CHAPTER 3

Essential Fourth Amendment Doctrines

Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

—JUSTICE WILLIAM O. DOUGLAS, *McDonald v. United States*, 335 U.S. 451, 456 (1948)

CHAPTER OUTLINE

KEY TERMS

anticipatory warrant
beeper
consent search
constitutionally protected area
controlled delivery
curtilage
enhancement device
exigency
ex parte
expectation of privacy
industrial curtilage
inventory and return
"knock and announce" rule
magistrate
media ride-along
neutral and detached magistrate
no-knock warrant
open fields
plain feel rule
plain view
plurality opinion
probable cause
reasonable suspicion
secret informant
"sneak and peek" warrant
telephonic warrant
thermal imaging
two-pronged test
undercover agent

This chapter presents five basic areas of Fourth Amendment law: (1) the search warrant, (2) the **'expectation of privacy'** doctrine, (3) probable cause, (4) the plain view doctrine, and (5) consent searches. Although in practice most searches are conducted without a warrant (i.e., are "warrantless"), the Fourth Amendment presumes that judicial search warrants are essential for preserving the privacy protections of the people. The expectation of privacy doctrine, established in 1967, is now the theoretical backbone of Fourth Amendment analysis. **Probable cause,** the level of evidence required by the Constitution before government agents can invade individual privacy, is the required basis for arrests and searches and seizures. Plain view is a concept that helps us understand when the Fourth Amendment applies and when it does not. Individuals may voluntarily waive their Fourth Amendment protections, making the consent doctrine a highly practical aspect of police work, by eliminating the need for police to follow Fourth Amendment strictures.

THE SEARCH WARRANT

Search Warrant Values: A Neutral and Detached Magistrate

A prime function of the Constitution is to protect individuals' liberty and rights from excessive government and law enforcement control. Requiring *executive branch* officers to get permission from *judicial* officers, via search warrants, is a principal method of keeping the government under control.

> The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a **magistrate** between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. (***McDonald v. United States,*** 1948)

These values are embodied in the Fourth Amendment's traditional '*warrant-preference construction'* (see Chapter 2), under which search and seizures are presumed unreasonable unless authorized by a judicial warrant, except for a few well-established exceptions.

The Supreme Court has expressed a *preference* for search warrants and has encouraged police use of warrants by easing strict probable cause requirements for warrants in close cases. The issue in ***United States v. Ventresca*** (1965), for example, was whether hearsay was sufficient to establish probable cause and support a warrant to search a house for an illegal liquor distillery. The Court made clear it would lean in favor of upholding searches in *close cases*, where warrants are obtained: "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." Of course, this does not mean that a magistrate must automatically grant a warrant simply on request (*Ventresca*).

Three factors support the search warrant preference: the long *history* of warrant use, the Fourth Amendment's *text*, and the *values* that underlie the amendment. The values protected are highly prized by Americans: personal autonomy, privacy, security, and freedom. The amendment

protects these values via *procedures* that place the decision whether to invade a person's liberties for law enforcement purposes in the hands of *judges*. The rationale was best expressed by Justice Robert Jackson:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a **neutral and detached magistrate** instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. (***Johnson v. United States,*** 1948)

In *Johnson*, an experienced federal narcotics officer standing in a hotel corridor smelled burning opium coming from behind a closed door. He demanded entry into the hotel room and found one person inside in possession of opium. The Court noted, "At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant." The evidence was nevertheless *excluded* because the officer invaded Anne Johnson's room without first submitting his evidence to the judgment of a judicial officer.

Judges are not given priority in ascertaining probable cause because of any belief of greater intelligence or expertise than police officers, or simply because warrant use is traditional. The policy is wrapped up in Justice Jackson's memorable phrase "a neutral and detached magistrate." The point is that the magistrate is part of the judicial branch, *detached* from "the government" (i.e., the executive branch) and therefore not part of the apparatus that seeks to prosecute the suspect. Further, the judge is *neutral* in the case. The officer is a partisan who is "engaged in the often competitive enterprise of ferreting out crime." Because the officer is a partisan, he or she is prone to judge a case in his or her own favor and thus find that probable cause exists. This does not mean that the officer is dishonest; but human nature is such that a partisan almost always sees things his or her way. The judge is formally neutral—an arbiter between the police and prosecution on the one side, and the defendant on the other. It is because the magistrate is neutral that he or she is more likely to exercise balanced judgment.

The Supreme Court has decided several revealing cases that determined whether the actions of magistrates or other government officers rose to the standards of a "neutral and detached magistrate." In ***Coolidge v. New Hampshire*** (1971), the state attorney general, an executive branch officer, personally took charge of a murder investigation. An archaic statute made him a justice of the peace, and as such, he issued a search warrant to *himself*! Over the dissents of three justices, who viewed this action as "harmless error," the Supreme Court ruled that it violated the fundamental Fourth Amendment premise that warrants must issue from a neutral and detached magistrate. Although the statute called the attorney general a "justice of the peace," in fact he was not a "detached" judicial officer but was the chief investigator and *prosecutor* in the case.

Shadwick v. City of Tampa (1972) shows that a formal title is less important than the actual situation of the officer issuing a warrant. Here, law and practice allowed a municipal *court clerk* to issue *arrest* warrants for municipal ordinance violations. This was upheld because the clerk met two tests: (1) he was *capable* of determining whether probable cause existed as to ordinance violations, such as impaired driving or breach of the peace, and (2) he was neutral and detached—he was not under the authority of the prosecutor or police but worked in the *judicial* branch, subject to the supervision of the municipal court judge. Thus, under limited circumstances, a valid warrant can be issued by a person who is not a lawyer or a judge.

A magistrate is *not* neutral or detached if he receives a *fee*, even a small one, for each warrant that is issued, instead of a salary. In ***Connally v. Georgia*** (1977), the magistrate received five dollars for each search warrant issued but nothing if a warrant was denied. The *possibility* of personal financial gain is sufficient to violate a suspect's due process and Fourth Amendment rights, whatever the magistrate's subjective disposition. In addition, a magistrate's *actions* can cause the loss of neutrality in a specific case. This occurred in ***Lo-Ji Sales, Inc. v. New York*** (1979). An overly helpful town justice, rather than simply issuing a search warrant for the seizure of films from an adult bookstore, joined police officers and prosecutors on a six-hour raid of the store, determining *at the scene* whether there was

probable cause to seize various materials. In determining that the warrant was improper, a unanimous Court said, "The Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." This loss of "detachment" was not, according to the Court, a matter of subjective intent but was inferred from the *objective* fact that the town justice "allowed himself to become a member, if not the leader, of the search party which was essentially a police operation." Yet despite the objective nature of the rule, it is easy to imagine that a judge who works too closely with the prosecutors will subjectively come to see himself as a member of the "prosecution team" rather than as a neutral and detached magistrate in a subjective sense.

The neutral and detached magistrate principle led the Supreme Court to invalidate a portion of the 1968 electronic eavesdropping law that allowed the *president* of the United States to *authorize* electronic eavesdropping for a "national security" purpose without a warrant (***United States v. United States District Court,*** 1972). The Court ruled that even if the president was exempt from the particular procedural requirements of the rest of the electronic eavesdropping statute, he was still required to seek "judicial approval prior to initiation of a search or surveillance" under the Fourth Amendment. The Court reasoned that dangers to free speech and political liberty are too great in national security cases to entrust exclusively to the executive branch, and that national security would not be compromised by requiring the president to seek prior judicial approval for electronic eavesdropping. Since 1978, under the Foreign Intelligence Surveillance Act (FISA), warrants for electronic eavesdropping for national security purposes are issued by a special court drawn for each case from among sitting federal judges.[1] This formerly obscure function came under great scrutiny after national security electronic eavesdropping was massively abused by the Bush administration in the 2000s.[2]

There are costs to the warrant process. Obtaining a search warrant from a judge is *less efficient* than allowing police to decide for themselves to enter a home on their assessment of probable cause. This may add a cost to *public safety*—a cost that the Framers felt was necessary to maintain liberty, exhibiting a consciousness of the Due Process Model. Skeptics question whether the warrant practice, in fact, adds that much protection. In high-publicity cases, public pressure can cause a magistrate to blunder. This happened when Judge Kathleen Kennedy-Powell ruled that Los Angeles Police detectives Mark Fuhrman and Philip Vannatter were justified in vaulting over the wall of O. J. Simpson's estate in the early morning hours of June 13, 1994, without a search warrant because they claimed that they feared for his safety.[3] This was a patently weak reason because ex-husbands are typically prime suspects in spouse killings, and Fuhrman had been called to the Simpson residence earlier to investigate a wife beating. As lawyer–novelist Scott Turow noted, "If veteran police detectives did not arrive at the gate of Mr. Simpson's home thinking he might have committed these murders, then they should have been fired."[4] Ironically, Judge Kennedy-Powell's case-saving ruling backfired. When Fuhrman's perjurious, racist statements later came out, the jury might have also questioned his truthfulness about the entry and search of Simpson's home and grounds.

To add to the skepticism, there is some concern that magistrates tend to *rubber-stamp* warrant requests. Despite all this, the late Professor Richard Uviller, after observing police for a year, reflected on the value of search warrants:

> It's easy to say that the whole routine is a sham: magistrates are not actually neutral or detached but just as closely associated with the prosecution as the cops; they don't really read the affidavits, many of those exercising the authority would not know the difference between probable cause and potato chips, much less the complexities of the law regarding the reliability of third-party informants who supply the hearsay on which the cop's belief may be founded.
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> However much truth there may be in such assertions, it has always seemed to me that the real values of the search warrant procedure are: (1) It makes the officer pause in his pursuit and reflect on whether he has a good reason to go into someone's private space; (2) it requires him to make a record of his reasons, recording what he knows about the case before he makes the move; and (3) his recorded reasons stand immutably for review by a knowledgeable judge after the fact, at trial, and again on appeal, if the search is challenged. In the enforced hesitation, recorded articulation, and prospect of true review, the objectives of the Fourth Amendment are well served.[5]

These comments remind us that the warrant procedure still requires police and prosecutors to fairly evaluate the facts and make their own probable cause decisions before applying for a warrant.

Obtaining a Search Warrant

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." To obtain a search warrant, law enforcement officers must (1) *present a written affidavit* to a magistrate requesting that a warrant be issued (see the example), (2) *swear under oath* that the information in the affidavit is truthful, and (3) convince the magistrate that the information they have sworn to *establishes probable cause* to believe that the warrant is justified. The magistrate should question the officer requesting the warrant about the circumstances of the case and must be personally satisfied that the evidence constitutes probable cause. The oath signifies that the officer takes responsibility for the facts alleged.[6]

The affidavit, or sworn statement, is presented to the court at an ***ex parte*** hearing—that is, a hearing with only one party present. Such a procedure would normally violate due process but is allowed out of necessity and is hemmed in with other safeguards, such as the **inventory and return,** which requires the officer to report on the execution of the warrant. The magistrate usually questions only the affiant but may require additional witnesses to testify before being satisfied that there is sufficient evidence to issue a warrant. The law enforcement agency applying for a warrant should keep all evidence and records of its application; if the warrant is challenged, the loss of such information would weigh heavily against the agency. Also, if a jurisdiction allows the agency to make a new warrant application to a different magistrate if an initial request is turned down, then the evidence submitted in the first application must be submitted in the second application.

The *classes of evidence* that may be searched and seized under a warrant are spelled out in the Federal Rules of Criminal Procedure: "A warrant may be issued for any of the following (1) *evidence* of a crime; (2) *contraband*, fruits of crime, or other items illegally possessed; (3) *property* designed for use, intended for use, or used in committing a crime; or (4) a *person* to be arrested or a person who is unlawfully restrained." (F.R.C.P. Rule 41(c), 2006, emphasis added).

The typical affidavit and warrant for a search need not be lengthy; they are often only one or two pages long. It is essential that the affidavit provide sufficient information to establish probable cause and that the warrant give clear directions to the executing officers. In some jurisdictions, a warrant is issued without attaching the affidavit; in others, the warrant incorporates the affidavit. This is the practice in Detroit, Michigan, which supplied the sample warrant and affidavit (with names and identifying information changed) as an example of what is required to establish probable cause.

TELEPHONIC WARRANTS With laptop computers in police cars and officers armed with smart phones and personal digital assistants (PDAs), it is now possible for officers to obtain search warrants from the field in less than an hour, regardless of the distance from the crime site to the courthouse.[7] California first enacted legislation to allow **telephonic warrants** in 1970, and nineteen states and the federal government now authorize oral search warrants.[8]

Under F.R.C.P. Rule 41(d)(3), a federal magistrate may issue a warrant "based on information communicated by telephone or other appropriate means, including facsimile transmission." The officer requesting the warrant is placed under oath and a record of the conversation providing the warrant information is made, signed by the magistrate, and filed with the court clerk.

Example of a Warrant and Affidavit

State of Michigan

Search Warrant and Affidavit

County of Wayne

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: Wayne; Police Officer Phillip Melon.

Affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists.

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:
18793 Colorado, a one story brick building, bearing the name O'Grady's Collision, located in the City of Detroit, County of Wayne, State of Michigan, and to seize, secure, tabulate and make return according to law the following property and things:

1. A 1984 Chevrolet Nova, Blue, VIN#1FABPO758EW236587, bearing license plate #241-LUS
2. Any stolen vehicles or parts of stolen vehicles
3. Any and all other vehicles belonging to Stephen Switzerland and Warren Switzerland
4. Any repair orders, estimates or other paperwork relating to the repair of vehicles.

