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Beware the Friends You Keep and the Places You Sleep: The Fourth Amendments Limited Protection over Visitors and Their Belongings

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BEWARE THE FRIENDS YOU KEEP AND THE PLACES YOU SLEEP: THE FOURTH AMENDMENT'S LIMITED PROTECTION OVER VISITORS AND THEIR BELONGINGS

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INTRODUCTION

The Arizona state police obtained a warrant to search a Kingman residence for drugs and drug paraphernalia.[1] Upon entering the home, the police found Alicia Gilstrap taking a shower; Gilstrap was not named in the warrant.[2] After escorting her to another room, one of the officers found and moved her purse from the bathroom and placed it in an adjoining bedroom.[3] While searching that bedroom, another officer searched the purse, finding Gilstrap's driver's license, small bags of marijuana, methamphetamine residue, packages of red and blue baggies, and a scale.[4] Subsequently, Gilstrap was arrested.[5] Having not being named in the search warrant, could Gilstrap claim that the police violated her Fourth Amendment right against unreasonable searches and seizures?

The Fourth Amendment does not deny a visitor the ability to bring a Fourth Amendment claim.[6] However, determining what protection the Fourth Amendment affords is not exactly clear. By its text, the Fourth Amendment requires that searches and seizures are reasonable and that warrants are both particular

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[1] State v. Gilstrap, 332 P.3d 43, 44 (Ariz. 2014).

[2] *Id.*

[3] *Id.*

[4] *Id.* There is no indication that either officer knew that the purse belonged to Gilstrap. *See id.*

[5] *Id.*

[6] *See* Jones v. United States, 362 U.S. 257, 265–67, 272–73 (1960) (finding that a visitor has standing to bring a Fourth Amendment claim), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

and based on probable cause.[7] The term "reasonable" has been interpreted as protecting one's "reasonable expectation of privacy,"[8] but the United States Supreme Court has failed to provide a consistent explanation for defining what circumstances are deemed reasonable.[9] Nonetheless, it is a well-established principle that one does hold a reasonable expectation of privacy in their the home.[10]

The right to be free from unreasonable searches and seizures in the home is considered "the core of the Fourth Amendment."[11] Not only is the home expressly mentioned in the text of the Fourth Amendment,[12] but the home has also been regarded as "the most essential bastion of privacy recognized by the law,"[13] and a place where an individual expects the most privacy.[14]

Whether a visitor holds a similar reasonable expectation is less transparent. This is mostly because determining what is reasonable "is the central mystery of Fourth Amendment law."[15] First introduced in *Katz v. United States*,[16] the reasonable expectation of privacy doctrine has been seen as a two-fold requirement: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[17] Defining the latter has become the primary

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[7] U.S. CONST. amend. IV; Payton v. New York, 445 U.S. 573, 584 (1980).

[8] *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504 (2007); Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[9] Kerr, *supra* note 8, at 503.

[10] *See* Wilson v. Layne, 526 U.S. 603, 612 (1999); *see also* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 905 (2010) ("The ideal of the inviolate home dominates the Fourth Amendment. The case law accords stricter protection to residential search and seizure than to many other privacy incursions.").

[11] *See Layne*, 526 U.S. at 612.

[12] U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . . .").

[13] Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsberg, J., dissenting).

[14] 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3, at 725 (5th ed. 2012).

[15] Kerr, *supra* note 8, at 504.

[16] 389 U.S. 347 (1967).

[17] *Id.* at 361. The Supreme Court later replaced the subjective prong, and added that "concepts of real or personal property law" are relevant. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). In other cases, however, the Court has rejected this notion. *See* Kerr, *supra* note 8, at 504.

cause of inconsistent rulings and has left most confused about how it applies.[18] For one, who is "society" and second, how do we know what it thinks? The Supreme Court's answer to these questions has led the Court through "a series of inconsistent and bizarre results."[19]

In an effort to apply *Katz* and determine what protection the Fourth Amendment affords a visitor's belongings, state and federal courts have applied one of three tests.[20] The first test is known as the possession test and assesses whether the visitor possessed the item at the time the search warrant was executed.[21] In comparison, the second test, known as the relationship test, looks at the connection between the visitor and the premises.[22] The third and final test takes a different approach. Known as the actual-notice test, it focuses on whether the officers were given notice about the item's ownership before it was searched.[23] Recently, in *State v. Gilstrap*,[24] the Arizona Supreme Court joined several other courts in adopting the possession test, classifying it as the most efficient.[25] When applying it, the court found that although Gilstrap held a reasonable expectation of privacy in the Kingman residence, that expectation did not reasonably extend to her purse, which was not in her actual possession.[26]

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[18] Kerr, *supra* note 8, at 504–05. *See generally* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727 (1993) (finding through an empirical study that the Supreme Court's interpretation of what society finds reasonable does not reflect societal understanding).

[19] *See* Kerr, *supra* note 8, at 505. Some argue that the Supreme Court's decisions do not reflect society's understanding. *See* Slobogin & Schumacher, *supra* note 18, at 733–34, 737–42 (finding through an empirical study that the Supreme Court's interpretation of what society finds reasonable does not reflect societal understanding).

[20] *See, e.g.*, United States v. Teller, 397 F.2d 494 (7th Cir. 1968) (applying the possession test); United States v. Micheli, 487 F.2d 429 (1st Cir. 1973) (applying the relationship test); State v. Nabarro, 525 P.2d 573 (Haw. 1974) (applying the actual-notice test).

[21] *See* State v. Gilstrap, 332 P.3d 43, 44–45 (Ariz. 2014).

[22] *Id.* at 45.

[23] *Id.*

[24] 332 P.3d 43 (Ariz. 2014).

[25] *See id.* at 46–47.

[26] *Id.*

The existence of these three tests adds to the confusion of interpreting the Fourth Amendment and ultimately fails to provide guidance for officers conducting searches, since "[s]earches often occur [under] harried, dangerous circumstances."[27] It is therefore imperative that the Supreme Court provides a guideline that officers can readily turn to when conducting these searches. A uniform test would not only make it easier for officers to determine when an item belonging to a visitor may be searched,[28] but would also lead to court efficiency and uniformity in rulings.[29]

Thus, this Note concludes that the Arizona Supreme Court correctly applied the possession test and strongly urges the Supreme Court to address the issue and follow in Arizona's footsteps. The possession test not only provides the best guidance for both officers and courts, but also provides the most precision and clarity. More importantly, this approach aligns with current Supreme Court case law and conforms to established Fourth Amendment principles. Holding otherwise would gravely undermine policy, disregard current precedents, and undervalue the sole purpose for the Fourth Amendment's existence: to protect one's reasonable expectation of privacy. Part I examines the scope of the Fourth Amendment, its reasonable expectation of privacy standard, and its application to visitors. Part II provides an overview of the three tests. Part III concludes by illuminating the precision and accuracy of the possession test, its conformity to current Fourth Amendment principles, its potential to guide officers during execution, and its ability to lead to uniformed rulings.

