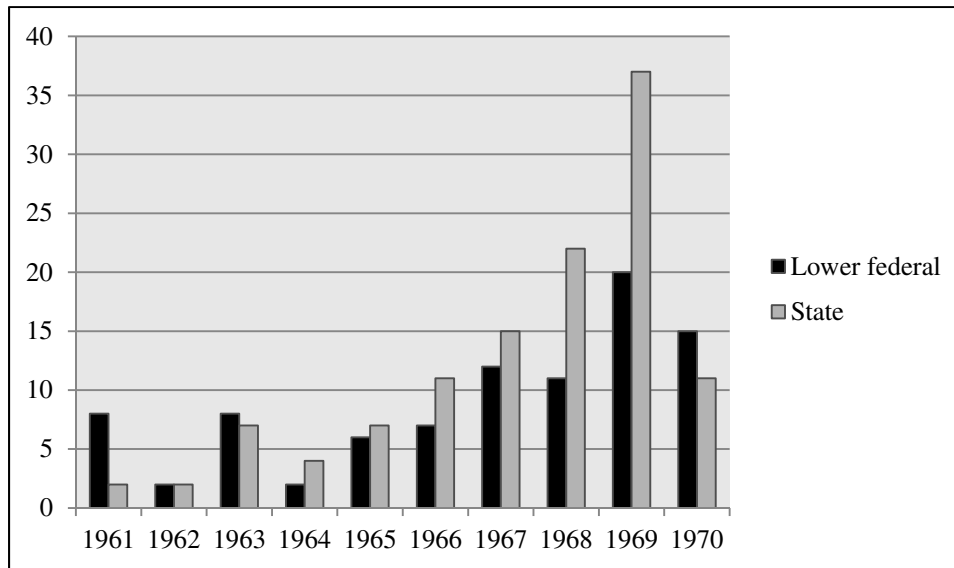
116. See state-court cases in Appendices A–D. The represented states are: Alabama; Alaska; Arizona; California; Colorado; Connecticut; Florida; Georgia; Hawaii; Illinois; Iowa; Kansas; Louisiana; Maine; Massachusetts; Maryland; Michigan; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Pennsylvania; Texas; Virginia; Washington.

117. This is evident from the cases in Appendices A through D, *infra*. Over the nine years from 1961 through 1970, state cases outnumbered federal cases where the searches were mainly aimed at finding marijuana generally, at other drugs, and at other items such as stolen property. However, federal cases outnumbered state cases in the “other,” category, which includes customs and border searches as well as searches incident to arrest. *Id.*

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involving marijuana outnumbered such opinions from the lower federal courts. (See Chart 3).

CHART 3: STATE AND LOWER FEDERAL COURT SEARCH AND SEIZURE CASES INVOLVING MARIJUANA, 1961–1970



In sum, more marijuana use led to more marijuana seizures by a wider variety of officers with diverse backgrounds and training. Application of the exclusionary rule to the states presented a wider variety of Fourth Amendment issues than those arising in federal cases. Not surprisingly, as petitions for certiorari presented these new issues, beginning in about 1970 the Supreme Court increasingly used marijuana-related cases to announce new Fourth Amendment rules and standards. The Warren Court had reviewed four marijuana-related search-and-seizure cases.¹¹⁸ By contrast, the Burger Court¹¹⁹ considered twenty-six, seventeen of which came from state courts.¹²⁰ Importantly, this new wave of

118. *Lewis v. United States*, 385 U.S. 206 (1966); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Ker v. California*, 374 U.S. 23 (1963); *Rea v. United States*, 350 U.S. 214 (1956).

119. Warren Burger became Chief Justice on June 23, 1969 and served in that position until September 16, 1986. Members of the Supreme Court of the United States, United States Supreme Court (2009), <http://www.supremecourt.gov/about/members.aspx> (on file with the *McGeorge Law Review*).