The following facts are sworn to by affiant in support of the issuance of this Warrant:
Affiant is a member of the Detroit Police Department, assigned to the Commercial Auto Theft Section. Affiant on January 19, 1988 and January 20, 1988 executed search warrants on this location and seized a stolen vehicle, a 1984 Chevrolet, 241-LUS. Affiant while conducting an investigation in regards to this stolen vehicle discovered that the vehicle had been falsely reported stolen in order to collect the insurance monies from Mackinac Insurance Company. On March 24, 1988, a warrant for Attempted OMUFP 0/100 (Obtaining Money under False Pretenses over $100) was obtained against Irwin Schmidlopp (Owner of the 1984 Chevrolet Nova) and for Stephen Switzerland (Owner of O'Grady's Collision). During the investigation it was discovered that persons would obtain insurance through the Mackinac Agency for vehicles that they did not own and then a claim would be submitted to the insurance company and an adjuster would arrive at O'Grady's Collision (an unlicensed motor vehicle repair facility). The insurance company would then issue a check to O'Grady's Collision and the insured party for the repair of this vehicle. One vehicle, a 1985 Oldsmobile, was repaired at least three times by O'Grady's listing three different owners when in fact, none of these alleged owners ever owned the vehicle or got into an accident with this 1985 Oldsmobile. All three checks were co-issued to O'Grady's Collision and all three checks, totaling about $15,000.00, were cashed by Stephen Switzerland through his account at First of America. Affiant on March 29, 1988, observed the 1984 Chevrolet, belonging to defendant, Irwin Schmidlopp, still inside this location. Affiant believes that estimates and bills and receipts will be found inside this location to show further schemes and frauds committed by these suspects to defraud the insurance companies.

Phillip Melon
Affiant

Subscribed and sworn to before me and issued under my hand this 30th day of ***March, 1988***
Approved:

John Carter
Assistant Prosecuting Attorney

Jane Ellis
Judge of 36th District Court,
Wayne County, Michigan, and a Magistrate ***P91234***

It appears that little use is made of telephonic warrants in the United States. "While law enforcement eagerly uses the latest technology to catch criminals, it rarely uses that technology to comply with the command of the Constitution requiring search warrants."[9] Detective Mark Fuhrman stated on cross-examination in the notorious O. J. Simpson trial that he never used telephonic warrants.[10] Failure to use telephonic warrants is especially serious because widespread use of the subjective exigent circumstances exception "is arguably the greatest threat to the continued viability of the warrant requirement"[11] Although a few courts in the 1980s excluded searches because police did not seek telephonic warrants, few do so today. Police will have no incentive to use telephonic warrants until defense attorneys press this issue in appropriate cases.

Particularity

The Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." This is a substantive and not merely a formal rule. An officer making an affidavit, for example, must investigate and accurately describe the place to be searched in addition to providing a street number, because a mistake might render a search

illegal. Police, planning a drug raid at a house located at the corner of Short and Adkinson Streets, incorrectly listed the place as "325 Adkinson Street" on the warrant when in fact it was 325 Short Street. The affidavit, however, described the house as a single residence with silver siding and red trim on the south side of the street. Despite the street number error, the search was held to be valid because the description met the particularity requirement. The "test for determining the sufficiency of the description of the place to be searched is whether [it] is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched."[12]

The Supreme Court confirmed that "reasonable" mistakes in a warrant do not violate the Fourth Amendment. In ***Maryland v. Garrison*** (1987), police obtained "a warrant to search the person of Lawrence McWebb and 'the premises known as 2036 Park Avenue third floor Apartment.'" Diligent police investigation did not reveal that there was another apartment on the third floor. When executing the warrant, police officers encountered McWebb downstairs and required him to walk up to the third floor. He opened the only apartment door, which led to a vestibule. Garrison was standing there, and doors to both Garrison's and McWebb's apartments were open. The police did not know at that time that there were two apartments. They entered Garrison's apartment and seized drugs in plain view. As soon as they were told that it was not McWebb's apartment, they left. Because the police could not have reasonably known that there were two apartments on the third floor, the Supreme Court ruled that their mistake did not invalidate an otherwise valid warrant and the seizure of drugs in Garrison's apartment. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment."

The goal of the "things to be seized" particularity requirement is that "nothing is left to the discretion of the officer executing the warrant" (*Marron v. United States*, 1927). Nonetheless, reasonable latitude is allowed. If police investigation shows that heroin is being sold from a particular location, the warrant can specify that police search for and seize "a quantity of drugs." It is important that the police investigate the situation to the greatest extent feasible and make a good faith effort to know in advance what is likely to be discovered in the place to be searched. The plain view doctrine (discussed later in this chapter) necessarily creates an expansion of what items the police may lawfully seize from a premises. Executing a valid search warrant is one of the ways in which police are legitimately in a premises; once legitimately in a place, they may seize all contraband in plain view, even if it is unrelated to the object of the search warrant.

In ***Groh v. Ramirez*** (2004), "a concerned citizen informed [Bureau of Alcohol, Tobacco and Firearms (ATF) agent Groh] that on a number of visits to [the Ramirez] ranch the visitor had seen a large stock of weaponry, including an automatic rifle, grenades, a grenade launcher, and a rocket launcher." Based on this hearsay, agent Groh prepared and signed a warrant application to search for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." The application was supported by a detailed affidavit and a warrant form that Agent Groh filled out. A federal magistrate signed the warrant, even though it completely "failed to identify any of the items that [Groh] intended to seize." In the place on the form "that called for a description of the 'person or property' to be seized, [Groh] typed a description of respondents' two-story blue house rather than the alleged stockpile of firearms." When he executed the warrant, only Mrs. Ramirez was home. Agent Groh apparently told her that he was looking for "an explosive device in a box."

The Supreme Court held that by failing to particularly describe the things to be seized, the warrant violated the Fourth Amendment. Despite the absence of *any* description of the things to be seized, the warrant would have been found constitutional *if* a detailed affidavit were attached or if it cross-referenced a supporting application or affidavit that accompanied the warrant. The fact that the magistrate *believed* there was probable cause to support the warrant does not cure this defect. Groh argued that the *search itself was reasonable*, and because of this, the warrant's defect should be *overlooked*. The Court rejected this: "Even though [Groh] acted with restraint in conducting the search, 'the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer'" (*Groh v. Ramirez*, 2004, citing *Katz v. United States*, 1967). Groh also argued that he "orally described" what he was searching for to Mrs. Ramirez, thus giving her actual notice. But the Supreme Court ruled that her version, that the agents were

looking for explosives in a box, had to be believed. The problem with police officers' giving *verbal descriptions* of what they are authorized to seize is that verbal descriptions can be open-ended and vague, leaving the householder no basis to argue that a search may be going *too far*. Searches based on verbal descriptions in effect become *general searches*.

The Intersection of the First, Fourth, and Fifth Amendments

Defendants in some cases have argued that the search and seizure of documents had violated not only the Fourth Amendment but also the First and the Fifth Amendments. Searches that tread on the First Amendment are closely scrutinized because free speech is a highly valued liberty. In **Stanford v. Texas** (1965), a warrant authorized police to search Stanford's San Antonio home to seize "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the. . .operations of the Communist Party of Texas." In actions eerily reminiscent of *Entick v. Carrington* (1765), officers spent almost five hours in Stanford's home, taking more than a thousand books from his small business and his personal library, including books written by "Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and MR. JUSTICE HUGO L. BLACK." Many of Stanford's private documents and papers, "including his marriage certificate, his personal insurance policies, his household bills and receipts, and files of his personal correspondence," were seized. Ironically, no "records of the Communist Party" or any "party lists and dues payments" were found. This was a general warrant. It violated the Fourth and Fourteenth Amendments. When the things to be seized are books "and the basis of their seizure is the ideas which they contain," the First Amendment is implicated and particularity must "be accorded the most scrupulous exactitude." Noting the historic continuity between this case and the earliest days of the American republic, Justice Potter Stewart concluded by stating that "the Fourth and Fourteenth amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King."

A search warrant supported by probable cause was issued in ***Andresen v. Maryland*** (1976) for the seizure of business records and employees' notes in Andresen's law office related to a real estate fraud that he was alleged to have committed. Andresen challenged the introduction of these records on the ground that "the seizure of these business records, and their admission into evidence at his trial, compelled [him] to testify against himself in violation of the Fifth Amendment." The trend of modern cases is that the Fifth Amendment does not protect business records; the state does not violate a person's privilege against self-incrimination by obtaining business records by subpoena. A search warrant did not require Andresen to do or say anything and so had no element of self-incrimination. Papers could be seized like any other property as long as there was probable cause that the papers were contraband or evidence of crime. Neither the seizure of the papers nor their introduction into evidence at a trial violated the Fifth Amendment.

In ***Zurcher v. Stanford Daily*** (1978), a violent demonstration led to assaults on police officers. The police could not identify most perpetrators but knew that photographs of the incident were taken by the student-run *Stanford Daily* newspaper. The police obtained and executed a search warrant to seize photographs of the demonstrators. A civil suit challenged the use of a search warrant. The *Stanford Daily* argued that the police had to use a subpoena *duces tecum* instead of a warrant because it sought evidence from a third party (the newspaper) and not from the suspect, and because the First Amendment Free Press Clause requires a process that allows a newspaper to voluntarily turn over the relevant documents to prevent the police from rummaging through all of the newspaper's files.

The Court dismissed both arguments. As to the "third-party" search issue, the Court held that the "critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." The state's interest in enforcing the criminal law and recovering evidence is the same whether the evidence is in the premises of the suspect or a third person. Allowing a third party the option and the time to decide whether to obey a subpoena would make criminal investigations more cumbersome and could undermine effective prosecution in many cases.

Arguments that police had to proceed via a subpoena when searching newspaper offices included: (1) searches would disrupt the timely publication of the news, (2) confidential sources would dry up, (3) reporters would not record and preserve their recollections for future use, (4) news processing and dissemination would be chilled by the fear that searches would disclose editorial deliberations, and (5) the press would resort to self-censorship to conceal information of potential interest to the police. The Court discounted these fears as speculative; if abuses arose, they could be dealt with in later cases. The warrant in this case was narrowly tailored to specific kinds of items that would not implicate confidential sources or interfere with editorial decisions. The Court declined to "reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises."

Justice Stewart, joined by Justice Thurgood Marshall, dissented on the grounds that "police searches of newspaper offices burden the freedom of the press." Barring exigencies, "a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it." Unlike the majority's dismissal of the newspaper's arguments, Justice Stewart cited cases of intrusive police searches of news offices and felt that the ransacking of news offices, the drying up of information sources, and "unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public."

Anticipatory Warrants and Controlled Deliveries

Courts since the 1980s have issued **anticipatory warrants** to police, typically involving **controlled deliveries** of contraband. This useful law enforcement tool was recognized by the Federal Rules of Criminal Procedure in 1991.[13] The Supreme Court upheld the constitutionality of anticipatory search warrants in ***United States v. Grubbs*** (2006). Grubbs purchased a child pornography videotape from a Web site run by an undercover postal inspector. In such cases, there may be additional child pornography on the premises. Postal inspectors applied for a warrant to search Grubbs's house. The affidavit stated that the warrant would *not* be executed *until* a person received the package and physically took it into the home. This "triggering condition" was not stated in the search warrant, which did include a description of the house and of the items to be seized. The warrant was issued; two days later, the videotape was delivered. Grubbs's wife signed for it and took the unopened package into the house. Grubbs was later detained as he left the house and the search commenced. A half hour into the search he was given a copy of the warrant but not the affidavit. Grubbs argued that the search violated the Particularity Clause because the warrant did not include the triggering condition.

The Court unanimously held that anticipatory warrants are constitutional. "An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place" (*Grubbs*, 2006, internal quote marks deleted).

> Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called "triggering condition." . . . If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. (*United States v. Grubbs*, 2006)

The Court noted that in a sense all search warrants are "anticipatory" because a warrant requires "the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed" (*United States v. Grubbs*). An anticipatory warrant complies with the Fourth Amendment when the magistrate is given probable cause to believe that the triggering condition will occur and that if the triggering condition occurs "there is a fair probability that contraband or evidence of a crime will be found in a particular place" (*United States v. Grubbs*). As for Grubbs's specific challenge, the Court noted that the Fourth Amendment does not require a warrant to include information about the *method or conditions of execution*; it only requires the warrant to state the particular place to

be searched and the persons or things to be seized. The Court also did not credit Grubbs's argument that a warrant has to be presented to the homeowner *before* the search commences.

Anticipatory warrants encourage the use of search warrants over warrantless searches based on exigent circumstances, especially in drug-related crimes.[14] Controlled deliveries in drug cases often arise when police become aware that illicit drugs are in transit. Police then *delay* the movement of the goods long enough to obtain a warrant and follow the package to its destination. Probable cause is established by a reasonable seizure made by customs or mail officials establishing that the goods are contraband. At that point, law enforcement agents will have probable cause to arrest the recipient of the package and to search the package.

This, however, does not give agents probable cause to search the place to which the suspected package was delivered because it is not certain that other contraband is in the place.[15] Therefore, the scope of the search following the controlled delivery depends on the extent of the information that the police have *before* they initiate the search. To be sure that officers do not write affidavits for anticipatory searches that are subterfuges for officers to enter and to "create" plain view, "affidavits in support of such warrants should demonstrate probable cause to believe additional evidence is on the premises and should specify the nature of that additional evidence."[16]

When the final destination of the contraband is not previously known, it may be impossible to meet the Fourth Amendment requirement that the place to be searched be particularly described. In that case, several courts have stated that the police should have as little discretion in determining the place, or the "ultimate location," as possible.[17]

Controlled deliveries create extra hazards of unconstitutional searches. Therefore, police who request and magistrates who issue anticipatory warrants have to be especially careful about (1) the basis for probable cause, (2) the degree of certainty that a seizable item will be delivered to a specified location, (3) the specificity of the place to be searched, and (4) the appropriate scope of the warrant.[18]

Challenging a Search Warrant Affidavit

Police officers who lie on search warrant affidavits, or glide around the truth, subvert the integrity of the warrant system. Prior to ***Franks v. Delaware*** (1978), a defendant could not directly challenge an invalid search warrant before trial. In *Franks*, the Court held (7–2) that a defendant is entitled to a hearing to challenge a warrant if he can show that police injected lies into an affidavit. Two detectives swore in an affidavit that they contacted Jerome Franks's coworkers about relevant evidence of an alleged rape and "did have personal conversation with both these people." After the warrant was executed, the defense attorney requested a hearing in order to call Franks's coworkers to testify that they never spoke personally to the detectives and that "although they might have talked to another police officer, any information given by them to that officer was 'somewhat different' from what was recited in the affidavit." The Delaware courts denied the hearing. The United States Supreme Court reversed.