I. BACKGROUND AND HISTORY

A. The Fourth Amendment

The Fourth Amendment of the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[30] As it was ultimately adopted, the Fourth

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[27] *Id.* at 46. *See infra* note 174.
[28] *See infra* notes 151–55 and accompanying text.
[29] *See* discussion *infra* Part III.D.
[30] U.S. CONST. amend. IV.

Amendment has been interpreted as containing two separate clauses, "the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause."[31]

The Fourth Amendment is a constitutional right that protects all. To be free from unreasonable searches and seizures is a freedom that "extends to the innocent and guilty alike."[32] This right "marks the right of privacy as one of the unique values of our civilization."[33] The purpose of the Fourth Amendment is to protect one's privacy in that "the hands of the police" shall not touch another person's property, "unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation."[34] Thus, violations of this right trigger the exclusionary rule, which allows for the suppression of any evidence secured as a result.[35]

The reasonableness and warrant requirements are driving forces behind Fourth Amendment protection.[36] The United States Supreme Court has stated that "[a] search without a warrant demands exceptional circumstances" and "there must be compelling reasons to justify the absence of a search warrant."[37] The purpose of the Fourth Amendment is to ensure that any invasion of privacy by the government is "reasonable."[38]

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[31] Payton v. New York, 445 U.S. 573, 584 (1980).

[32] McDonald v. United States, 335 U.S. 451, 453 (1948).

[33] *Id.*

[34] *Id.*

[35] *Fourth Amendment*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/fourth_amendment (last visited Mar. 29, 2016). *See also* Mapp v. Ohio, 367 U.S. 643, 654 (1961) (extending the exclusionary rule to state courts and local actors); *McDonald*, 335 U.S. at 453 ("[T]he law provides as a sanction against the flouting of this constitutional safeguard the suppression of evidence secured as a result . . . when it is tendered in a federal court.").

[36] *See* ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS 16 (2003) ("The history of the Fourth Amendment in contemporary times has focused mainly on the meaning of the reasonableness clause and the importance of a warrant."). Although it is debatable as to whether the framers of the Constitution intended for the requirement of a search warrant, the Supreme Court has consistently articulated its preference for warrants. *See id.* at 11–13.

[37] *McDonald*, 335 U.S. at 454.

[38] *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))).

Generally, the issuance of a valid judicial warrant[39] meets the reasonableness requirement, since a judicial warrant ensures that all "inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' "[40]

As time progressed, however, the warrant requirement became much easier to circumvent. Although presumed unreasonable,[41] a warrantless search is not always deemed to be in violation of the Fourth Amendment. Instead, the requirement of a warrant is premised on *Katz's* reasonable expectation of privacy doctrine; any circumstance which results in a reduced reasonable expectation is no longer a search, and the need for a warrant is no longer necessary.[42] Unfortunately, defining what constitutes a reasonable expectation has been far from easy.[43]

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[39] In order for a search warrant to be valid it must (1) be based on probable cause, (2) be supported by Oath or affirmation (magistrate requirement), and (3) "particularly describ[e] the place to be searched, and the persons or things to be seized." *See id.* (quoting U.S. CONST. amend. IV); *see also* FED. R. CRIM. P. 41(e)(2)(a) (stating what a warrant must say in order to be valid). The particularity requirement is important, since "[t]he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." Massachusetts v. Sheppard, 468 U.S. 981, 988 n.5 (1984); *see also* Groh v. Ramirez, 540 U.S. 551, 557–58 (2004) (finding that a search warrant for defendant's ranch that failed to describe the persons or things to be seized was invalid on its face).

[40] *Riley*, 134 S. Ct. at 2482 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

[41] *Fourth Amendment*, *supra* note 35.

[42] *See* Minnesota v. Carter, 525 U.S. 83, 90–91 (1998) (finding that a person in a commercial residence holds a reduced expectation of privacy, and although there was no warrant, found that no search occurred in violation of the Fourth Amendment). The Supreme Court has defined exceptional, "well-delineated" circumstances in which a search warrant is not required. Katz v. United States, 389 U.S. 347, 357 (1967). There are five well-known exceptions. First, if a person legally authorized to do so gives consent, the police do not need a warrant. *See* WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK 20 (3d ed. 2010). Second, under the plain view doctrine, if an officer observes a person in the act of committing an offense or any probable evidence in a constitutionally protected area, a warrant is not required. *See id.* at 19–20. Third, when persons are lawfully arrested, the police can search the place where the arrest is made without a warrant; this is known as a search incident to arrest. *See id.* at 16–17. Fourth, known as the Terry exception, if the police can articulate a reasonable suspicion that crime is afoot or that a person holds weapons, the officer may conduct a stop and frisk of the person. *See id.* at 18–19. Fifth, if the police feel that the time it would take to obtain a search warrant would either risk public safety, or result in the loss of evidence, the police may perform a search without a warrant; this is known as exigent circumstances or the " 'hot pursuit' exception." *See id.* at 18. These exceptions were originally based on

B. The Reasonable Expectation of Privacy Doctrine and Its Application to Visitors

Since its appearance in *Katz*, the reasonable expectation of privacy doctrine has been considered "remarkably opaque" and "the central mystery" of the Fourth Amendment.[44] In *Katz*, FBI agents attached an electronic listening and recording device to the outside of a public telephone booth, where the defendant was placing a call.[45] At trial, the defendant moved to suppress the recordings, which held sufficient evidence to convict him of violating a federal statute.[46] The Supreme Court held that the government's activities of electronically listening to and recording the defendant's words "violated the privacy upon which he justifiably relied while using the telephone booth."[47] The Court emphasized that the Fourth Amendment "protects people, not places," and its protection of people depends on one's reasonable expectation of privacy.[48] The reasonable expectation of privacy doctrine was discussed further in Justice Harlan's concurrence.[49] In his attempt to define the doctrine, Justice Harlan created a two-fold requirement: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[50]

Through its subsequent decisions, the Supreme Court has created a sliding scale for determining whether a visitor holds a reasonable expectation of privacy under *Katz*. The issue was first addressed in *Jones v. United States*,[51] which held that any person "legitimately on the premises" may bring a Fourth Amendment claim.[52] However, in *Rakas v. Illinois*,[53] the Court vigorously

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practicality concerns, but more recent exceptions are justified by a finding of a limited expectation of privacy. *See* BLOOM, *supra* note 36, at 101. See GREENHALGH, *supra*, at 16–22, for a list of all the recognized exceptions.