120. *California v. Ciraolo*, 476 U.S. 207 (1986); *California v. Carney*, 471 U.S. 386 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *United States v. Johns*, 469 U.S. 478 (1985); *United States v. Sharpe*, 470 U.S. 675 (1985); *Oliver v. United States*, 466 U.S. 170 (1984); *Florida v. Royer*, 460 U.S. 491 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *Illinois v. Andreas*, 463 U.S. 765 (1983); *Michigan v. Long*, 463 U.S. 1032 (1983); *Robbins v. California*, 453 U.S. 420 (1981); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Washington v. Chrisman*, 455 U.S. 1 (1982); *New York v. Belton*, 453 U.S. 454 (1981); *Rawlings v. Kentucky*,

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marijuana-related search-and-seizure cases hit the Supreme Court just as it was pulling back on Fourth Amendment rights.¹²¹

Continuing this trend, the next critical mass of cases came to the Rehnquist Court, often seen as even less friendly to an expansive view of substantive Fourth Amendment rights and the exclusionary remedy that accompanies those rights.¹²² That Court heard twenty-one marijuana-related search-and-seizure cases, eleven from state courts.¹²³ As of this writing, the Roberts Court has decided only one such case.¹²⁴

Going beyond raw numbers, it is not difficult to conclude that the marijuana cases contributed to a shrinking of Fourth Amendment rights. The Burger Court used marijuana-related cases to announce four doctrines protective of individual rights: the prohibition of stops by roving patrols in the absence of reasonable suspicion or probable cause,¹²⁵ the requirement that warrants be issued by a neutral and detached magistrate,¹²⁶ the notion that investigative stops can morph into arrests under certain circumstances,¹²⁷ and restrictions on opening closed containers found in mobile vehicles.¹²⁸ However, the Burger Court later applied

448 U.S. 98 (1980); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); *Connally v. Georgia*, 429 U.S. 245 (1977); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Bowen v. United States*, 422 U.S. 916 (1975); *United States v. Peltier*, 422 U.S. 531 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

121. See, e.g., Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 63 (Vincent Blasi ed., 1983) (arguing that the Warren Court began its pull-back on Fourth Amendment rights toward the end of its existence and that the Burger Court was not as hostile to individual rights as is largely assumed); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2495–503 (1996) (contending “the Warren Court’s own Fourth Amendment cases set the stage for these later developments”).

122. William Rehnquist became Chief Justice on September 26, 1986, just before the start of the 1986 term, and served in that position until September 3, 2005. Members of the Supreme Court of the United States, United States Supreme Court (2009), <http://www.supremecourt.gov/about/members.aspx> (on file with the *McGeorge Law Review*).

123. *Illinois v. Caballes*, 543 U.S. 405 (2005); *Thornton v. United States*, 541 U.S. 615 (2004); *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Arvizu*, 534 U.S. 266 (2002); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822 (2002); *Illinois v. McArthur*, 531 U.S. 326 (2001); *Kyllo v. United States*, 533 U.S. 27 (2001); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Chandler v. Miller*, 520 U.S. 305 (1997); *Ohio v. Robinette*, 519 U.S. 33 (1996); *Arizona v. Evans*, 514 U.S. 1 (1995); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Wilson v. Arkansas*, 514 U.S. 927 (1995); *California v. Acevedo*, 500 U.S. 565 (1991); *Alabama v. White*, 496 U.S. 325 (1990); *Florida v. Wells*, 495 U.S. 1 (1990); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Florida v. Riley*, 488 U.S. 445 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Murray v. United States*, 487 U.S. 533 (1988); *Maryland v. Garrison*, 480 U.S. 79 (1987).

124. *Kentucky v. King*, 131 S. Ct. 1849 (2011).

125. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

126. *Connally v. Georgia*, 429 U.S. 245, 250 (1977).

127. *Florida v. Royer*, 460 U.S. 491, 499–500 (1983).

128. *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United*

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the investigative-stop-and-arrest guidelines in a manner friendly to law enforcement,¹²⁹ and the closed-container restrictions were relatively short-lived, as the Rehnquist Court later overruled them.¹³⁰ In contrast to the four rights-friendly opinions, the Burger Court used marijuana-related cases to announce thirteen doctrines restrictive of Fourth Amendment rights. One—related to investigative stops versus arrests—has already been noted.¹³¹ As for the others, the Burger Court continued the open fields doctrine,¹³² expanded the restrictive approach to a defendant’s ability to raise Fourth Amendment challenges,¹³³ adopted a more lenient test for use of information from anonymous informants,¹³⁴ applied the mobile vehicle exception to mobile homes in certain circumstances,¹³⁵ expanded the availability of searches incident to arrest,¹³⁶ declined to treat aerial viewing of domestic curtilage as a search,¹³⁷ extended the availability of frisks to the passenger compartments of vehicles,¹³⁸ validated inventory searches of impounded vehicles,¹³⁹ established the special needs exception to the warrant requirement,¹⁴⁰ established the good faith exception to the exclusionary rule,¹⁴¹ and continued a permissive approach to border and customs searches.¹⁴²

The Rehnquist Court’s use of marijuana-related search and seizure cases is also a mixed bag, but again, the expansive view of police authority prevailed. The few instances in which the Court used marijuana cases to advance Fourth Amendment protections turned out to be half-hearted at best. The Court declined to allow suspicionless drug testing for political candidates,¹⁴³ but allowed such testing in other situations.¹⁴⁴ It treated the use of thermal imaging to detect heat

States v. Chadwick, 433 U.S. 1 (1977).