Franks v. Delaware requires that a defendant first make a *substantial preliminary showing* that the police made a false statement on the search warrant affidavit, either *knowingly* and intentionally or with *reckless disregard for the truth*. If this is shown the Fourth Amendment requires a hearing. At the hearing, the defendant must establish falsehoods by a *preponderance* of the evidence. If the defendant prevails, the magistrate then sets aside the false statements and decides whether probable cause still exists to support the warrant. If not, the warrant is voided, and the fruits of the search are excluded to the same extent as if probable cause was lacking on the face of the affidavit. This exacting standard precludes frequent challenges to affidavits.

Several arguments were raised against *ever* allowing a hearing to challenge an affidavit, including the weak ones that police are deterred from lying by swearing an oath and by the fear of perjury prosecutions. It was also argued that allowing a post-warrant challenge somehow diminished the authority of the magistrate who issued the warrant and that the magistrate could screen out lies on affidavits at the *ex parte* warrant application. This makes little sense, as a magistrate does not have the means to expose police perjury in a brief and often perfunctory *ex parte* session to review the affidavit. More substantial objections were that an additional hearing was collateral to the truth, wasted time and resources, and weakened finality. Justice Blackmun's majority opinion noted that the need to make a preliminary showing would prevent frivolous challenges, and such hearings do not undermine the truth-finding aspects of the criminal case. The dissenters were upset that this provided an area where the *exclusionary rule* would operate, but the majority believed that the exclusionary rule

should be applied to evidence obtained by means of police perjury and that a "flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning" (*Franks v. Delaware*, 1978).

Executing a Search Warrant: Knock and Announce

Search warrants can become *stale*. If not executed quickly, the probable cause that supported the warrant may disappear if the evidence is moved, destroyed, or loses its character as contraband. Therefore, F.R.C.P. Rule 41(e)(2)(A) states: "The warrant must command the officer to execute the warrant within a specified time no longer than 10 days." Similar rules exist in every state.

Because nighttime searches create a greater intrusion on privacy and raise the risk of greater violence born of confusion, the federal rules specify: "The warrant must command the officer to execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time" (F.R.C.P. 41(e)(2)(B)). Some states leave the decision of whether to conduct nighttime searches to the discretion of law enforcement officers.

The common law rule that officers must announce their presence before entering and state that they have a warrant—the **"knock and announce" rule**—is designed to (1) reduce the potential for violent confrontations, (2) protect individual privacy by minimizing the chance of forced entry into the dwelling of the wrong person, and (3) prevent a physical invasion of privacy by giving the occupant time to voluntarily admit the officers.[19] However, when officers have reason to believe, based on specific facts, that prior announcement of entry would produce immediate violence or an attempt to destroy all the evidence, they may dispense with the announcement.[20] Although this is a well-litigated area, the Supreme Court only recently decided the constitutional status of the knock and announce rule.

Petitioner Sharlene Wilson, in ***Wilson v. Arkansas*** (1995), made a series of narcotics sales to a police informant at the home that she shared with Bryson Jacobs. At one sale, Wilson produced a semiautomatic pistol, waved it in the informant's face, and threatened to kill her if she turned out to be working for the police. Based on information supplied by the informant, police obtained a warrant, which included a knock-and-announce provision, to search the house and to arrest Wilson and Jacobs. The affidavits stated that Jacobs had previously been convicted of arson and firebombing.

> The search was conducted later that afternoon. Police officers found the main door to petitioner's home open. While opening an unlocked screen door and entering the residence, they identified themselves as police officers and stated that they had a warrant. Once inside the home, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. They also found petitioner in the bathroom, flushing marijuana down the toilet. Petitioner and Jacobs were arrested and charged with delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia, and possession of marijuana. (*Wilson v. Arkansas*, 1995)

The Arkansas Supreme Court upheld the search and seizure and specifically found that the Fourth Amendment does *not* include a rule that police must knock and announce. A unanimous U.S. Supreme Court reversed that decision.

Because there is no "knock and announce" rule in the Fourth Amendment's *text*, the state argued that it is not a constitutional rule. The opinion of "originalist" Justice Clarence Thomas took a different tack: "In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." The Court will engraft an English common law rule onto the Fourth Amendment so long as it existed *prior to* the adoption of the Constitution. This was justified by arguing that the general-reasonableness construction of the Fourth Amendment (see Chapter 2) requires that searches be reasonable, and what was reasonable to the Framers is determined by knowing late-eighteenth-century common law rules. Also significant was the fact that most new states, shortly after July 4, 1776, passed "reception" statutes making the English common law the law of the state up until independence. Justice Thomas cited a noted seventeenth-century case, *Semayne's Case* (1603), and several prominent English commentators to establish that "[a]t the time of the framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce

his presence and authority." Furthermore, the "common-law knock-and-announce principle was woven quickly into the fabric of early American law." In all, the Court's opinion surmised that the Framers thought that the "knock and announce" rule was part of the "reasonableness" analysis of the Fourth Amendment.

The Court did not rule on the constitutionality of the actual search in this case. It did note that *exceptions* to the "knock and announce" rule existed when:

- A threat of physical violence exists.
- A suspect escapes from an officer and retreats to his or her dwelling.
- A demand to open the door is refused.
- There is reason to believe that evidence would likely be destroyed if advance notice were given.

The case was remanded to the Arkansas courts to determine if any exception existed to uphold the search and seizure in this case.

In fact, *Wilson v. Arkansas* does not create an impediment to unannounced entry when justified by an exception. The Supreme Court has insisted, nevertheless, that the circumstances allowing a constitutional unannounced search must be justified in *each* case. In ***Richards v. Wisconsin*** (1997), the magistrate *denied* a police request for a **no-knock warrant**. Police tried to enter a suspected drug dealer's hotel room with a ruse, but Richards spotted a uniformed officer and slammed the door shut. The officers waited two or three seconds before breaking in the door and identified themselves *after* they entered. Richards was caught escaping through a window, and cash and cocaine hidden in the room were seized. Although the police did not "knock and announce" *before* entering as required by law, the trial court allowed the introduction of the evidence because drugs are easily disposable. The Wisconsin Supreme Court, affirming, held that when police officers execute a warrant to search for drugs, the circumstances *automatically* raise exigent circumstances. This in effect held that police *never* have to knock and announce in a drug case. The United States Supreme Court unanimously *reversed*. A blanket no-knock exception has two flaws: (1) some drug search warrants might be executed at a house where the occupants, at the time of the search, were not involved in the drug trade; and (2) such an exception would soon negate the rule, because it would be extended to all other crimes. The *Richards* Court also specified *reasonable suspicion*—a very low standard—as the evidentiary standard to support the no-knock warrant exception.

United States v. Ramirez (1998) confirmed that police officers are not held to a higher standard than "reasonable suspicion" when the *execution* of a no-knock warrant results in *damage to property*. A reliable confidential informant told federal agents that a dangerous prisoner, who escaped from an Oregon county jail where he was held while testifying in a case, was hiding in the home of Hernan Ramirez. A 'no-knock' warrant was obtained to search Ramirez's home for the prisoner.

> In the early morning of November 5, approximately 45 officers gathered to execute the warrant. The officers set up a portable loud speaker system and began announcing that they had a search warrant. Simultaneously, they broke a single window in the garage and pointed a gun through the opening, hoping thereby to dissuade any of the occupants from rushing to the weapons the officers believed might be in the garage.

Ramirez, awakened by this, thought his house was being burglarized and took his pistol and fired it into the garage ceiling. He dropped the gun when he realized the besiegers were police officers. Ramirez was indicted for being a felon in possession of firearms. The federal district court granted his motion to suppress evidence regarding the weapon possession; it found that the Fourth Amendment had been violated because there were "insufficient exigent circumstances" to justify the police officer's destruction of property in their execution of the warrant. The Ninth Circuit Court of Appeals affirmed, holding that property destruction accompanying a no-knock entry required more than a "mild" **exigency**. The Supreme Court unanimously *reversed*. It held that there is not a higher standard for a no-knock entry when property damage occurs as part of the entry. While noting that excessive property damage created during an entry could amount to a Fourth Amendment violation, the breaking of a single pane of glass in this case was reasonable.

The standard by which to evaluate the constitutionality of the *delay* between announcing police presence and breaking into a home was established in ***United States v. Banks*** (2003): the

test is whether the entry is *reasonable* under all of the facts and circumstances of the case. In the *Banks* case, the police executed a warrant to search for cocaine during the daytime, when people are up and about. They loudly announced their presence. Under these circumstances, the Court ruled that it was reasonable to force open the door after waiting for *fifteen to twenty seconds* with no answer. The test was *not* the time it would take a person *to get to the door*, but the time a person needed *to destroy contraband*. A "prudent dealer" was likely to keep cocaine "near a commode or kitchen sink" and would have the opportunity to get rid of the illegal drugs within a short period of time. "Police seeking a stolen piano may be able to spend more time to make sure they really need the battering ram" (*United States v. Banks*, 2003).

As discussed in Chapter 2, the Supreme Court held (5–4) in ***Hudson v. Michigan*** (2006) that violations of the "knock and announce" rule, which *are* Fourth Amendment violations, do *not* result in *excluding* the evidence seized. In reaching this conclusion, the majority offered several comments about the "knock and announce" rule that *diminished* its stature. The rule has many exigency exceptions that are put into operation if the police or magistrate merely have reasonable suspicion of their existence. Further, the rule is somewhat vague, depending on the facts and circumstances of the situation to determine whether the delay between announcing police presence and forced entry was reasonable. To cap it off, while the "knock and announce" rule is designed to protect life and limb, property, and elements of privacy and dignity, "[w]hat the knock-and-announce rule has never protected . . . is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable" (*Hudson v. Michigan*, 2006, emphasis in original). The majority and the dissenters differed as to whether eliminating exclusionary rule protection will undermine the rule. The effects of *Hudson* remain to be seen, although with no effective remedy it is logical to believe that the "knock and announce" rule will not be followed in the most typical kinds of drug busts.

Inventory and Delayed Notice, "Sneak and Peek" Warrants

Federal rules require that a copy of the search warrant be given to the property owner or left at the premises after execution (F.R.C.P. Rule 41(f)(3)). An officer present at the search must prepare and verify a detailed written inventory of the property seized in the presence of another (F.R.C.P. Rule 41(f)(2)). The officer must return the warrant and the inventory to the judge who issued the warrant, and the judge in turn must give a copy of the inventory to the person from whom the property was taken and to the warrant's applicant (F.R.C.P. Rule 41(f)(4)). These practices ensure the *regularity* of the search warrant process, provide *notice* to suspects that the state has intruded on their privacy, and protect police officers from charges of theft.

A significant exception to the rule of immediate notice is the relatively novel *"sneak and peek"* or *covert-entry* warrant. Beginning in 1984, federal agents in a few drug cases requested warrants to enter a premises, observe the premises and perhaps take photographs, and leave the premises undisturbed. The few federal appeals courts that decided cases where **"sneak and peek" warrants** were issued have held that covert entry under a warrant is a search and that information gained about the area of privacy is a seizure. The courts held that although "sneak and peek" warrants violated the Federal Rules of Criminal Procedure, which required immediate notice, they did *not* necessarily violate the Fourth Amendment. The 1968 federal wiretap law, for example, was held to allow covert entry into places to place the listening devices without immediate notice. *Dalia v. United States* (1979) ruled that the Fourth Amendment or the eavesdropping statute did not require a separate warrant to authorize a covert entry to install the listening device. Covert entries are constitutional as long as they are made pursuant to a *warrant*. The cases make it clear that to be constitutional, "sneak and peek" warrants must provide notice of the entry to the defendants within a reasonable time, which usually means within a week.[21]

Legislative authorization for "sneak and peek" warrants in all cases, not just terrorism investigations, was established by the USA PATRIOT Act in 2001. The law now allows *delay* in the notice of a warrant execution *if* the issuing court finds that immediate notification may have adverse results such as endangering the life or physical safety of an individual, flight from prosecution, destruction or tampering with evidence, intimidation of potential witnesses, or something else that seriously jeopardizes an investigation or unduly delays a trial. Notice of the search can also be delayed if the warrant prohibits the seizure of any tangible property. A "sneak and

peek" warrant must provide "notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay" (18 U.S.C. §§ 3103a, 2705).[22]

Author Robert Duncan, who favors surreptitious or covert-entry warrants as necessary law enforcement tools in a dangerous age, nevertheless is concerned that the new law is too broad and has suggested modifications. First, requesting agents should provide more information than is needed for an ordinary search warrant, similar to that required for electronic eavesdropping warrants (e.g., showing that other law enforcement techniques have failed to provide needed information). The time limit for notice should be reduced to seven days, and there should be limits on the number of times extensions can be requested. Finally, covert-entry warrants should be limited to crimes that involve "well-planned, well-organized, and in-depth criminal behavior," including terrorism, racketeering, and gang-related activity.[23]

Notice—formally alerting individuals that the government will or has acted against their interests—is a fundamental part of the due process "timely notice and fair hearing" formula, stretching back in our law to Magna Carta (1215). Secret arrest, secret search, secret interrogation, secret trial, and secret detention are the very definition of lawless government. Being able to spy on someone's constitutionally protected private areas should raise profound concerns about "Big Brother" government.[24] One innovation that has allowed greater intrusion with delayed notice has been electronic eavesdropping. There is no disagreement that electronic eavesdropping is a necessary law enforcement tool in serious conspiracy, white-collar crime, organized crime, bribery, and terrorism cases. But the 1968 electronic eavesdropping law (and subsequent additions) has been carefully hedged in with substantial checks to ensure that this potentially coercive tool will not be abused by government officials for partisan or corrupt purposes.