[43] *See generally* Kerr, *supra* note 8 (discussing the central issues behind the reasonable expectation standard).

[44] *Id.* at 504–05.

[45] *Katz*, 389 U.S. at 348.

[46] *Id.*

[47] *Id.* at 353.

[48] *See id.* at 351–52.

[49] *See id.* at 360–62 (Harlan, J., concurring).

[50] *Id.* at 361 (Harlan, J., concurring).

[51] 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

[52] *Id.* at 267.

rejected the "legitimately on the premises" standard, finding it too broad.[54] This standard was ultimately rejected by the Court in *United States v. Salvucci.*[55]

The Supreme Court revisited the issue in *Minnesota v. Olson*.[56] In *Olson*, the police obtained a pickup order for the defendant, who was suspected of being a getaway driver for a robbery.[57] Upon finding the defendant's location, the police, without a warrant, entered a duplex where the defendant was an overnight guest.[58] Applying *Katz*, the *Olson* Court assessed whether an overnight guest held an expectation of privacy that society recognizes as reasonable:[59]

> To hold that an overnight guest has a [reasonable] expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. . . . From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. . . . The houseguest is there with the permission of his host, who is willing to share his house and his privacy with his guest. It is unlikely that the guest will be confined to a restricted area of the house; and when the host is away or asleep, the guest will have a measure of control over the premises.[60]

Ultimately, the Court held that the defendant had a reasonable expectation of privacy in the duplex, therefore making the search unreasonable.[61]

The Supreme Court narrowed its *Olson* holding in *Minnesota v. Carter*.[62] There, the defendant was arrested after the police observed him inside an apartment, bagging cocaine with the apartment lessee.[63] The Court found that the defendant, who was not an overnight guest and who used the home as a place to conduct business, did not hold the same

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[53] 439 U.S. 128 (1978).
[54] *Id.* at 141–42.
[55] 448 U.S. 83, 85 (1980).
[56] 495 U.S. 91 (1990).
[57] *Id.* at 93–94.
[58] *Id.*
[59] *See id.* at 97–100.
[60] *Id.* at 98–99.
[61] *See id.* at 96–98.
[62] 525 U.S. 83 (1998).
[63] *Id.* at 85.

reasonable expectation of privacy as the defendant in *Olson*.[64] The Court stated, "An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home."[65] Accordingly, it held that since the defendant was "essentially present for a business transaction and [was] only in the home [for] a matter of hours," he did not have a reasonable expectation of privacy.[66]

These cases analyzing a visitor's reasonable expectation have left a vague and unhelpful sliding scale. On one end, "the overnight guest . . . typif[ies] those who may claim [Fourth Amendment] protection.[67] On the other end, "one merely 'legitimately on the premises' . . . typif[ies] those who may not."[68] In the middle, no protection is granted to a guest in a home that is actually conducted as a place of business.[69] But what these cases fail to address are situations where the visitor is not an overnight guest, and where the house is an actual dwelling and not a place of business. For example, how would the Court address a case like *United States v. Johnson*,[70] where the defendant, a visitor in a friend's home being lawfully searched, was arrested after police found narcotics in her purse;[71] or a case like *State v. Reid*,[72] where the defendant, also a visitor in an apartment being lawfully searched, was arrested after the police found cocaine in her jacket?[73]

The problem is that cases like *Johnson*, *Reid*, and similarly, *Gilstrap*, are distinguishable from current Supreme Court precedents *Jones*, *Olson*, and *Carter*. In the latter cases, the police entered the home without a warrant, while in the former cases, the officers were armed with valid warrants to search the premises. The relevance of *Jones*, *Olson*, and *Carter* is the Supreme Court's recognition of a visitor's reasonable expectation of privacy in another's home. Yet, for cases like *Johnson*, *Reid*, and *Gilstrap*, where the visitor is not named in a valid warrant,

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[64] *Id.* at 90.
[65] *Id.* at 90 (quoting New York v. Burger, 482 U.S. 691, 700 (1987)).
[66] *Id.* at 90–91.
[67] *Id.* at 91.
[68] *Id.*
[69] *Id.*
[70] 475 F.2d 977 (D.C. Cir. 1973).
[71] *Id.* at 978.
[72] 77 P.3d 1134 (Or. Ct. App. 2003).
[73] *Id.* at 1135.

the issue turns on whether a visitor's belongings are included in their expectation of privacy.[74] To answer this question, federal and state courts have each applied one of three tests while simultaneously creating more confusion to already complex Fourth Amendment principles.

II. DO VISITORS HOLD A REASONABLE EXPECTATION OF PRIVACY IN THEIR BELONGINGS?: THE THREE TESTS CURRENTLY APPLIED

A. The Possession Test

The first test is known as the possession test. Under this test, "officers may search personal items, such as purses or clothing, that are not in their owners' possession" during the execution of a premises warrant.[75] The United States Court of Appeals for the Seventh Circuit in *United States v. Teller*[76] was the first to apply this test.[77] The test stands for the proposition that "the search of a personal item like a purse is not regarded as a search of the person when the item is not in the person's possession."[78] In *Teller*, police officers, while executing a search

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[74] The Supreme Court in *Rawlings v. Kentucky* hinted that a person's reasonable expectation may extend to their belongings. 448 U.S. 98 (1980). In *Rawlings*, the police entered a house armed with an arrest warrant. *Id.* at 100. The person named within the warrant was not present, but four other occupants, including Vanessa Cox and the defendant, were present. *Id.* After smelling marijuana smoke and seeing marijuana seeds, the officers proceeded to obtain a search warrant for the premises. *Id.* While conducting the search, the officers asked Cox to empty her purse and the defendant claimed ownership of the drugs that were concealed within. *Id.* at 101. Subsequently, the defendant was convicted of possession of controlled substances. *Id.* at 101–02. The *Rawlings* Court found that the defendant did not possess a reasonable expectation of privacy to the purse because he generally had no relationship to it. *Id.* at 103. The Court's analysis leaves a compelling inference that if Cox, the owner of the purse, challenged the search, she would hold the reasonable expectation of privacy that the defendant lacked. *See id.* at 104–05. But even if that is true, meaning that the facts are such that Cox challenged the search of her purse, it does not automatically mean that her expectation of privacy would overcome the government's interest making the search unlawful. *See* discussion *infra* Part III.A.