129. United States v. Sharpe, 470 U.S. 675 (1985).

130. California v. Acevedo, 500 U.S. 565 (1991).

131. *Sharpe*, 70 U.S. 420.

132. Oliver v. United States, 466 U.S. 170 (1984).

133. Rawlings v. Kentucky, 448 U.S. 98 (1980).

134. Illinois v. Gates, 462 U.S. 213 (1983), *overruling* Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964).

135. California v. Carney, 471 U.S. 386 (1985).

136. Washington v. Chrisman, 455 U.S. 1 (1982); New York v. Belton, 453 U.S. 454 (1981); Gustafson v. Florida, 414 U.S. 260 (1973).

137. California v. Ciraolo, 476 U.S. 207 (1986).

138. Michigan v. Long, 463 U.S. 1032 (1983).

139. South Dakota v. Opperman, 428 U.S. 364, 372–73 (1976).

140. New Jersey v. T.L.O., 469 U.S. 325, 332 (1985).

141. Michigan v. DeFillippo, 443 U.S. 31, 38–39 (1979).

142. United States v. Johns, 469 U.S. 478, 487–88 (1985); Illinois v. Andreas, 463 U.S. 765 (1983); United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

143. Chandler v. Miller, 520 U.S. 305, 322 (1997).

144. See generally Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822 (2002) (holding that a school district’s policy requiring students to consent to drug testing in order to participate in extracurricular activities does not violate the Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (holding that performing random drug tests of student athletes does not violate the Fourth Amendment); Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (holding that drug testing as a

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emanating from a residence as a search, but implied that the holding could change once such devices come into general public use.¹⁴⁵ It restricted inventory searches to those supported by department policy, but it allowed the policy to be articulated so broadly as to provide few real limits.¹⁴⁶ It declined to allow searches incident to issuance of a citation,¹⁴⁷ but greatly expanded an officer's ability to make custodial arrests for minor infractions.¹⁴⁸ In one marijuana-related case where the Rehnquist Court was unabashedly solicitous of Fourth Amendment rights, the Court declared that knocking and announcing was relevant to the reasonableness of a warrant execution.¹⁴⁹ The Roberts Court later unraveled that protection by declining to apply the exclusionary rule to a violation of the requirement.¹⁵⁰

In contrast, the Rehnquist Court used most of its marijuana-related cases as an opportunity to further restrict Fourth Amendment rights. It extended the aerial search doctrine to officers in hovering helicopters.¹⁵¹ It announced a deferential approach for allowing officers to resolve ambiguities between the place to be searched as described in a warrant and the situation that existed at the scene.¹⁵² It announced a watered-down version of the permissive approach to anonymous informants' tips when used to establish reasonable suspicion;¹⁵³ going further, the Court instructed that the standard be applied in a flexible, deferential manner.¹⁵⁴ It approved a relatively lengthy detention of the occupant of a residence while police sought a search warrant¹⁵⁵ and declined to label an extended traffic stop an arrest.¹⁵⁶ It validated the search of the passenger compartment of a car incident to

required term of employment does not violate the Fourth Amendment).

145. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

146. *See Florida v. Wells*, 495 U.S. 1, 4 (1990) (“[W]hile policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible . . . to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers’ exteriors.”).

147. *Knowles v. Iowa*, 525 U.S. 113, 119–20 (1998).

148. *See generally Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (finding that custodial arrest for failure to wear seat belts, punishable by fine only, did not violate Fourth Amendment). Note that the Roberts Court later extended this approach to allow police, consistent with the Fourth Amendment, to make custodial arrests even where state law restricted police to issuing a summons. *Virginia v. Moore*, 553 U.S. 164 (2008) (regarding cocaine found during search incident to arrest for driving with a suspended license).

149. *Wilson v. Arkansas*, 514 U.S. 927, 935 (1995).

150. *Hudson v. Michigan*, 547 U.S. 586, 600 (2006).