The problem, in the years after the 9/11 attacks, is that the public and even members of Congress may be kept in the dark by the administration about the scope of "sneak and peek" warrants. According to the *Los Angeles Times*, "FBI agents are [using] 'sneak and peek' warrants on a wider scale, entering hundreds of homes clandestinely to gather intelligence and copy files and computer drives . . . without notification. And they have conducted surveillance on antiwar, religious, civil rights and environmental groups, including Greenpeace and the American-Arab Anti-Discrimination Committee."[25] This politicized use of the government's law enforcement powers is reminiscent of the Watergate abuses that brought down the Nixon administration in the 1970s.[26] In a time of war, ordinary political differences become magnified, and opponents come to be seen as traitors. Prosecutions in such times of crisis can be motivated by these deep emotions, even if the actual charges are not for treason.[27]

Even if fears about the politicized use of "sneak and peek" warrants are exaggerated, a highly intrusive law enforcement technique has been slipped into the law with virtually no discussion—and it can be used in ordinary criminal investigations, not just terror-related cases.[28] The "sneak and peek" provision was in the Justice Department's grab bag of desired powers, just waiting for the right opportunity to be enacted.[29] Another concern is that state and local law enforcement authorities are likely to lobby for such powers, and the potential exists for "sneak and peek" searches to become a regular feature of investigations of low-level drug possession and other crimes that occur with regularity.

Deadly Errors

The importance of police honesty and accuracy in the search warrant process cannot be overstated. In September 1999, four Denver SWAT officers were sent to execute a no-knock warrant at 3738 High Street, a two-story home. It was the wrong house. While executing the warrant, the officers who broke in killed forty-five-year-old Mexican migrant laborer Ismael Mena, father of nine, who raised a gun as the police entered his bedroom. Officer Joseph Bini, who swore out the affidavit, however, was charged with perjury for "'unlawfully and knowingly' lying on a search warrant affidavit." He swore in his affidavit that "he *personally* observed an informant make his or her way on foot to the house" at 3738 High Street. Based on his affidavit, an assistant district attorney and a county judge signed off on the warrant. In fact, the drug deal took place at 3742 High Street, a single-story home. Bini dropped the informant off four blocks from the house. The district attorney believed "[the informant] attempted to determine the address by counting the houses down the alley and up the front on this particular block. He apparently miscounted the houses and wrote the address down wrong."

As a result, a man died, Denver paid Mena's family $400,000 to settle legal claims, and the police chief was fired. Officer Bini pleaded guilty to misdemeanor charges, and the SWAT team was officially exonerated in the shooting after a close examination of their responses. Denver adopted several reforms: Police have only three days instead of ten days to serve no-knock warrants, more training is provided, and experienced police supervisors evaluate and approve no-knock raids. Denver's mayor said that "the public can expect to see a decrease in the number of no-knock raids" as a result of the tighter guidelines. But it took an unnecessary death to achieve that result.[30] Unfortunately, the overuse of paramilitary police raids by SWAT teams in America, estimated at forty thousand per year, has led to many cases like that of Ismael Mena.[31]

REVOLUTIONIZING THE FOURTH AMENDMENT

For many years, Fourth Amendment law was tied to property concepts, especially the idea that a search and seizure involved a physical trespass onto a person's **constitutionally protected area**. This concept was based on traditional practice and on the Fourth Amendment's words, protecting "persons, houses, papers, and effects" from unreasonable search and seizure. This thinking created problems when, in *Olmstead v. United States* (1928), the Supreme Court held that wiretapping did not constitute a search and seizure. This decision withdrew constitutional protection from a vital area of privacy and caused many to realize that the Fourth Amendment protected vital interests and not simply property. The Court finally overruled *Olmstead* in 1967, but to do so it had to establish an entirely new "expectation of privacy" doctrine because protecting intangible privacy rights was not compatible with the older "constitutionally protected area" doctrine.

Modernizing Search and Seizure Law

In 1967 and 1968, the Supreme Court "revolutionized" Fourth Amendment law in four cases that upset established doctrines and opened the door for a more flexible mode of search and seizure interpretation. The first of these cases, *Katz v. United States* (1967), was the centerpiece of this revolution. It broke the law of search and seizure away from its traditional mooring in property law. In its stead, issues were now to be decided more explicitly on balancing of the interests deemed central to the Fourth Amendment: the need for effective law enforcement versus the protection of privacy and liberty rooted in the expectation of privacy.

Katz was followed by ***Warden v. Hayden*** (1967), the second case in this series, which abolished the "mere evidence" rule of *Gouled v. United States* (1921). (See Chapter 2.) *Gouled* held that only the fruits of a crime, contraband, or the instrumentality used to commit the crime could be seized by police. So-called *mere evidence* that did not fit these categories could not be seized by police to be used in evidence. In *Warden v. Hayden*, police seized clothing that could be used to identify an alleged robber during a lawful search of Hayden's house. The Supreme Court held that seizing the clothing was proper, and it could be held by the state for the duration of the prosecution to be used as evidence that a man wearing similar clothing was the perpetrator. The mere evidence rule (1) did not serve a defendant's legitimate privacy interest; (2) was based on outmoded property concepts; and (3) hampered the legitimate law enforcement interests of the state. The new rule better balanced the competing interests.

Next came ***Camara v. Municipal Court*** (1967) and its companion case, *See v. City of Seattle* (1967), which appeared to expand Fourth Amendment rights of individuals by requiring a warrant for administrative searches that did not directly enforce the criminal law. Under a 1959 case, *Frank v. Maryland*, the Supreme Court held that the search of a house or a business place, conducted by an *administrative officer* for the purpose of enforcing administrative regulations rather than the state's penal code, was simply not a search protected by the Fourth Amendment. In *Camara*, the Court rethought the issue and held that the Fourth Amendment text applied to an intrusion by any government officer into "areas" protected by the expectation of privacy. Entry by health, fire, or housing inspectors, for purposes of enforcing regulations, was now covered by the Fourth Amendment.

This, however, created a dilemma. Most administrative inspection programs are based not on particularized probable cause of a safety hazard in a particular home or business, but on bureaucratic assessments that houses or businesses in an entire neighborhood should be entered and inspected. Requiring a municipality to get particularized probable cause for each house in the neighborhood would be too burdensome, and the inspection program would fail. The Court

solved the problem by authorizing less-specific administrative warrants based on general area inspections. Information about such general conditions as the age of buildings in a subdivision or statistical information about the number of fires in a neighborhood would support such warrants. Probable cause was "defined down," so to speak. This solution created a new and more flexible way of thinking about the Fourth Amendment. *Camara* thus opened the door to the general-reasonableness construction of the Fourth Amendment. (See Chapter 2.) The Court reasoned that the Fourth Amendment text does not absolutely require search warrants, and at minimum requires that all search and seizures be reasonable. Under this newer, flexible reasoning, the Supreme Court upheld general or "area" warrants, the very thing that the generation of 1776 found abominable. This relaxed mode of interpretation was later used to allow greater government intrusion into areas of privacy by non-law-enforcement officers under the special needs doctrine. (See Chapter 5.)

The last case in this series, ***Terry v. Ohio*** (1968), for the first time in American constitutional history, upheld temporary but forcible stops of individuals even though the police officer did not have probable cause to believe that the person committed a crime, the only evidentiary standard found in the Fourth Amendment's text. A state deprivation of liberty could now be based on a lesser standard of evidence that came to be known as **reasonable suspicion**. (*Terry* is covered in Chapter 5.) The decision in *Terry* depended on the new mode of Fourth Amendment reasoning: balancing of interests between the state and the individual, flexibility, and reliance on the Reasonableness Clause.

These four revolutionary decisions were not inherently liberal or conservative. Two of them, *Warden* and *Terry*, explicitly expanded the state's powers, while *Katz* and *Camara* formally expanded the rights of individuals. In their larger effects, the cases were "liberal" in that they brought a larger measure of police work under constitutional oversight, but they were "conservative" in permitting a flexible approach that made it easier for the Court to water down traditional Fourth Amendment standards. It is ironic that the liberal Warren Court laid a foundation for flexible interpretation—an approach that was resisted by relatively "conservative" justices like John M. Harlan II. The flexible approach was then adapted by the politically conservative Burger and Rehnquist Courts to make new law and expand the powers of the state against the individual.

Creating the "Expectation of Privacy" Doctrine

This section takes a closer look at the decision and reasoning in ***Katz v. United States*** (1967). Modern conditions generate problems that require novel legal thinking. Electronic communication by telegraph, telephone, and wireless communication—unknown to the Framers in 1791—led to invasions of privacy by police that did not have the appearance of a traditional search and seizure, with the police pounding at the door and physically searching the home. In 1928, the Supreme Court thus ruled in *Olmstead v. United States*, by a five-to-four decision, that wiretapping did *not* constitute a search because there was no physical trespass into the house and no tangible evidence was taken. This ruling was deeply disturbing because wiretapping and electronic eavesdropping by the government are an obvious intrusion into the lives and privacy of individuals, and privacy is at the core of the Fourth Amendment. A powerful dissent by Justice Louis Brandeis reflected the decision's unpopularity. (See the biographical sketch of Brandeis following Chapter 1.) A federal statute soon placed some controls on telephone wiretapping.[32] The federal law, incidentally, did not cover "bugging"—electronic eavesdropping by means of a wireless listening device—which was not as well known and not then seen as being within the purview of the federal government's jurisdiction over interstate communications.[33]

Over the next few years, the Court grappled with the question of electronic eavesdropping. The application of traditional, property-based Fourth Amendment concepts produced weirdly inconsistent results. ***Goldman v. United States*** (1942), for example, held that placing an electronic listening device against a wall of a house was not a trespass and therefore, under *Olmstead*, was not a search and seizure under the Fourth Amendment. Evidence so obtained could be used against the defendant. Dissatisfied with the notion of leaving individuals open to government spying, the Court in ***Silverman v. United States*** (1961) held that when a microphone was driven into a wall, rather than placed up against it, there was a physical trespass and it was thus a search and seizure subject to the rules of the Fourth Amendment. In this case, the evidence seized by the eavesdropping was not admissible. These contradictory decisions were inherently unstable. The Supreme Court, nevertheless, was not eager to clear up this doctrinal mess.

The Court was chiefly concerned that a case squarely holding electronic eavesdropping to be a search and seizure within the purview of the Fourth Amendment could entirely outlaw bugging and wiretapping. The reason is that a bug or wiretap is an inherently general search that picks up all conversations—of nonsuspected people who happen to call or be in the place being bugged, as well as the suspect. It was difficult to see how a warrant for an electronic eavesdropping device could ever square with the Fourth Amendment's particularity requirement. The justices in the 1940s and 1950s included former prosecutors, senators, and attorneys general who were familiar with how government worked. They knew that electronic eavesdropping was a useful law enforcement tool and that it was often impossible to obtain evidence of organized crime, white-collar crime, and government fraud and bribery without bugs and taps. On the other hand, they were well versed in the dangers of unchecked government electronic spying. As became later known to the general public, the FBI under its long-time director J. Edgar Hoover, often with the compliance of presidents, spied on members of Congress and a significant number of citizens. At least one Supreme Court justice believed that he was the subject of FBI taps.[34] The dilemma confronting the Court, seemingly insoluble until the late 1960s, was how to allow but to tame electronic eavesdropping.

The answer to this dilemma emerged in the 1960s. Under established doctrine, no statutory or Fourth Amendment rights (including the expectation of privacy) are violated when a person's voice is secretly recorded while voluntarily talking to an interceptor. A person who says things in a conversation to another lives with the risk that the false friend will reveal any confidences to others, including the authorities (*Hoffa v. United States*, 1966; *Lewis v. United States*, 1966). This is the case even if the false friend is speaking on a telephone and a police officer is listening on an extension line (*Rathbun v. United States*, 1957) or secretly wearing a listening device (*On Lee v. United States*, 1952; *Lopez v. United States*, 1963). In short, a law enforcement officer or agent need not obtain a judicial warrant to "wear a wire."[35] Despite this firm rule, to be on the safe side, government investigators in ***Osborn v. United States*** (1966) had Vick, a private cooperating undercover agent, make a written statement under oath that he had been hired by Osborn, an attorney, to bribe a juror in a prosecution of national labor leader James R. Hoffa. The statement was taken to two federal district judges who authorized Vick to wear an electronic recorder when next speaking to Osborn about the bribery. This practice was upheld by the Court in *Osborn*, although not made mandatory. The following year, in *Katz*, the Supreme Court praised the practice of seeking a warrant for a narrow and precise electronic search—for capturing a conversation that would not draw in innocent speakers.

Shortly before deciding *Katz*, the Supreme Court struck down New York's electronic eavesdropping law as too broad in ***Berger v. New York*** (1967). Objectionable features of the New York law included the fact that it "lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed," that a warrant is granted for sixty days of uninterrupted listening, that the statute failed to describe the conversations sought with specific particularity, that once incriminating conversations were recorded the eavesdropping did not have to cease, that extensions of the initial sixty-day listening period could be obtained without new reasons, and that no return was required, so that a person who was tapped or bugged would not know of it. *Osborn* and *Berger* were the extreme ends of electronic eavesdropping—one extremely precise and narrow, and the other overly broad.

The facts in *Katz* were simple. Federal agents suspected that Charles Katz, a "bookie," was transmitting betting information across state lines by telephone in violation of federal law. Katz was observed making calls from the same telephone booth at about the same time every day in Los Angeles. For a week, FBI agents placed a microphone on the top of the telephone booth and activated it only when Katz used the booth to make calls, recording incriminating conversations. Katz appealed his conviction on the ground that the electronic eavesdropping violated his Fourth Amendment rights. The government argued that this case was the same as *Goldman* in that no physical intrusion into a constitutionally protected area, and so no Fourth Amendment violation, had occurred.