[75] State v. Gilstrap, 332 P.3d 43, 44–45 (Ariz. 2014).

[76] 397 F.2d 494 (7th Cir. 1968).

[77] *Gilstrap*, 332 P.3d at 44–45.

[78] *Id.* at 45; *see also Teller*, 397 F.2d at 497–98. A search is considered to be " 'of a person' if it involves an exploration into an individual's clothing, including a further search within small containers, such as wallets, cigarette boxes and the like, which are found in or about such clothing." 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5, at 283 (5th ed. 2012); *see*

warrant, searched the defendant's purse that was left in another room.[79] The court held that under these circumstances, to conclude that the purse was an extension of the defendant would be contrary to the fact that she placed it in another room and left it there.[80]

The D.C. Circuit, as well as several state courts, has also adopted the possession test.[81] However, many jurisdictions have rejected this test, finding it too broad. Others have rejected the test based on the likelihood that it could prevent the government's interest in successfully executing a search warrant.[82] Accordingly, most courts have rejected the possession test, finding the relationship test more efficient and reasonable.

B. The Relationship Test

Under the relationship test, a court will examine the relationship between the person and the place.[83] For example, in *United States v. Micheli*,[84] the First Circuit applied the relationship test to determine whether an officer's search of a briefcase was unreasonable.[85] There, officers had a warrant to search the defendant's office.[86] However, the warrant was based on probable cause that the defendant's brother, a co-owner of the

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also Terry v. Ohio, 392 U.S. 1, 7, 16–19 (1968) (finding that the search of the defendant's outer clothing constituted a search of his persons).

[79] *Teller*, 397 F.2d at 496.

[80] *Id.* at 497; *see infra* Part III.B.

[81] *E.g.*, United States v. Branch, 545 F.2d 177, 182 (D.C. Cir. 1976) (finding a search of a shoulder-bag worn by the defendant an improper search); United States v. Johnson, 475 F.2d 977, 979 (D.C. Cir. 1973) (holding that the search of a purse that was separate from the owner was not improper); State v. Reid, 77 P.3d 1134, 1143 (Or. Ct. App. 2003) (finding that the search of the defendant's jacket that was near him but not on him was proper); Commonwealth v. Reese, 549 A.2d 909, 911 (Pa. 1988) ("Clearly, the police are not prohibited from searching a visitor's personal property (not on the person) located on premises in which a search warrant is being executed when that property is part of the general content of the premises and is a plausible repository for the object of the search."); State v. Jackson, 873 P.2d 1166, 1169 (Utah Ct. App. 1994) (finding that the search of a purse that was not in the possession of an owner was proper).

[82] *E.g.*, United States v. Young, 909 F.2d 442, 445 (11th Cir. 1990) (finding the possession rule would insulate incriminating evidence from lawful searches by allowing people to put it in one's purse or pockets).

[83] *See Gilstrap*, 332 P.3d at 45.

[84] 487 F.2d 429 (1st Cir. 1973).

[85] *See id.* at 430.

[86] *Id.*

office, was engaged in illegal activity.[87] While searching the premises, one of the officers searched what he knew to be the defendant's briefcase and found counterfeit five dollar Federal Reserve Notes.[88]

After analyzing the possession test and the *Teller* opinion, the *Micheli* court found the relationship test to be more consistent with the Fourth Amendment.[89] The court held that whether a search violates a visitor's Fourth Amendment right is determined by "reference to the reasonable expectations of privacy [that] visitors bring to premises."[90] To the court, the best way to determine a visitor's expectation of privacy would be by examining the defendant's relationship to the place.[91] Ultimately, if the person has a special relationship, meaning that he could have reasonably expected that some of his belongings would be there, a search of those belongings is not outside of the scope of the warrant.[92] Accordingly, the court held that the defendant had "a special relation to the place," since the defendant was a co-owner and conducted business through that office.[93] The defendant "was not in the position of a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises."[94]

Other courts, such as the Ninth, Fifth, and Eleventh Circuits, have also adopted the relationship test.[95] The Eleventh Circuit specifically concluded that the relationship test has a better outcome then the possession test because under the relationship test, "[although] the [homeowner] of a building being

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[87] *See id.*
[88] *Id.*
[89] *Id.* at 431–32.
[90] *Id.* at 432.
[91] *Id.* at 431–32.
[92] *Id.* at 432.
[93] *Id.*
[94] *Id.*
[95] *See* United States v. Young, 909 F.2d 442, 444–45 (11th Cir. 1990) ("[I]n determining whether a search of personal effects violates the scope of a 'premises' warrant, one must consider the relationship between the object, the person and the place being searched."); United States v. McLaughlin, 851 F.2d 283, 286–87 (9th Cir. 1988) (finding that the police were allowed to search the briefcase of a co-owner of a business because of his sufficient relationship to the premises); United States v. Giwa, 831 F.2d 538, 545 (5th Cir. 1987) (finding that the relationship between the defendant and the premises draws the conclusion that "[he] was not a 'mere visitor' or 'passerby' and thus, the agents could reasonably believe his flight bag contained evidence of credit card fraud").

searched would lose a privacy interest in his belongings located there . . . a transient visitor would retain his expectation of privacy, whether or not his belongings are being held by him or have been temporarily put down."[96] Furthermore, the Eleventh Circuit feared that the possession rule "would facilitate the insulation of incriminating evidence from lawful searches through the simple act of stuffing it in one's purse or pockets."[97]

In short, federal courts differ as to whether the relationship or the possession test should prevail. In contrast, the actual-notice test seems less significant, since no circuit court has yet to entertain it and few state courts have adopted it. Still, it is important to note its approach.

C. The Actual-Notice Test

The actual-notice test is interpreted as an extension of the relationship test.[98] Under the actual-notice test, the focus is on the notice given to the police regarding the ownership of the item before it is searched.[99] In other words, "[t]his test allows police to search an item . . . unless they are put on notice that the item belongs to a non-resident."[100] Some state courts have found this test to be the most appealing.[101]

An example of its application can be found in *Waters v. State*.[102] There, state and federal officers were granted a warrant to search an apartment for evidence of drug trafficking.[103] Once officers gained entry into the apartment, they found several occupants, including the defendant.[104] While searching the living room, an officer found a coin purse where the defendant previously sat and, after searching it, found several tinfoil slips

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[96] *Young*, 909 F.2d at 445.