151. *Florida v. Riley*, 488 U.S. 445, 451 (1989).

152. *Maryland v. Garrison*, 480 U.S. 79, 88–89 (1987).

153. *Alabama v. White*, 496 U.S. 325, 333 (1990).

154. *See generally United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“Although an officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop . . . the likelihood of criminal activity need not rise to the level required for probable cause, and it calls considerably short of satisfying a preponderance of the evidence standard.”).

155. *Illinois v. McArthur*, 531 U.S. 326, 337 (2001).

156. *Illinois v. Caballes*, 543 U.S. 405 (2005) (decided in January, before Roberts became Chief Justice in September).

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the arrest of someone who was recently, but not actually, in the car at the time he was arrested.¹⁵⁷ It found consent to search valid even if the defendant was not told he could leave.¹⁵⁸ It expanded the good faith exception to the exclusionary rule.¹⁵⁹ It demonstrated an expansive approach to application of the independent source aspect of the fruit of the poisonous tree doctrine.¹⁶⁰ The Rehnquist Court continued the permissive approach to border and customs searches.¹⁶¹ Finally, it held that the Fourth Amendment did not cover the search by United States agents of the Mexican residence of a Mexican national who had insignificant ties to the United States.¹⁶²

As of November 2011, the Roberts Court has decided only one marijuana-related search-and-seizure case. The Court held that police may use the exigency exception to the warrant requirement to enter a residence when they fear destruction of evidence, even if their own behavior created the exigency.¹⁶³

As noted in Part III, the Burger, Rehnquist, and Roberts Courts could have announced its search-and-seizure holdings in cases that had nothing to do with marijuana. Although the “War on Drugs” has included substances other than marijuana,¹⁶⁴ the widespread use of marijuana as compared to other drugs presented the Court with the opportunity to address some search-and-seizure issues sooner (and perhaps more frequently) than they otherwise would have done.¹⁶⁵ The juxtaposition of an increase in marijuana use and a change in the Court’s attitude toward searches and seizures may represent the real effect of marijuana prohibition on the shrinking of the Fourth Amendment.

157. *Thornton v. United States*, 541 U.S. 615, 624–25 (2004).

158. *Ohio v. Robinette*, 519 U.S. 33, 40–41 (1996).

159. *See generally Arizona v. Evans*, 514 U.S. 1 (1995) (expanding the good-faith exception to the exclusionary rule to include when seizure of evidence is based on clerical error).

160. *Murray v. United States*, 487 U.S. 533 (1988).

161. *United States v. Flores-Montano*, 541 U.S. 149 (2004).

162. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

163. *Kentucky v. King*, 131 S. Ct. 1849 (2011) (noting that police did not violate or threaten to violate the Fourth Amendment in approaching the residence).

164. *E.g.*, Claire Suddath, *Brief History: The War on Drugs*, TIME, Mar. 25, 2009, available at <http://www.time.com/time/world/article/0,8599,1887488,00.html> (reporting a focus on heroin and cocaine) (on file with the *McGeorge Law Review*).

165. Data collected by the Justice Department Bureau of Justice Statistics regarding federal and state arrests indicate that “[m]ore than four-fifths of drug law violation arrests are for possession” as opposed to sale or manufacture. Bureau of Justice Statistics, *Drug Law Violations and Enforcement*, <http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm#drug> (last visited Mar. 30, 2011) (on file with the *McGeorge Law Review*). Between 1982 and 1987, arrests for marijuana surpassed arrests for heroin or cocaine by a substantial margin. *Id.* This switched between 1987 and 1995. *Id.* But in 1995, arrests for marijuana again surpassed heroin or cocaine arrests even more substantially than before. *Id.* Arrests for other drugs, including synthetic drugs, occur less frequently than marijuana, cocaine, and heroin. *Id.*

V. CONCLUSION

The social and legal contexts made it difficult for marijuana criminalization to affect the Fourth Amendment until the early 1960s. Beginning in 1961, however, with the application of the exclusionary rule to the states, a change in both contexts resulted in a significant number of marijuana-related search and seizure cases becoming available for consideration by the United States Supreme Court. The Court mainly used these cases as vehicles to restrict Fourth Amendment rights. The Court could have developed the same doctrines in cases involving evidence other than marijuana. Nevertheless, the juxtaposition of a critical mass of marijuana cases and a Court increasingly friendly to law enforcement resulted in marijuana criminalization affecting the rapidity, if not the actuality, of the shrinking of the Fourth Amendment.