The Supreme Court overruled *Olmstead* and *Goldman* and replaced the concept that the Fourth Amendment applies in "constitutionally protected areas" with a memorable phrase in Justice Potter Stewart's majority opinion: "For *the Fourth Amendment protects people, not places.* What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (*Katz v. United States*, 1967, emphasis added). It did not matter that Katz was visible to the eye in the phone booth.

> But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. . . . One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. (*Katz*, 1967)

The Court made it clear that property interests do not determine the scope of Fourth Amendment protections. It held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment" (*Katz*, 1967).

The government's search and seizure of Katz's conversations violated the Fourth Amendment because the agents did not seek a warrant. The Court took special pains to note that the search was very narrow in that it seemed to be based on probable cause and was conducted in such a way as to obtain only Katz's words at a time and place likely to involve his suspected criminal activity. The Court noted that a magistrate probably could have issued a warrant. No matter how strong the probable cause, the *actual issuance* of the warrant is critical; failing to obtain one rendered the search unconstitutional.

The Katz doctrine is a product not only of the majority opinion but of that decision plus the heart of Justice Harlan's concurrence. "My understanding of the rule that has emerged from prior decisions is that there is a twofold 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'" (*Katz v. United States*, 1967, Harlan, J., concurring). This **two-pronged test** means that there is a *subjective* (personal) and an *objective* (societal) component of the expectation of privacy. The objective component prevents defendants from making outlandish or unacceptable claims of Fourth Amendment privacy.

Justice Hugo Black was the lone dissenter. He argued that although electronics were unknown in 1791, eavesdropping was a familiar practice, and the Framers could have protected private conversations if they so wished. He instead adhered to the notion of *Olmstead*, that the Fourth Amendment indeed did refer to and protect the seizure of tangible items. By this narrow adherence to the words of the Fourth Amendment, Justice Black solidified his standing as a "constitutional fundamentalist" rather than a "judicial liberal."

Applying the "Expectation of Privacy" Doctrine

Despite the new mode of expectation of privacy Fourth Amendment analysis introduced by *Katz*, the Supreme Court continues to decide some cases under the "constitutionally protected area" idea, which affords greater protection to the home than other places. In Fourth Amendment standing cases, for example, the Court has resisted the logic of *Katz*. Justice Byron White, dissenting in *Rakas v. Illinois* (1978), noted that

> [t]he Court today holds that the Fourth Amendment protects property, not people, and specifically that a legitimate occupant of an automobile may not invoke the exclusionary rule and challenge a search of that vehicle unless he happens to own or have a possessory interest in it. . . . The majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense.

In such cases. the conservative Court seems to be motivated more to limit suspects' rights than to create a coherent body of Fourth Amendment law. One might almost say that the *Katz* doctrine is used by the Court to resolve Fourth Amendment issues except when it does not.

EXPECTATION OF PRIVACY IN ONE'S BODY Obtaining physical evidence from within a person's body raises Fourth Amendment questions that are answered by examining the severity of the intrusion and the law enforcement interests. Factors include the risk to a person's safety or health in the procedure, the extent of control used on the body, and the effect on the suspect's dignity. Forced surgery to remove a bullet lodged in a robbery suspect was held to violate his

Fourth Amendment rights because the expectation of privacy in one's bodily integrity is great (***Winston v. Lee,*** 1985). On the other hand, taking blood in a medical setting by medical personnel to determine a driver's blood alcohol level after a fatal accident has been upheld as constitutional: It presents virtually no health risk and is so routine as to involve minimal interference with Fourth Amendment dignity interests (***Schmerber v. California,*** 1966). Lower courts have also perceived a greater privacy interest in bodily integrity in cases involving body cavity searches and strip searches. (See Chapter 4.)

A person's observable physical characteristics, such as one's facial description, voice, or handwriting, are not "seized" if someone testifies to them at a trial or if a person's description is taken by police in an investigation (***Holt v. United States,*** 1910; *United States v. Dionisio*, 1973; *United States v. Mara*, 1973). Requiring a person to participate in a lineup does not violate that person's Fourth or Fifth Amendment rights (*United States v. Wade*, 1967).

The Supreme Court has held that urine collection and testing to ascertain the presence of drugs in a person's body intrudes upon expectations of privacy that society has long recognized as reasonable. "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." The Court noted that the expectation of privacy is not only rooted in the traditional dictates of modesty but also in the fact that the chemical analysis of urine, like that of blood, can reveal a host of medical facts about a person. Although urine testing by state agencies in order to detect drugs or alcohol is protected by the Fourth Amendment, the collection is allowed under certain conditions (***Skinner v. Railway Labor Executives' Association,*** 1989). (See Chapter 5.) In contrast, private business is not restricted in this practice by the Fourth Amendment because there is no state action.

MAINTAINING PROPERTY INTERESTS AFTER KATZ The Fourth Amendment continues to protect property interests. In ***Soldal v. Cook County*** (1992), a mobile home park evicted Soldal and his mobile home from its property and utilities. The park's owner requested that sheriff's deputies stand by in the event that the eviction might lead to violence. The park's employees, not acting in accordance with local statutes, pushed Soldal's trailer into a road, causing major property damage. There was no invasion of Soldal's privacy, because the employees never entered Soldal's trailer, but his property was damaged. The officers did not physically assist in the eviction, but the Supreme Court held that their presence established state action. (See Chapter 2.) Soldal sued the sheriff's department under 42 U.S.C. §1983, claiming that his Fourth Amendment rights were violated. The government argued that without a *Katz*-like violation of privacy rights, there was no Fourth Amendment wrong. This argument was firmly rejected: *Katz* protects both privacy and property rights. According to Justice White, although there was no search, there was a seizure—a "meaningful interference with an individual's possessory interests in that property." Because "[w]hat matters is the intrusion on the people's security from governmental interference," this case fell within the Fourth Amendment, allowing Soldal's lawsuit to go forward.

EXPECTATION OF PRIVACY IN DWELLINGS "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable" (*United States v. Karo*, 1984). The Supreme Court often leans in favor of a defendant's home rights for this reason. In *Payton v. New York* (1980) (see Chapter 4), for example, the Court ruled that an arrest warrant must be obtained in order to forcibly enter a home to arrest a person. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*Payton*, citing *United States v. United States District Court*, 1972). The protection of the home applies to apartments, offices, garages, and temporary dwellings, such as hotel rooms. This has been confirmed in cases where the Court has denied landlords and hotel keepers the right to consent to police searches of tenants' rooms (*Chapman v. California*, 1967; *Stoner v. California*, 1964). The protection of home privacy was a key reason for the Court's modification of the hot pursuit doctrine to disallow warrantless home entry for relatively minor offenses (*Welsh v. Wisconsin*, 1984; see Chapter 5).

Even a conservative Court has scrupulously upheld the Fourth Amendment protections of the warrant and probable cause when the core area of the home is involved. A person has no expectation of privacy in his or her public movements, and thus no warrant was required when

police placed an electronic **beeper** in a drum containing chloroform to monitor a suspected drug manufacturer route along public streets (*U.S. v. Knotts*, 1983). On the other hand, a suspect's Fourth Amendment rights were violated when, without a warrant, agents used a beeper to trace the movement of a drum *inside* the suspect's home. "The beeper tells the agent that a particular article is actually located at a particular time in the private residence and is in the possession of the person or persons whose residence is being watched. Even if visual surveillance has revealed that the article to which the beeper is attached has entered the house, the later monitoring not only verifies the officers' observations but also establishes that the article remains on the premises" (*United States v. Karo*, 1984).

There is no Fourth Amendment protection of real estate as such, called **open fields** in *Hester v. United States* (1924) and *Oliver v. United States* (1984). The Supreme Court has taken the common law concept of the **curtilage**—the area immediately surrounding a house—and has given it constitutional protection (*Oliver v. United States* 1984; *United States, v. Dunn*, 1987). Still, the Court has strained to not apply the curtilage idea to police observations of backyards from low-flying fixed-wing airplanes and helicopters (*California v. Ciraolo*, 1986; *Florida v. Riley*, 1989).

PERSONS UNDER CORRECTIONAL JURISDICTION The one dwelling not clothed with Fourth Amendment protection is a prison cell, no matter how strong a prisoner's subjective sense of privacy in it. A "prison shares none of the attributes of privacy of a home." Although prisoners retain constitutional rights that do not conflict with legitimate prison objectives (rights such as freedom of religion and protection from cruel and unusual punishment), "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell; . . . the Fourth Amendment proscription against unreasonable searches and seizures does not apply within the confines of the prison cell." As a result, prison authorities are allowed under the Constitution to make random shakedown searches of prisoners' cells. There are limits to the practice if it is intended only to harass prisoners (***Hudson v. Palmer,*** 1984).

Similarly, the Court, over a strong dissent, allowed a probation officer to enter a probationer's home without a warrant and on less than probable cause (***Griffin v. Wisconsin,*** 1987). The Court said that a "probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" On the other hand, in Wisconsin all probationers fall under a regulation that permits any probation officer to search a probationer's home without a warrant as long as his or her supervisor approves and as long as there are "reasonable grounds" to believe that contraband is present. The Supreme Court upheld the regulation on the ground that probation supervision is a "special need beyond the normal need for law enforcement"—a Fourth Amendment doctrine that permits warrantless searches on less than probable cause. (See Chapter 5.) *Griffin* implied that a probationer's status imposes a lower expectation of privacy at home than that of an unconvicted person. It was the last case in this group based on the special needs doctrine, which upholds standardless searches that are not designed to promote law enforcement.

Probationers' home privacy rights were further diminished in ***United States v. Knights*** (2001). A California probationer signed a probation order acknowledging as a condition of probation that he would "submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." Knights's apartment was searched by a police officer who investigated an arson and had reasonable suspicion but not probable cause that evidence of the crime was in the apartment. The officer did not obtain a search warrant because he knew of Knights's probation condition. Incriminating evidence was found in a search of Knights's home and was used to convict him of a new crime. Knights argued that a warrantless search was permissible only for the special needs purpose of enforcing probation regulations and not for the investigation of new crimes. In rejecting this position, the Court noted that "'the very assumption of the institution of probation' is that the probationer 'is more likely than the ordinary citizen to violate the law.'"

The major difference between the privacy expectation in a prison cell and in a probationer's home is the level of cause required before probation or police officers can enter without a warrant. A few years before *Knights*, the Supreme Court held, in ***Pennsylvania Board of Probation and Parole v. Scott*** (1998), that the exclusionary rule does not apply to exclude evidence from a parole revocation hearing, where a parole officer illegally entered the home that a parolee shared with his mother, without consent, a warrant, or authorization "by any state

statutory or regulatory framework ensuring the reasonableness of searches by parole officers." This clearly implies that a parolee has a lesser expectation of privacy in a home than a free citizen does, although the Supreme Court did not analyze the case under *Katz*.

In a six-to-three decision, the Court held in ***Samson v. California*** (2006) that a state can, by statute, obliterate virtually all of the Fourth Amendment rights of a parolee. Donald Samson was walking down the street with a woman and a child. A police officer who knew that Samson was a parolee verified that there were no outstanding warrants against him. The officer nevertheless searched Samson and found drugs. A California law, probably the only one like it in the United States, required a parolee to consent to warrantless and standardless searches at any time. The majority found the condition to be reasonable and upheld the search because a parolee's status is essentially like that of a prisoner and because of the high recidivism rates of California parolees.

MEDIA RIDE-ALONGS ***Wilson v. Layne*** (1999) held it to be "a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." A proper arrest warrant, supported by probable cause, was issued to U.S. Marshals to enter a Rockville, Maryland, home to arrest Dominic Wilson, a dangerous fugitive. Unbeknownst to the police, it was the home of Wilson's parents. The arrest warrant was executed at 6:45 a.m., much to the surprise of Wilson's parents. After discovering that Dominic was not at the house, the arrest team departed. The team "was accompanied by a reporter and a photographer from the *Washington Post*, who had been invited by the Marshals to accompany them on their mission as part of a Marshal's Service ride-along policy." The photographer took numerous photographs but published none. The reporters did, however, observe a scuffle and the handcuffing of Mr. Wilson, who was wearing briefs. They did not assist in executing the warrant. The Wilsons brought a civil lawsuit for money damages against the Marshal's Service for violating their Fourth Amendment right of privacy by bringing reporters into their home.

The government tried to justify the **media ride-along** by arguing that (1) media presence promotes accurate reporting and crime fighting, (2) the presence of third parties minimizes police abuses and protects the suspects, and (3) the police should be allowed to determine whether these law enforcement interests are advanced by the ride-along. The Court was unpersuaded by these reasons. These factors, even if reasonable, promote general interests and are not sufficient to overcome the specific constitutional right held by the Wilsons.

The Court did not refer to *Katz* or to the expectation of privacy in *Wilson;* instead, it emphasized "the importance of the right of residential privacy at the core of the Fourth Amendment," a "centuries-old principle of respect for the privacy of the home." Beyond this, the Court did not reason except to say, "Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down." *Wilson* shows a trend of recent cases that emphasize the expectation of privacy in the home but do not apply the *Katz* doctrine to the fullest extent in other areas of law enforcement.

EXPECTATION OF PRIVACY IN AUTOMOBILES There is a lesser expectation of privacy in an automobile than in a home (*California v. Carney*, 1985). The Supreme Court has found that at common law, mobile vehicles could be stopped without a warrant and has generally extended this exception into the Fourth Amendment "automobile exception" (*Carroll v. United States*, 1925). Yet the Court has applied the "expectation of privacy" doctrine to the stopping of automobiles by law enforcement officers, on the ground that stopping an automobile is a seizure that can cause annoyance or fright. A warrantless stop of a vehicle, therefore, must be justified by reasonable suspicion or probable cause of a traffic violation or crime (*United States v. Brignoni-Ponce*, 1975; *Delaware v. Prouse*, 1979). To the contrary, a stop at a fixed checkpoint does not produce the same level of anxiety as being stopped by a roving patrol, and so the expectation of privacy is less and the stop need not be justified by particularized suspicion (*United States v. Martinez-Fuerte*, 1976; *Michigan Department of State Police v. Sitz*, 1990).