[97] *Id.*

[98] State v. Gilstrap, 332 P.3d 43, 45 (Ariz. 2014).

[99] *Id.*

[100] *Id.*

[101] *See, e.g.*, People v. McCabe, 192 Cal. Rptr. 635, 637 (Cal. Ct. App. 1983) (finding the search of a purse was proper because police had no notice that the purse belonged to a nonresident); State v. Lambert, 710 P.2d 693, 697–98 (Kan. 1985) (finding the search of a purse was improper because officers had no reason to believe that the purse belonged to the person named in the warrant); State v. Thomas, 818 S.W.2d 350, 360 (Tenn. Crim. App. 1991) (finding search improper because officers "knew or should have known" that the purse belonged to a nonresident).

[102] 924 P.2d 437 (Alaska Ct. App. 1996).

[103] *Id.* at 438.

[104] *Id.*

commonly used to package crack cocaine.[105] Ultimately, the *Waters* court found that "officers executing a warrant have no duty to inquire into ownership."[106] The court further held that police are entitled to assume that all objects found in a premises are lawfully subject to a search under a warrant and are part of those premises, barring "notice of some sort of ownership of a belonging."[107]

Unfortunately, the courts' reasoning for applying either the relationship or the actual-notice test is misguided. Although there are no United States Supreme Court cases that directly address this issue, two cases ultimately support an adoption of the possession test. Moreover, the possession test provides precision, clarity, and conformity to existing Fourth Amendment principles. Thus, it is more than likely that the Supreme Court would be less than hesitant to adopt it.

III. THE POSSESSION TEST'S PRECISION, CLARITY, AND CONFORMITY TO THE FOURTH AMENDMENT JUSTIFIES ITS ADOPTION

When addressing the issue of whether a visitor's reasonable expectation of privacy in another's home equally extends to his belongings, it is evident that the possession test provides the most precision, clarity, and conformity to current Fourth Amendment principles. Furthermore, the possession test's approach aligns with current United States Supreme Court cases. In comparison, the relationship and actual-notice tests not only fail to accomplish these goals, but also severely undermine well-established Fourth Amendment principles.

A. The Possession Test's Conformity to the Fourth Amendment

The search of a visitor's belongings during the execution of a search warrant presents a unique issue. Although a warrant may be valid to search the premises, the warrant lacks probable cause with respect to the visitor. As discussed earlier, warrantless searches do not automatically afford a person the protection of the Fourth Amendment.[108] Instead, a balancing of

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[105] *Id.*

[106] *Id.* at 439 (citing Carman v. State, 602 P.2d 1255, 1262 (Alaska 1979)).

[107] *Id.* (quoting State v. Nabarro, 525 P.2d 573, 577 (Haw. 1974)).

[108] *See Fourth Amendment*, *supra* note 35.

the "degree of intrusion on the individual's right to privacy and the need to promote government interests and special needs" must be conducted.[109]

As seen in *Jones*, *Olson*, and *Carter*, the Supreme Court has consistently recognized that visitors, depending on the circumstances, may hold an expectation of privacy that society recognizes as reasonable.[110] This gives a presumption that any intrusion into that privacy constitutes an unreasonable search.[111] However, a conflicting rule of law exists, for a valid warrant gives officers the authority to "open[] and inspect[] . . . any containers on the premises where the object of the warrant may be hidden."[112] The issuance of the warrant itself acts as the "balancing between governmental interest in investigating crime and the degree of intrusion into a citizen's privacy."[113]

The warrant embodies the government's interest in investigating crime. The issuance of a warrant is based on probable cause,[114] that is, the authority for a search is based on inferences drawn by police.[115] The Supreme Court has held that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found."[116] For example, a warrant that authorizes an officer to search a home for illegal weapons also grants that officer the authority to open closets, drawers, and any containers in which the weapon may be concealed.[117] The officer is not "limited by the possibility that separate acts of entry or opening may be required to complete the search."[118] On the forefront, the warrant justifies such broad government intrusion.[119] However, as discussed in

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[109] *Id.*

[110] *See supra* Part I.B.

[111] *See Fourth Amendment*, *supra* note 35.

[112] Waters v. State, 924 P.2d 437, 439 (Alaska Ct. App. 1996) (noting the issue of two conflicting laws).

[113] GREENHALGH, *supra* note 42, at 14.

[114] U.S. CONST. amend. IV. *But see* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1385–86 (1994) (noting that the Supreme Court has found that a warrant is not always required).

[115] Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 799–800 (2013).

[116] United States v. Ross, 456 U.S. 798, 820 (1982).

[117] *Id.* at 821.

[118] *Id.* at 820–21 (comparing the validity of the search of a home's draws and containers to the search of a car's trunk, glove compartment, and packages).

[119] *See id.* at 823 ("A container that may conceal the object of . . . [the] warrant may be opened immediately; the individual's interest in privacy must give way to

Gilstrap, " '[s]pecial concerns arise when the items to be searched belong to visitors, and not occupants, of the premises' because these 'searches may become personal searches outside the scope of the premises search warrant.' "[120]

The possession test adequately balances the government's interest in finding evidence of crime and a visitor's reasonable expectation of privacy. For one, if the visitor possesses the item, it no longer becomes an object within the premises subjecting it to a lawful search.[121] The importance of this, as the Supreme Court has noted, is the Fourth Amendment's distinction between body searches and property searches.[122] Additionally, the reason behind the authorized search arises from the officer's "reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[123] It is for this reason only that officers are allowed to open any container in which the object of the warrant may be hidden.[124] However, it is impossible for police officers to have reasonably believed that a visitor's items holds evidence relevant to their search, mainly because the officers had no reason to believe the visitor would be present. Furthermore, "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."[125]

Courts that oppose the possession test argue that the ability to find the object in the warrant is frustrated when visitors are on the premises, since "there are hands inside the premises to

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the magistrate's official determination of probable cause."); Zurcher v. Stanford Daily, 436 U.S. 547, 554 (1978) ("[W]hen the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." (quoting Fisher v. United States, 425 U.S. 391, 400 (1976))).

[120] State v. Gilstrap, 332 P.3d 43, 44 (Ariz. 2014) (quoting United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987)).

[121] *See* discussion *infra* Part III.B.

[122] *Zurcher*, 436 U.S. at 555 ("Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."); *see* discussion *infra* Part III.B.

[123] *Zurcher*, 436 U.S. at 556.