EXPECTATION OF PRIVACY IN PROPERTY AND EFFECTS In ***United States v. Chadwick*** (1977), the Supreme Court held that a footlocker is protected by a subjective and objective expectation of privacy. Police had probable cause to believe that a footlocker contained

marijuana, had arrested its possessor, and had the luggage in custody. Opening the footlocker violated Chadwick's Fourth Amendment rights, and the evidence was suppressed. The police should have sought a search warrant from a magistrate.

The Court has further extended the expectation of privacy to soft baggage that was squeezed by a Border Patrol agent. A bus traveling from California to Arkansas stopped at a Border Patrol checkpoint in Texas, and the agent boarded the bus to check the immigration status of its passengers. After reaching the back of the bus, having satisfied himself that the passengers were lawfully in the United States, the agent began walking toward the front. Along the way, he squeezed the soft luggage that passengers had placed in the overhead storage space above the seats. He squeezed a green canvas bag belonging to passenger Steven Dewayne Bond and noticed that it contained a "brick-like" object later identified as methamphetamine. The Supreme Court held that this physical examination was a search. Bond exhibited an actual expectation of privacy by using an opaque bag and placing that bag directly above his seat. The agent's manipulation of the bag went beyond that tolerated by society:

> When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment. (***Bond v. United States,*** 2000)

On the other hand, the Court has come close to stating that a person has no expectation of privacy in the odor of drugs emanating from a piece of luggage in a public area if detected by a trained drug-sniffing canine (*United States v. Place*, 1983; *Illinois v. Caballes*, 2005). There is no expectation of privacy in abandoned property such as trash left in opaque plastic bags at the curb. It may be seized and searched without a warrant. The general public does not believe that a person expects trash to be kept private because the bags can be opened by children playing, by animals, or by scavengers (***California v. Greenwood,*** 1988). The same result occurs under the older property theory: Once people abandon property, they lose all control over it.

EXPECTATION OF PRIVACY IN BUSINESS RECORDS AND COMMERCIAL PROPERTY The Court has held that by depositing money in banks, people expose financial information in bank records to strangers such as bank employees and thus lose an expectation of privacy. As a result, Congress may require that large cash or other transactions be reported to federal agencies without showing particularized suspicion. One's banking records can be subpoenaed by the government under the Bank Secrecy Act (*California Bankers Association v. Shultz*, 1974; *United States v. Miller*, 1976).

The Court has held that business records are not protected by the Fifth Amendment privilege against compelled self-incrimination and thus are subject to seizure under the Fourth Amendment with a proper search warrant (*Andresen v. Maryland,* 1976). Business premises, however, are protected by the Fourth Amendment (*Hale v. Henkel,* 1906; *See v. City of Seattle,* 1967). If commercial property such as a retail store is open to the public, a police agent may enter the premises and observe or purchase suspected items, and such an entry and purchase is not a search and seizure (*Maryland v. Macon,* 1985). Although warrants are required for commercial health or safety inspections under the *Camara–See* doctrine, they require a lesser standard of evidence than the traditional probable cause standard (*Marshall v. Barlow's, Inc.,* 1978). Some commercial properties are subject to warrantless inspections, although retaining expectations of privacy, because of the nature of the business or the special risks that the business creates (e.g., mining) (*Donovan v. Dewey,* 1981).

Undercover Agents and the Fourth Amendment

In ***Gouled v. United States*** (1921), U.S. Army investigators sent a "secret agent" into Gouled's office, not by means of a trespass or burglary, but by false pretenses. The Court held that a physical seizure of papers in these circumstances violated Gouled's Fourth Amendment

rights. The question not answered was whether gaining entry by false pretenses invalidated the use of *statements* made in confidence by the suspect to the **undercover agent**. The Supreme Court resolved the issue in two cases decided on the same day in 1966. There is no Fourth Amendment right of privacy against "inviting" a person who is a secret government agent into the home.

Lewis v. United States (1966) dealt with the common situation of a narcotics agent being invited into a home to conclude an illicit drug transaction after having misrepresented his intentions. The Fourth Amendment was not violated because Lewis had converted his home "into a commercial center to which outsiders are invited for purposes of transacting unlawful business." Whether one applies the older property theory or the *Katz* "expectation of privacy" concept of Fourth Amendment rights, there is no constitutional violation in this scenario. The Court warned that entry gained by invitation did not give the undercover investigator the right to conduct a general search of the premises. In *Lewis,* the Court also expressed its concern for the practical needs of law enforcement:

> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se.* Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest. A prime example is provided by the narcotics traffic. (*Lewis v. United States,* footnote omitted)

In ***Hoffa v. United States*** (1966), national Teamsters Union president James Hoffa was convicted of bribing jurors in an earlier trial. Evidence of the jury tampering was offered by Edward Partin, a Teamsters Union official who was in trouble with the law and who was present in Hoffa's hotel apartment during the earlier trial. He had assisted Hoffa while simultaneously reporting on the jury tampering to federal agents. Partin went to Hoffa's apartment as a government agent; in return for his spying, state and federal criminal charges against him were dropped, and Partin's wife was paid $1,200 out of government funds. Hoffa argued that Partin's entry into the apartment violated his Fourth Amendment right to privacy and was an illegal "search" for verbal evidence. The Court agreed that Hoffa had a Fourth Amendment right to privacy in the hotel apartment and that entry could have been made both by a trespass and, as in *Gouled,* by trickery. What Hoffa relied on was the protection offered by the place. Thus if Partin had opened a desk drawer or a filing cabinet and had stolen incriminating evidence, this would have intruded into Hoffa's constitutionally protected area. The same result would occur by applying the *Katz* expectation of privacy analysis. However,

> [i]t is obvious that [Hoffa] was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . .
>
> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. (*Hoffa v. United States,* 1966)

The Fourth Amendment does not protect a person against false friends.

A related question is whether there is any Fourth Amendment protection when a "false friend" wears a concealed microphone on his body to transmit and/or record incriminating conversations. The Supreme Court has consistently ruled that this practice is not prohibited by the Fourth Amendment. When a person "invites" an undercover agent to speak with him or her voluntarily, the effect of the recording device is to improve the accuracy of the agent's testimony against the defendant. The Court has so held, both before and after *Katz,* and the federal electronic eavesdropping law has confirmed this rule as a matter of federal law.[36]

PROBABLE CAUSE AND THE FOURTH AMENDMENT

The Fourth Amendment states that warrants must be issued on probable cause, a standard that is the evidentiary touchstone of all Fourth Amendment action, including arrests, warrantless searches, and both search and arrest warrants. Until *Terry v. Ohio* (1968), a forcible police interference with liberty, property, or privacy on less than probable cause violated the Fourth Amendment. *Terry's* flexible interpretation, first applied to field interrogation, introduced the lower evidentiary standard of reasonable suspicion. This section explores the meaning and contours of probable cause.

The Concept of Evidence Sufficiency

Liberty is a fundamental precept of American political life. This means that a person's liberty interests—freedom of movement, privacy, and property—must not be stopped or interfered with by the government unless the government can first show a need to interfere that is justified by law. In Fourth Amendment terms, a police officer must have evidence to support a stop, arrest, or search *before* the search takes place. The best way for a police agent to do this is to obtain a warrant. If a warrantless stop, arrest, or search is challenged, the officer must convince a court that he or she had a sufficient level of evidence to lawfully interfere with the defendant's liberty interests. In other areas where the criminal justice or legal process interferes with liberty, different levels of evidence sufficiency are required. The concept of evidence sufficiency is therefore a latent part of due process and helps to ensure fundamental fairness.

Defining Probable Cause

Probable cause, defined as "known facts that could lead a reasonably prudent person to draw conclusions about unknown facts," is a standard of evidence that triggers and justifies government interference with liberty. It is also referred to as *reasonable cause*. Because the evidence standard of stops under *Terry v. Ohio* is commonly known as *reasonable suspicion*, it is important to use these technical terms precisely. *Evidence* is any kind of proof offered to establish the existence of a fact. Evidence may be (a) the testimony of a witness as to what was heard, seen, smelled, tasted, or felt; or (b) physical items such as documents, drugs, or weapons. Physical evidence is sometimes called *real evidence*.

Probable cause is one of several standards of evidence that trigger and justify intrusive governmental action. Table 3–1 displays a hierarchy of evidentiary standards. These standards pertain to the sufficiency or weight of evidence rather than to its admissibility. In general, the greater the impact of a legal action on an individual, the more stringent is the evidentiary standard.

Probable cause is the evidentiary standard for a wide variety of police and legal decisions in the pretrial criminal process: arrest, search and seizure, a magistrate's authorizing a charge after an initial hearing, a magistrate's bind-over decision after a preliminary hearing, and the formal charging of a criminal defendant by a prosecutor's information or by an indictment by a grand jury's voting a "true bill" against a suspect. (In some states, the grand jury or bind-over decision might be subjected to the slightly more rigorous "prima facie case" standard.) Probable cause to arrest a person consists of facts that would lead a prudent person to believe that a crime has been committed and that the suspect has committed it. Probable cause to search a place and seize evidence consists of facts that would lead a prudent person to believe that "seizable" items (i.e., contraband, the fruits of a crime, instrumentalities used to commit a crime, or evidence of criminality) are or soon will be located at a particular place.

There is a fine line between probable cause and reasonable suspicion. *Terry* (1967) did not use the term *reasonable suspicion* but upheld a temporary "stop"—a lesser intrusion than an arrest—where an officer believed that "criminal activity is afoot" based on articulable facts, taken together with logical inferences from those facts. A mere hunch does not support reasonable suspicion. (Reasonable suspicion will be explored at greater length in Chapter 4.)

Probable cause is not only a lower "weight" of evidence than that needed for civil or criminal verdicts, but it also relies on less stringent rules guiding the admissibility of evidence. Thus probable cause may be established on the basis of hearsay evidence; it is up to the magistrate to weigh the hearsay to determine whether it is plausible and genuine on the one hand, or farfetched or even fabricated on the other.

TABLE 3–1 Standards of Evidence Sufficiency

STANDARD	MEANING	LEGAL CONSEQUENCE
Proof beyond a reasonable doubt	No actual and substantial doubt must be present; not a vague apprehension or imaginary doubt; not absolute certainty	Conviction of guilt in a criminal trial
Clear and convincing evidence	Higher than a preponderance of evidence; need not be conclusive	Hold a person without bail under preventive detention; involuntary civil commitment; establish civil fraud; prove a gift
Preponderance of the evidence	Evidence reasonably tending to prove the essential facts in a case; the greater weight of the evidence	Verdict for the plaintiff in a civil litigation
Prima facie case	Evidence good and sufficient on its face to prove a fact or group of facts	Evidence that makes out the plaintiff's or prosecutor's case at trial and is strong enough to prevent a directed verdict for the defendant; in some jurisdictions, a prima facie case is required as the basis for indictment instead of probable cause
Substantial evidence on the whole record	Such evidence that a reasonable mind might accept as adequate to support a conclusion	Judicial review upholding administrative agency action
Probable cause	Known facts that would lead a reasonably prudent person to draw a conclusion about unknown facts	Lawful arrest; reasonable search and seizure; judicial determination to hold a suspect after an initial inquiry; bind-over by magistrate after preliminary examination; prosecutor's information; indictment after grand jury deliberations
Reasonable suspicion	Facts that would lead an experienced police officer to believe that a crime has been, is, or is about to be committed	Stop, pat-down search of outer clothing, and brief questioning of a person
None or "mere" suspicion	Whimsy; randomness; mere suspicion	Observation and surveillance of a person by police or government agent that do not amount to harassment or otherwise unduly interfere with the reasonable expectation of privacy

Probable Cause Based on Informers' Tips

An officer/affiant seeking a search warrant swears to the magistrate that the information presented is true. Where the officer affirms that he or she saw things or smelled odors (common in drug cases) that would lead a prudent person to believe that contraband is located at a specific place, the magistrate can directly question the officer to be sure of the accuracy of the evidence. Likewise, information given to an officer or magistrate by a victim of a crime is usually considered to be honest and accurate.

However, much criminal activity—including bribery by government officials, white-collar crime, organized crime, and illicit drug trading—is conducted in secret. Officers or blameless victims cannot get access to the criminal behavior. Often, the only way for law enforcement agencies to detect and prosecute such crimes is by using undercover agents to infiltrate the worlds of drug trafficking, organized crime, and white-collar crime. These **secret informants** are themselves often involved in criminal activity. Professors Robert Reinertsen and Robert Bronson note, "Informants are generally unsavory types, engaged in marginal activities that involve betrayal of others. Nonetheless, despite their negative image, informants play such a large and important role in law enforcement efforts that they cannot be ignored."[37] The common terms *'snitch'*, *'fink'*, and *'stool pigeon'* attest to the negative image and reality of informants. They rarely aid the police out of altruistic motives. More likely, they are being paid, given a promise of prosecutorial leniency, or even rewarded with illicit drugs.

Law enforcement agencies are caught in a dilemma. Knowing the risk of receiving unreliable information when using criminal informants, agencies establish policies regarding informants' recruitment, control, and payment. The proper use of informants depends in large measure on the honesty and mature judgment of the law enforcement officers who control them and good management practices.[38]

Despite internal law enforcement controls, informants have an incentive to lie and have sent many innocent people to prison.[39] The question facing the judicial system is whether it can take steps to ensure that the threat to justice from lying informants is minimized. One solution would be to have the police bring informers before the magistrate so that instead of accepting hearsay, the magistrate can examine the informant personally. The Supreme Court refused to take this path. In ***Rovario v. United States*** (1957), the Court held that the identity of an informant must be made available at the trial, but prior to trial, law enforcement agencies are allowed to keep the identity of informants secret. (See the biographical sketch of Justice Harold Burton following Chapter 4.) There is a legitimate fear that bringing the informant to the courthouse and having the identity made known to judges and other court personnel would undermine the integrity and success of investigations. It is also not the role of the judicial branch to exercise administrative oversight of the executive branch.

Still, magistrates play an important role in screening out fabrications by secret informants, who are often unreliable. Magistrates therefore have good reason to examine affidavits based on the hearsay of confidential sources with special care. In a series of decisions beginning in 1933, the Court has struggled with the question of whether hearsay supplied by "snitches" had established probable cause under the Fourth Amendment or had to be excluded.

In ***Nathanson v. United States*** (1933), the Court excluded liquor seized from a private home based on a warrant that "went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts." A magistrate cannot "properly issue a warrant to search a private dwelling unless he can find probable cause therefore from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." Another way of stating the rule of *Nathanson* is that a magistrate cannot issue a warrant on the mere say-so of the officer.

Nathanson was supported in ***Aguilar v. Texas*** (1964). The search warrant application from police officers simply stated that "[a]ffiants have received reliable information from a credible person and do believe" that drugs are located in Aguilar's home. Here, the hearsay basis of the officers' suspicions were more clearly stated than in *Nathanson.* The Court reaffirmed that "an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant." Nevertheless, "the magistrate must be informed of some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was '*credible*' or his information '*reliable.*'" (*Aguilar v. Texas,* emphasis added). Again, the Supreme Court ruled that a magistrate's warrant is fatally flawed under the Fourth Amendment if the magistrate simply takes the police officer's word that an informant is reliable or credible and that the contraband is where the officer says it is. This rule is a necessary corollary to the "detached and neutral magistrate" doctrine. If a warrant is issued simply on an officer's say-so, the magistrate becomes a rubber stamp for the executive branch and fails to uphold his or her duty under the Constitution.

Justice Harlan, a conservative jurist, concurred in *Aguilar.* Justice Tom Clark's dissent, joined by Justices Black and Stewart, argued that the officers' statement that they "received reliable information from a credible person" was sufficient to provide probable cause.

The rule of *Aguilar* was confirmed and strengthened in ***Spinelli v. United States*** (1969). William Spinelli was being investigated by the FBI for bookmaking in St. Louis. A search warrant was obtained to enter an apartment for evidence of an illegal gambling establishment. The affidavit, when reduced to its essential information, contained four facts: (1) that for four of the five days he was followed, Spinelli crossed into Missouri from Illinois at about noon, went to the same apartment house at about 4:00 p.m., and was seen to enter a particular apartment; (2) that there were two telephones in the apartment listed under another's name; (3) that Spinelli had a reputation as a bookmaker and gambler among law enforcement agents, including the affiant; and (4) that a "confidential reliable informant" told the FBI agent that Spinelli was operating a gambling operation with the telephones in the apartment. Evidence seized in the apartment was used to convict Spinelli of interstate travel in aid of racketeering, specifically, of illegal bookmaking.

Justice Harlan's majority opinion held that this affidavit did not provide probable cause and that the evidence seized had to be excluded. He quickly tossed out the first three items in the affidavit as essentially not supportive of probable cause. There is simply no reason why traveling from one city to another every day would lead anyone to suspect the traveler of being a bookie. The existence of two telephones in the apartment, described as a "petty luxury," was also not deemed at all suspicious.

The third item, Spinelli's reputation, was dismissed: "[T]he allegation that Spinelli was 'known' to the affiant and to other federal and local law enforcement officers as a gambler is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." Justice Harlan cited *Nathanson* for this point, although *Nathanson* does not discuss reputation evidence. Reputation evidence is hearsay, and hearsay is proper evidence in a search warrant affidavit. It would appear that the Court, almost instinctively, understood that hearsay about an individual can be entirely baseless and scurrilous and indeed could even be manufactured by the government. Although it may be useful as a starting point for investigation, the reliance on a person's reputation as a matter of Fourth Amendment law could lead to gross injustices.

This, then, left the statement about the "confidential reliable informant" as the sole basis for the warrant. The prosecution argued that the innocent facts in the affidavit corroborated the informant's tip, "thereby entitling it to more weight." The Court disagreed, saying that "the '*totality of circumstances*' approach . . . paints with too broad a brush." Instead of a "totality" approach, Justice Harlan, refining the elements of the *Aguilar* case, provided "a more precise analysis" by which the affidavit's statements regarding a secret informant had to stand on its own. He stated the rules of *Aguilar* that could be reduced to two tests:

> [W]e first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar*'s other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. . . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation. (*Spinelli v. United States,* 1969)

The *Aguilar–Spinelli* two-pronged test to obtaining a warrant based on an informer's hearsay includes (1) a veracity, or truthfulness, prong—showing that the informant is truthful because he was used successfully in the past or because the tip is so strong that it is inherently believable; and (2) a basis-of-knowledge prong—showing that the facts were obtained by the informant in a manner that is sufficiently reliable to establish probable cause. The facts that support the prongs must be strong enough to convince the magistrate making an independent determination that the informant had a real basis for knowing about the criminal activity. The facts would also give the magistrate a basis for ascertaining whether they support probable cause.

The dissenters in *Spinelli,* Justices Black, Fortas, and Stewart, felt that the four elements found wanting by the majority constituted probable cause. Justice Abe Fortas referred to the length of the affidavit to indicate that it was not simply conclusory. But he did not adequately respond to Justice Harlan's analysis that cut through the lengthy verbiage of the affidavit to reduce it to its essential elements. Justice White concurred in the holding of *Spinelli,* but he expressed concern that it did not fully comport with that of *Draper v. United States* (1959), on which the Court relied.

Justice Harlan, in *Spinelli,* demonstrated how a magistrate should critically evaluate information presented in an affidavit by drawing on the 1959 case of ***Draper v. United States.*** In that case, a paid informer named Hereford told Bureau of Narcotics agents that Draper would travel from Chicago to Denver on a train on one of two days with three ounces of heroin. Hereford precisely described what Draper looked like and told the agents that Draper would be carrying "a tan zipper bag," that he habitually "walked real fast," and that he would be wearing a light-colored raincoat, brown slacks, and black shoes. Agents waited at the incoming trains from Chicago in the Denver station and saw a man fitting the exact description given by Hereford. The man, who turned out to be Draper, was found to be carrying heroin and was arrested. The Supreme Court held that the agents had probable cause to arrest and search Draper, based on the hearsay description of the informant, Hereford. Although Hereford did not provide information to show how he obtained his information about Draper, the "basis of knowledge" prong of the *Aguilar–Spinelli* rule was inferred. The Supreme Court upheld the seizure and search in *Draper* because the highly detailed facts were verified by the agent (except for the possession of heroin) before making the arrest. *Draper,* therefore, stands for the proposition that the police can strengthen any weaknesses in the information provided by the informant by gathering corroborating information.

Conservative Revisions

A task of the Supreme Court, to lay down clear rules for the guidance of lower court judges and government officers, seems to have been fulfilled in *Spinelli* when the Court clarified a line of informers' tip decisions, beginning with *Nathanson v. United States* (1933), with relatively clear procedural guides for resolving probable cause issues. *Spinelli* exemplified the Warren Court's penchant for establishing structured rules. This changed with the advent of the Burger Court, as conservative activism replaced liberal activism.

Professor Charles Whitebread described the five elements of the Burger Court's criminal procedure jurisprudence (see Chapter 1):[40]

- A crime control orientation.
- A hierarchy of constitutional values, with Sixth Amendment trial rights on a higher plane than Fourth Amendment rights.
- A preference for case-by-case analysis rather than establishing general rules.
- A tendency to uphold the prosecution side if the Court believes in the defendant's factual guilt.
- The denial of federal jurisdiction from state cases.

These tendencies were clearly at work in *Illinois v. Gates,* which upset the *Aguilar–Spinelli* rule after fourteen years, during which there was little criticism of the two-pronged test.

Read Case and Comments: *Illinois v. Gates*

It is interesting that the nine justices in *Illinois v. Gates* came up with four different analyses of whether the facts established probable cause:

1. The majority (Chief Justice Warren Burger and Justices William Rehnquist, Harry Blackmun, Lewis Powell, and Sandra Day O'Connor) found probable cause to exist under the new totality-of-the-circumstances test.
2. Justice White, concurring, found that probable cause existed under the *Aguilar–Spinelli* two-pronged test.
3. Justices William Brennan and Thurgood Marshall, dissenting, found that the anonymous letter plus the corroboration did not amount to probable cause under either test.
4. Justice John Paul Stevens, dissenting, found no probable cause because at the time when the magistrate issued the warrant, he did not know that the Gateses had driven twenty-two hours nonstop from West Palm Beach to Bloomingdale, a suspicious activity in light of the anonymous letter. The anonymous letter predicted that Sue Gates would fly back to Illinois while Lance drove. This discrepancy undermined probable cause because (1) the couple's willingness to leave their house unattended suggested that it did not contain drugs, and (2) their activity was not as unusual as if they had left separately.

CASE AND COMMENTS

Illinois v. Gates

462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents Lance and Susan Gates were indicted for violation of state drug laws after police officers, executing a search warrant, discovered marihuana and other contraband in their automobile and home. * * * The Illinois Supreme Court * * * held that the affidavit submitted in support of the State's application for a warrant to search the Gateses' property was inadequate under this Court's decisions in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States* [this volume] (1969).

We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. * * *

II

* * * On May 3, 1978, the Bloomingdale Police Department received by mail an anonymous handwritten letter which read as follows: **[a]**

> "This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [*sic*] down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> "They brag about the fact they never have to work, and make their entire living on pushers.
>
> "I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
>
> "Lance & Susan Gates
> "Greenway
> "in Condominiums"

The letter was referred by the Chief of Police * * * to Detective Mader, who decided to pursue the tip. Mader learned * * * that an Illinois driver's license had been issued to one Lance Gates, residing at a stated address in Bloomingdale. He contacted a confidential informant, whose examination of certain financial records revealed a more recent address for the Gateses, and he also learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines Flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 P.M.

Mader then made arrangements with an agent of the Drug Enforcement Administration for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7 o'clock A.M. the next morning, Gates and an unidentified woman left the motel in a Mercury bearing Illinois license plates and drove northbound on an interstate highway frequently used by travelers to the Chicago area. In addition, the DEA agent informed Mader that the license plate number on the Mercury was registered to a Hornet station wagon owned by Gates. The agent also advised Mader that the driving time between West Palm Beach and Bloomingdale was approximately 22 to 24 hours. **[b]**

Mader signed an affidavit setting forth the foregoing facts, and submitted it to a judge of the Circuit Court of Du Page County, together with a copy of the anonymous letter. The judge of that court thereupon issued a search warrant for the Gateses' residence and for their automobile. The judge, in deciding to issue the warrant, could have determined that the *modus operandi* of the Gateses had been substantially corroborated. As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7 o'clock A.M. the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him. **[c]**

At 5:15 A.M. on March 7, only 36 hours after he had flown out of Chicago, Lance Gates, and his wife, returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach some 22 hours earlier. The Bloomingdale police were awaiting them, searched the trunk of the Mercury,

[a] What motivates such an anonymous letter? Motives like envy or revenge could enhance its reliability; on the other hand, a false, incriminating letter could be written as a prank or as a means to harass someone. The police and the magistrate did not rely exclusively on the letter to initiate the search.

[b] Can you think of any legitimate explanations for this travel plan? Is the couple's travel consistent only with a criminal conspiracy? If there is a legitimate explanation, does it negate probable cause to search?

[c] Are the level and type of specificity in the letter similar to, or different from, that given by Hereford in *Draper?* Although the travel plans stated in the letter were mostly corroborated, does that dissolve doubts about the fact that Officer Mader had no idea who wrote the letter?

and uncovered approximately 350 pounds of marihuana. A search of the Gateses' home revealed marihuana, weapons, and other contraband. * * *

The Illinois Supreme Court concluded—and we are inclined to agree—that, standing alone, the anonymous letter * * * would not provide the basis for a magistrate's determination that there was probable cause to believe contraband would be found in the Gateses' car and home. **[d]** The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gateses' criminal activities. Something more was required.

[d] The Court is wary of information from anonymous tips—yet it does not close the door on the use of such information.

* * *

[The evidence was suppressed by the Illinois courts. They all held that probable cause was not made out under the *Aguilar–Spinelli* test.]

* * * The Illinois Supreme Court, like some others, apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements before it could be relied on. * * * According to this view, the letter, as supplemented by Mader's affidavit, first had to adequately reveal the "basis of knowledge" of the letterwriter—the particular means by which he came by the information given in his report. Second, it had to provide facts sufficiently establishing either the "veracity" of the affiant's informant, or, alternatively, the "reliability" of the informant's report in this particular case.

The Illinois court * * * found that the test had not been satisfied. First, the "veracity" prong was not satisfied because, "[t]here was simply no basis [for] conclud[ing] that the anonymous person [who wrote the letter to the Bloomingdale Police Department] was credible." * * * The court indicated that corroboration by police of details contained in the letter might never satisfy the "veracity" prong, and in any event, could not do so if, as in the present case, only "innocent" details are corroborated. * * * **[e]** In addition, the letter gave no indication of the basis of its writer's knowledge of the Gateses' activities: [it] * * * failed to provide sufficient detail to permit such an inference. Thus, it concluded that no showing of probable cause had been made.

[e] Did the close match between the couple's travels and the letter establish the veracity of the anonymous letter writer? If so, was it veracity regarding the couple's travel patterns or veracity as to their drug dealing?

We agree with the Illinois Supreme Court that an informant's "veracity," "reliability," and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

III

This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific "tests" be satisfied by every informant's tip. **[f]** Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." * * * "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." * * *

[f] "Totality of the circumstances" was proposed to the Court by the government in *Spinelli* but rejected by the Court at that time. What factors caused the Court to shift gears?

* * * [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. * * * "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." * * *

Moreover, the two-pronged test directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." **[g]** There are persuasive arguments against according these two elements such independent status. Instead, they are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. * * *

[g] Justice Harlan, a noted conservative, said in *Spinelli* that a weakness in one prong should not be made up in another: Even a "reliable" informant may, at times, obtain information from a weak hearsay source.