[124] *See* United States v. Ross, 456 U.S. 798 (1982).

[125] Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (citing Sibron v. State, 392 U.S. 40, 62–63 (1968)).

pick up objects before the door is opened by the police."[126] Even if this were true, common practicalities used by officers when conducting searches make this argument obsolete. First, no matter the type of search, most people freely give their consent when asked by police to be searched.[127] Moreover, even if the consenter argues that consent was unintentional or inaudible under the circumstances, courts seem to favor a finding that consent was given.[128] Second, it is well established that police rarely take no for an answer, often repeatedly asking for consent to search until they receive an affirmative answer.[129] Finally, the argument that a visitor would pick up incriminating evidence upon hearing the police at the door is largely based on the assumption that visitors, and society in general, are well versed in Fourth Amendment law, a theory that has been shown to be unlikely.[130] Accordingly, the practicalities used by officers when conducting searches make this argument immaterial.[131]

In sum, the conformity of the possession test to current Fourth Amendment principles would sway the Supreme Court to its ultimate adoption. Under the Fourth Amendment, for a search to be unreasonable, a balancing of an individual's privacy interest and the government's interest must be conducted. The possession test adequately maintains this balance. Although officers armed with a warrant have probable cause to search every container within, the lack of probable cause towards the

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[126] United States v. Micheli, 487 F.2d 429, 431 (1st Cir. 1973). The court recognized that this loophole led one court to bar such acts by authorizing the search of an item held in a person's hand. *Id.* (citing Walker v. United States, 327 F.2d 597, 600 (D.C. Cir. 1963)).

[127] *See, e.g.*, United States v. Guerrero, 374 F.3d 584, 588 (8th Cir. 2004) ("[The defendant] signed the consent form; [the defendant] did not object while [the officer] conducted the search; and, when [the officer] asked [the defendant] to follow him to the garage he complied without difficulty."); United States v. Shranklen, 315 F.3d 959, 960 (8th Cir. 2003) (consenting to search of a truck); United States v. Stokely, 733 F. Supp. 2d 868, 875 (E.D. Tenn. 2010) (consenting to search of home).

[128] *See, e.g.*, United States v. Cedano-Medina, 366 F.3d 682, 684–85, 688 (8th Cir. 2004) (finding a search reasonable after receiving a number of varying responses). The law even recognizes consent by third parties. *See* United States v. Matlock, 415 U.S. 164, 165–66, 177–78 (1974) (consenting to the search of a home by third party).

[129] *See, e.g.*, *Cedano-Medina*, 366 F.3d at 685–86.

[130] Although the law presumes that citizens know the law, "[a]verage citizens do not peruse statute books even once in their lifetimes; most will never read even one full paragraph from a court opinion." Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 106 (2003).

[131] *See infra* note 174 and accompanying text.

visitor, coupled with their belongings being in their personal possession, undeniably outweighs the government's interest. Moreover, the possession test's application coincides with current Supreme Court case law.

B. The Supreme Court's Insight: The Possession Test Is Supported by Both Ybarra *and* Houghton

The Supreme Court in *Ybarra v. Illinois*[132] addressed an officer's authority to search a bar patron, while executing a valid warrant in a local tavern.[133] In its analysis, the Court acknowledged, "[A] search or seizure of a person must be supported by probable cause particularized with respect to that person."[134] The requirement of particularity may not be "undercut" simply because there is probable cause to search the premises "where the person may happen to be."[135] The Court stood for the proposition that, in the absence of reasonable belief that the patron was involved in any criminal activity or that the person was armed and dangerous, a search and seizure of that patron was not permissible.[136]

The holding in *Ybarra* supports the proposition that a person has a high and reasonable expectation of privacy when it comes to the search of their person.[137] *Ybarra* limits "a premises warrant [to only] authorize[] police to search any item that might contain the object of the search by holding that the warrant does not authorize the search of a person it does not name."[138]

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[132] 444 U.S. 85 (1979).

[133] *Id.* at 87–88.

[134] *Id.* at 91 (emphasis added).

[135] *Id.* (holding that the warrant gave the officers authority to search the premises, not to search the tavern's customers).

[136] *Id.* at 92–93. The reasonable belief or suspicion standard is one of the well-delineated exceptions to the warrant requirement. It is more commonly known as a *Terry* search. *See* GREENHALGH, *supra* note 42, at 18–19. Some argue, as did the government in *Ybarra*, that under certain circumstances the reasonable belief or suspicion standard should be made applicable to aid in the evidence-gathering function of the search warrant for premises. *See Ybarra*, 444 U.S. at 94. This argument, however, goes against the long prevailing rule that just because one is in the presence of a suspect does not equally make him guilty. *See id.* at 91; *see also e.g.*, United States v. Di Re, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.").

[137] *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

[138] State v. Gilstrap, 332 P.3d 43, 46 (Ariz. 2014).

"[S]earches of a person involve a higher degree of intrusiveness and require justification in addition to that provided by the probable cause that supports a premises warrant."[139]

The Supreme Court's holding in *Wyoming v. Houghton*[140] also implies that the Court would ultimately adopt the possession rule. The Court in *Houghton* addressed a passenger's expectation of privacy regarding her purse during the search of a car.[141] While conducting the search, an officer found a purse in the car's passenger compartment.[142] The passenger claimed the purse as her own.[143] In it, the officer found drug paraphernalia, and arrested the passenger.[144] The trial court denied the passenger's motion to suppress by finding that the officer's probable cause to search the vehicle by extension gave him cause to search containers found within.[145] The Wyoming Supreme Court reversed.[146] The Supreme Court, however, reversed the Wyoming Supreme Court, finding that the passenger's reduced reasonable expectation of privacy, compared to the government's high interest, supported the finding of a reasonable search.[147]

More importantly for present purposes is the reasoning offered by Justice Breyer's concurrence. Justice Breyer focused on the fact that the purse at issue was "found at a considerable distance from its owner."[148] He further noted that "personal items," like the defendant's purse, are ones "that people generally like to keep with them at all times."[149] For this reason, Justice Breyer felt that a search of such personal items involves an

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[139] *Id.*
[140] 526 U.S. 295 (1999).
[141] *Id.* at 297–98.
[142] *Id.* at 298.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 298–99.
[146] *Id.* at 299.
[147] *Id.* at 303–04.
[148] *Id.* at 308 (Breyer, J., concurring).
[149] *Id.* ("But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of 'outer clothing.' "); *see generally* Terry v. Ohio, 392 U.S. 1 (1968) (finding that the search of the defendant's outer clothing constituted a search of his persons).

intrusion similar to a search of one's person, and hinted that rules like *Ybarra* and *Terry* may ultimately govern.[150] Unfortunately, the *Houghton* Court limited its holding to car searches.[151]

Nonethelesss, the thrust and tone of the *Houghton* opinion, coupled with *Ybarra*, unquestionably supports an adoption of the possession test. It is impractical to consider a person's belongings as an extension of that person in accordance with *Ybarra*, unless they possess the item.[152] Failure to hold such item subjects the item to a lawful search,[153] and a person's expectation of privacy and the invasiveness nature of the search "would not attach . . . until the police officer knows or has reason to know that the container belongs" to that person, whether a visitor in a home or a passenger in a car.[154]

The possession test is the best way for officers to determine whether a container belongs to a visitor. It is clear and easy for officers to apply.[155] If the visitor possesses the item and is not named in the warrant, the visitor and the items they possess

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[150] *Houghton*, 526 U.S. at 308 (Breyer, J., concurring).

[151] *Id.* at 307–08 ("Obviously, the rule applies only to automobile searches. Equally obviously, the rule apples only to containers found within automobiles.").

[152] *See id.* at 303–07 (majority opinion).

[153] *See supra* Part III.A. *See generally* United States v. Ross, 456 U.S. 798 (1982).

[154] *See Houghton*, 526 U.S. at 305. Although it may seem that Justice Breyer is hinting towards the actual-notice test, the overall thrust of his concurrence suggests his preference of the possession test. *Id.* at 307–08 (Breyer, J., concurring). Furthermore, policy reasons severely undercut the actual-notice test. *See* discussion *infra* Part III.C.

[155] *See* State v. Gilstrap, 332 P.3d 43, 46 (Ariz. 2014). It is arguable that possession does not provide such a bright-line rule given the issue of constructive possession. This occurs when the item is not in the possession of the person, but is instead relatively close to the person. An example would be if the item were on the ground next to the owner's feet, or as in *People v. Reyes*, where the defendant's clothes laid nearby as he showered. *See generally* People v. Reyes, 273 Cal. Rptr. 61 (Cal. Ct. App. 1990). The *Reyes* court concluded that in this instance, the item was still an extension of the defendant's person, and therefore guarded by the Fourth Amendment. *Id.* at 65. It is best that the courts stay away from expanding the possession rule in this manner. Allowing a constructive possession element "would thwart [the] goal [of having a bright-line rule] by requiring law enforcement officers to guess whether items in proximity to a person not identified in the warrant" actually belong to that person. *Gilstrap*, 332 P.3d at 46. Having officers play this guessing game gives people—assuming that people are readily sophisticated in the law—an opportunity to claim items they do not own simply because it contains the substance searched for in the warrant. A person's incentive to prevent government intrusion and criminality is an interest that the Supreme Court considers when assessing Fourth Amendment issues. *See Houghton*, 526 U.S. at 304.

should be free from government intrusion. However, if the item is not within the visitor's possession, the officers may search the item, but only if the item is capable of holding the subject of the warrant.

Taken together, the possession test is not only consistent with the text and interpretation of the Fourth Amendment, but it also aligns with rationale and policy considerations of current Supreme Court case law. By no means, however, is the possession test perfect. Like any rule of law, the test has negative consequences. Nevertheless, the overbearing negatives of the relationship and actual-notice tests outweigh any of the possession test's negative implications.

C. The Negatives of the Possession Test Are Not Overwhelming

Courts have held that because of the possession test's negative implications, it should either not be used at all, or should not be the sole test used to assess whether a search was reasonable.[156] For example, the First Circuit found that the test suffers from being both too broad and too narrow.[157] On one hand, the possession test "is too broad in that a search warrant could be frustrated to the extent that there are hands inside the premises to pick up objects before the door is opened by the police."[158] By the same token, the possession test can be too narrow in that "it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage."[159] In this way, the Fourth Amendment's interest in protecting privacy "is hardly furthered by making its applicability hinge upon whether the individual happens to be

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[156] *See* United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987) ("[M]ere physical possession should not be the sole criterion which should be used to determine whether a personal item may be searched pursuant to a premises search warrant."); *see also supra* Part II.B–C.

[157] United States v. Micheli, 487 F.2d 429, 431 (1st Cir. 1973) ("This has the virtue of precision but suffers from being at once too broad and too narrow.").

[158] *Id.*

[159] *Id.*

holding or wearing his personal belongings after he chances into a place where a search is underway."[160] Accordingly, courts have looked to both the relationship and possession test for guidance.[161]

The negative consequences of the possession test are easily negated. For one, and as explained earlier, the argument that the test leaves room for fraud—as in the persons inside the home may pick up items not belonging to them—is easily overruled by other practical implications of the Fourth Amendment law.[162] Even if the possibility for fraud is taken into consideration, courts have noted that the possession test is still much less "susceptible to abuse."[163]

There is greater room for fraud under the relationship and actual-notice tests. For example, once inside, the police, knowing that the visitor is not named within the warrant, may ask him to step aside giving the visitor notice that he is not susceptible to a search and the opportunity to "simply assert ownership to immunize property from [the] search."[164] Even worse, the "police could make a point of never being put on notice [even if they were] so that they could assume all items were searchable."[165]

The second noted consequence of the possession test is that it leaves vulnerable many personal items that are often set down. Although this may be true, it may be easily reconciled by turning to *Katz* and other Fourth Amendment precedent in which courts have held that it is unreasonable for a person to believe that their belongings would remain untouched if left unattended.[166]

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[160] *Id.*

[161] *See Giwa*, 831 F.2d at 544–45 ("In the instant case, we agree with the district court's conclusion that mere physical possession should not be the sole criterion which should be used . . . . We believe that the better approach is . . . examin[ing] the relationship between the person and the place.").

[162] See *supra* notes 126–31 and accompanying text.

[163] State v. Leiper, 761 A.2d 458, 462 (N.H. 2000).

[164] *Id.* (quoting State v. Andrews, 549 N.W.2d 210, 217 (Wis. 1996)).

[165] *Id.* Some police officers are far from shy when it comes to deception. *See generally* Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239 (2007). However, in most cases, their reasoning for the deception lies within good intentions, either to vindicate the victim or stop crime. *See generally id.* But, an officer's good intention behind deception does not negate the fact that deception does occur.

[166] *E.g.*, Wyoming v. Houghton, 526 U.S. 295 (1999); United States v. Teller, 397 F.2d 494 (7th Cir. 1968); cases cited *supra* note 81.

An adoption of the possession test does not mean that under no circumstances will an officer be able to search a visitor's belongings.[167] The possession test is still subject to many well-known exceptions, which authorize police to conduct a search without a warrant.[168] For instance, there may be circumstances that give the officers probable cause to arrest the visitor.[169] Consequently, and subject to certain limitations, a search of the visitor's belongings can be made incident to the arrest.[170] Furthermore, in many instances, people do not object to searches, and often comply with the police without hesitation.[171] Moreover, some courts have added rules to the possession rule, making it easier for a visitor's belongings to be within the scope of the warrant.[172]

Accordingly, the negatives that surround the possession test are not overwhelming when balanced with the potential positive considerations. Additionally, and more importantly, the possession test provides guidance, precision, and clarity to officers and courts regarding police authority during the execution of premises warrants.

D. The Possession Test Provides Guidance, Precision, and Clarity

The possession test provides guidance, precision, and clarity, while the other tests create confusion and chaos. For one, the relationship test is hard for police officers to implement while executing premises warrants.[173] Searches are usually conducted under "harried, dangerous circumstances."[174] Therefore, "officers

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[167] *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.10(b), at 950–51 (5th ed. 2012).

[168] *See id.*

[169] *Id.* at 951.

[170] *See id.*; *see also* GREENHALGH, *supra* note 42, at 16–17.

[171] *See supra* Part III.A.

[172] *See* LAFAVE, *supra* note 167, at 952–53. The D.C. Circuit has adopted an exception, which states that in the event that "the police could reasonably have believed that items sought and described in the warrant had been concealed in the purse, and, notwithstanding [the defendant's] status as a visitor on the premises, could have searched the purse in pursuit of items for which the warrant issued." United States v. Johnson, 475 F.2d 977, 979 (D.C. Cir. 1973).

[173] State v. Gilstrap, 332 P.3d 43, 46 (Ariz. 2014).

[174] *Id.* For example, when granted a warrant under the "no-knock" provision, officers do not have to announce their presence, and therefore "smash down the front doors of homes with battering rams and rush inside with guns drawn." Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the*

may not be readily able to identify the relationships between persons and the premises."[175] The inability to identify the relationship between the visitor and the premises makes it virtually impossible for police to effectively search a dwelling because officers will not know which items could be searched or not.[176] The officers would have to establish ownership of each item on the premises, and then "determine whether the owner of the item or container was merely a 'transient visitor' or whether there was some greater connection to the premises."[177]

Similarly, the actual-notice test fails to give officers the simplistic guidance and precision that the possession test provides. The actual-notice test allows officers to search an item, unless they are put on notice that the item belongs to a non-resident.[178] Although the actual-notice test takes the focus off the relationship and instead places it on the notice given to police in regards to the item's ownership,[179] the test presents similar policy concerns.

The actual-notice test hinders the government's interest by requiring an officer to engage in a colloquy with persons not contained in the search warrant.[180] "One would expect [the] confederates to claim everything as their own."[181] This possibility hinders the Government's ability to find the searched items because, under this test, the police are unable to search it after the confederate makes his claims. Furthermore, the interpretation of the actual-notice test may give rise to a parade of litigation "involving such questions [like] whether the officer

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Destruction-of-Evidence Exception, 93 COLUM. L. REV. 685, 685 (1993). This provision was developed as an effort to diminish the increasing "peril police officers face in executing search warrants in the often violent drug trade." *Id.* at 703. Drug abuse and the violent crime it spawns are "among the greatest dangers facing the United States today," and are often the reasons for the grant of a warrant. *See id.* at 685 (discussing the purpose of the "no-knock" rule as an effort to prevent the destruction of drug evidence).

[175] *Gilstrap*, 332 P.3d at 46.

[176] *See* Commonwealth v. Reese, 549 A.2d 909, 911 (Pa. 1988).

[177] State v. Jackson, 873 P.2d 1166, 1168 (Utah Ct. App. 1994).

[178] *See Gilstrap*, 332 P.3d at 45.

[179] *Reese*, 549 A.2d at 911.

[180] *See* Wyoming v. Houghton, 526 U.S. 295, 305 (1999).

[181] *Id.*

should have believed [a person's] claim of ownership, [and] whether . . . he had probable cause to believe that the [person] was a confederate."[182] The *Houghton* Court directly expressed concern with requiring such inquiry and guessing.[183]

When balancing the competing interests of a person's Fourth Amendment protection and governmental interests, the Supreme Court has noted that one "must take account of these practical realities,"[184] and the possession test adequately does so. For instance, it eliminates the need for the inquiry between officers and visitors in order to determine the relationship between the person and the place. Additionally, it eliminates the opportunity to hide contraband or evidence of criminal activity, since visitors will not have the chance to claim their belongings. Furthermore, both the relationship and actual-notice tests are "so nebulous"[185] that they ultimately lead to different results,[186] while the possession test leads to consistency in rulings. The possession test simply looks at whether the visitor possessed the item at the time the officers began their search, and if they did, the court would ultimately find a violation of the Fourth Amendment. Accordingly, the possession test leaves no room for error, providing the utmost guidance and certainty for police officers conducting search warrants.

CONCLUSION

The possession test should be adopted as a means to determine the issue of a search of a visitor's belongings. This test provides a bright-line rule that will result in consistency in rulings and make it easier for officers to determine when an item belonging to a visitor may be searched. Regardless of the limited car-specific language of *Houghton*, the tone of the Court, along

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[182] *Id.*

[183] *Id.*

[184] *Id.* at 306.

[185] State v. Gilstrap, 332 P.3d 43, 46 (Ariz. 2014) ("[T]he relationship/notice test is so nebulous it provides little guidance to police officers or trial courts." (quoting State v. Leiper, 761 A.2d 458, 462 (N.H. 2000))).

[186] *Compare* Carman v. State, 602 P.2d 1255, 1262 (Alaska 1979) (finding that a search of a purse during the execution of a warrant with only male occupants named was within the scope of the warrant because there was no notice of ownership), *with* State v. Lambert, 710 P.2d 693, 697–98 (Kan. 1985) (finding that a search of a purse during the execution of a warrant with only male occupants named was illegal because the police could not have reasonably believed it belonged to the man named in the warrant).

with the holding of *Ybarra* shows that the Supreme Court would apply the possession test if confronted with the issue. Furthermore, the possession test conforms to current policies and principles behind the Fourth Amendment. The relationship and actual-notice tests fail to accomplish these goals.