[Justice Rehnquist suggests that an unusually reliable informant should be believed when on occasion he fails to state the basis of knowledge regarding a prediction of crime.] * * *

* * *

We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." * * * Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause." * * * **[h]** The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are—quite properly,—issued

[h] This analysis is belied by a recent article that shows that police agencies prefer the two-prong rule, reviewed at the conclusion of this case. Is Justice Rehnquist setting his sights too low regarding the mental capabilities of lay magistrates and police officers?

on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties," * * * of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause.

* * *

[Justice Rehnquist urged that courts not review the facts of magistrates' probable cause decisions but pay them great deference. He also argued that if courts continue to scrutinize affidavits according to the two-prong test, police will stop using warrants and will turn more to warrantless searches.]

Finally, the direction taken by decisions following *Spinelli* poorly serves "[t]he most basic function of any government": "to provide for the security of the individual and of his property." * * * **[i]** If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work. * * *

* * * [W]e conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli.* In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. * * *

* * *

JUSTICE BRENNAN's dissent also suggests that "[w]ords such as 'practical,' 'nontechnical,' and 'common sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment." * * * **[j]** [N]o one doubts that "under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure [the horrors of drug trafficking];" * * * but this agreement does not advance the inquiry as to which measures are, and which measures are not, consistent with the Fourth Amendment. "Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is not achieved by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true," and we think we have done that in this case.

IV

Our decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work. * * *

* * *

The showing of probable cause in the present case was * * * compelling. * * * **[k]** Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gateses were involved in drug trafficking. In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs. * * * Lance Gates' flight to Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car, conveniently awaiting him in West Palm Beach, is as suggestive of a prearranged drug run, as it is of an ordinary vacation trip.

In addition, the judge could rely on the anonymous letter, which had been corroborated in major part by Mader's efforts. * * *

Finally, the anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted. The letterwriter's accurate information as to the travel plans of each of the Gateses was of a character likely obtained only from the Gateses themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities. Of course, the Gateses' travel plans might have been learned from a talkative neighbor or travel agent; under the "two-pronged test" developed from *Spinelli,* the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letterwriter's "basis of knowledge." But, as discussed previously, * * * probable cause does not demand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. It is apparent, therefore, that the judge issuing the warrant had a "substantial basis for * * * conclud[ing]" that probable cause to search the Gateses' home and car existed. The judgment of the Supreme Court of Illinois therefore must be

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

* * *

[i] Is this a "constitutional" reason or a "policy" reason? Can such a division be neatly made? Does this seem result oriented?

[j] Justice Brennan, a result-oriented liberal, argues in his dissent that Justice Rehnquist's opinion is result oriented. In reply, Justice Rehnquist makes the valid point that different justices (and different people) genuinely view constitutional rules differently.

[k] Do you agree with Justice Rehnquist that this evidence is "compelling," or is it a close call? When deciding to intrude into a person's home and car, should magistrates lean toward restraint? If the warrant were not issued in this case, how much additional investigation would the Bloomingdale Police Department have to do after the couple's return to make a stronger case for probable cause? Given the Court's allowance of a corroborated anonymous letter as the basis of probable cause, does this create a risk that a dishonest police officer will be tempted to have an "anonymous" letter submitted in a

I

* * *

Until today the Court has never squarely addressed the application of the *Aguilar* and *Spinelli* standards to tips from anonymous informants. Both *Aguilar* and *Spinelli* dealt with tips from informants known at least to the police. * * * And surely there is even more reason to subject anonymous informants' tips to the tests established by *Aguilar* and *Spinelli.* By definition nothing is known about an anonymous informant's identity, honesty, or reliability. * * *

To suggest that anonymous informants' tips are subject to the tests established by *Aguilar* and *Spinelli* is not to suggest that they can never provide a basis for a finding of probable cause. **[I]** It is conceivable that police corroboration of the details of the tip might establish the reliability of the informant under *Aguilar*'s veracity prong, as refined in *Spinelli,* and that the details in the tip might be sufficient to qualify under the "self-verifying detail" test established by *Spinelli* as a means of satisfying *Aguilar*'s basis of knowledge prong. The *Aguilar* and *Spinelli* tests must be applied to anonymous informants' tips, however, if we are to continue to ensure that findings of probable cause, and attendant intrusions, are based on information provided by an honest or credible person who has acquired the information in a reliable way. * * *

[I] What sort of fact would verify the basis of knowledge in an anonymous tip? Perhaps a verifiable reference to criminal activity that would not be known to an average person? If it would be impossible for a magistrate to rely on an anonymous tip, would the proper law enforcement response be to get additional corroboration in order to establish independent probable cause?

II

* * *

* * * But of particular concern to all Americans must be that the Court gives virtually no consideration to the value of insuring that findings of probable cause are based on information that a magistrate can reasonably say has been obtained in a reliable way by an honest or credible person. I share JUSTICE WHITE's fear that the Court's rejection of Aguilar and Spinelli and its adoption of a new totality-of-the-circumstances test, * * * "may foretell an evisceration of the probable-cause standard. * * *" * * *

Gates is a constitutionally important decision that significantly shifted the criminal procedure balance in favor of the state, a result that has been criticized by some legal commentators.[41] An interesting study published in 2000, examining the practices of six Atlanta-area police academies, shows that the departments train their officers in the *Aguilar–Spinelli* two-pronged test rather than the open-ended *Gates* totality test. Two reasons were given by the training officers: (1) they felt that prosecutors and courts were likely to demand adherence to the two-pronged or a similar test, and (2) "almost all of the instructors stated that they did not believe a majority of their recruits could master the intricacies of an open-ended standard such as the *Gates* standard."[42] This is contrary to the main reason given by Justice Rehnquist for the majority opinion, and it is not the first time that police practice did not agree with legal speculation.

PLAIN VIEW AND RELATED DOCTRINES

Plain view is a useful doctrine for police officers. It allows seizures of evidence without a warrant when the police are already lawfully in a place or have made a lawful search. This section also examines the related "open fields" doctrine, curtilage, and the use of enhancement devices.

Plain View

The simple idea that a police officer can seize contraband lying about in a public place is so obvious that it has rarely been litigated. In ***Cardwell v. Lewis*** (1974), the Court articulated the principle that there is no Fourth Amendment privacy interest in material or possessions that are exposed to public scrutiny. In this case, a car owned by a murder suspect was in a public parking lot; the police scraped a bit of paint from a fender to be used as evidence. The court found no constitutional violation: "[W]here probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments."

It is a different matter for police to seize material from inside a place that is protected by the Fourth Amendment. Professors Whitebread and Slobogin assert, correctly, that a police officer who saw marijuana through a house window while standing on a sidewalk could not enter and seize the evidence, although in a factual sense it was in "plain view."[43] As the Supreme Court stated in *Agnello v. United States* (1925): "Belief, however well-founded, that an article sought is

concealed in a dwelling house furnishes no justification for a search of that place without a warrant." In such a case, the officer has to obtain a warrant to enter lawfully.

PRIOR JUSTIFIED SEARCH The basic rules of plain view were established in ***Coolidge v. New Hampshire*** (1971). Justice Stewart, writing for a plurality, made clear the ancillary, or "piggyback," nature of the doctrine:

> What the "plain view" cases have in common is that the police officer in each of them had a *prior justification* for an intrusion. . . . The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. (*Coolidge v. New Hampshire,* emphasis added)

Under *Katz,* a plain view seizure of property is justified on the ground that there is no reasonable expectation of privacy in items that are contraband or the clear evidence of crime; police have a legitimate interest, not blocked by the Fourth Amendment, to take such items.

Nevertheless, it must be stressed that the first rule of plain view is that there must be a lawful intrusion. In *Coolidge,* Justice Stewart noted,

> But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal. (*Coolidge v. New Hampshire,* 1971, emphasis in original)

Police cannot "create" plain view by taking advantage of an illegal search. Justice Stewart put it this way: "[P]lain view alone is never enough to justify the warrantless seizure of evidence." It would destroy Fourth Amendment protections to allow the police to search at will, or without a warrant where a warrant is otherwise required, and to rationalize a seizure because an unearthed item is seen to be contraband or evidence of criminality.

IMMEDIATELY APPARENT *Coolidge* established a second rule of plain view—the "immediately apparent" rule. The police in *Coolidge* conducted a warrantless search of an automobile suspected to contain fiber evidence and sought to justify it because the car itself was "in plain view." The car was obviously in plain view, but the vacuumed microscopic particles certainly were not. Justice Stewart said, "Of course, the extension of the original justification is legitimate only when it is *immediately apparent* to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." The rule that the evidence in plain view must be immediately apparent as contraband is another way of saying that *probable cause* must exist to secure the evidence at the moment of seizure.

As with all probable cause decisions, absolute certainty is not required. For example, in *Texas v. Brown* (1983), a police officer looked into an automobile at night with a flashlight at a routine traffic license checkpoint and saw an opaque, green party balloon knotted about one-half inch from the tip. The Supreme Court ruled that he had probable cause to believe that the balloon contained illegal drugs because it was known that this was a common way for drug dealers to carry their wares. The Court thus allowed the police some leeway for making an inference in determining whether it was immediately apparent that drugs were in the car.

Read Case and Comments: *Arizona v. Hicks*

It is interesting to note that in *Coolidge* a plurality of four justices adopted a rule—that plain view searches must be "inadvertent" or unintentional—which was later dropped in ***Horton v. California*** (1990). If police seek to subvert the plain view doctrine by deliberately "creating" plain view they will necessarily violate the rule that the police must be in a public area or a place where they have a right to be or violate the immediately apparent rule. In *Horton* a police warrant affidavit particularly described guns used to commit a robbery and the robbery proceeds as things to be seized. The warrant, however, only mentioned the robbery proceeds. When the warrant was executed, the robbery proceeds were not in Horton's home but the distinctive weapons

(an Uzi machine gun, a .38-caliber revolver, and a stun gun) were. The detective, knowing that the guns tied Horton to the robbery, seized them as evidence.

Because the detective knew about the guns, they were not seized inadvertently. Nevertheless, the officer was properly in Horton's house under the warrant and did not exceed the scope of the search allowed by the warrant. Therefore the inadvertence rule did not create any additional privacy protection and could frustrate legitimate law enforcement. Justice Brennan, dissenting, expressed concern that eliminating the inadvertence rule would lead to a larger number of pretext searches. Because the Court has since ruled that a pretextual auto stop is not unconstitutional as long as an officer has a valid basis to search or make an arrest, this argument has taken on greater urgency.[44]

PLAIN FEEL Plain view is not limited to matters viewed by eyesight, but applies to evidence known to any of the senses. In ***Minnesota v. Dickerson*** (1993), police lawfully stopped Dickerson outside a known drug house when his overall behavior created a reasonable suspicion that he carried drugs. An officer, following *Terry* (1968), patted down the outside of Dickerson's jacket to check for weapons. He testified, "I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." The officer then retrieved a small plastic bag with crack cocaine from Dickerson's pocket.

Dickerson raised two plain view issues. First, must the police *visually observe* an item for it to be in plain view? The Court answered that plain "view" applies to any seizable item apparent to *any of the senses*:

> To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here. (*Minnesota v. Dickerson,* 1993, quoting trial judge)

Two arguments to the contrary were raised by the Minnesota Supreme Court to reject the so-called **plain feel rule**: (1) that the sense of touch is inherently less immediate and less reliable than the sense of sight and (2) that the sense of touch is far more intrusive into personal privacy. The U.S. Supreme Court disagreed; the facts in *Terry v. Ohio* (1968) itself relied on the sense of touch—the pat-down search—to establish probable cause to arrest for gun possession.

Dickerson had to resolve a second issue: whether what the officer felt was *immediately apparent* as crack cocaine. Justice White's close examination of the facts led him to conclude that the officer "overstepped the bounds" of the limited search authorized by *Terry* because he continued to explore Dickerson's outer pocket after determining that it contained no weapon. The *Terry* rule overlapped with the immediacy/probable cause rule: "If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.,* if 'its incriminating character [is not] "immediately apparent,"'. . . the plain-view doctrine cannot justify its seizure" (*Dickerson*, 1983) Here, because the officer had to slide the object in the pocket around, it was not immediately apparent as contraband and was not admissible as evidence in a trial.

Curtilage and Open Fields

The Fourth Amendment protects the privacy, liberty, and property interests of "persons, houses, papers, and effects, against unreasonable searches and seizures." Is a "house" limited to the precise structure of residence? If so, can police roam at will around the yard of a suburban house, as they can on streets? Or does a "house" include surrounding property? If it does include some property around the house, does it include all of the real estate around a house, even extending for miles? Do these issues apply to apartments in multi-occupant dwellings? Can police roam the entrance areas, stairways, and halls of apartment houses, perhaps with drug-sniffing dogs? It should be obvious from these questions that genuine home privacy requires some "breathing room" around the precise boundary of living quarters.

CASE AND COMMENTS

Arizona v. Hicks

480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987)

Justice SCALIA delivered the opinion of the Court.

In *Coolidge v. New Hampshire* (1971), we said that in certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment. * * * [The issue] in the present case [is] whether this “plain view” doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband.

I

[Police entered an apartment without a warrant to search for a person who shot a bullet through the floor, injuring a man in the apartment below.] **[a]** They found and seized three weapons, including a sawed-off rifle. * * *

One of the policemen, Officer Nelson, noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four room apartment. Suspecting that they were stolen, he read and recorded their serial numbers—moving some of the components, including a Bang and Olufsen turntable, in order to do so—which he then reported by phone to his headquarters. On being advised that the turntable had been taken in an armed robbery, he seized it immediately. It was later determined that some of the other serial numbers matched those on other stereo equipment taken in the same armed robbery, and a warrant was obtained and executed to seize that equipment as well. Respondent was subsequently indicted for the robbery.

[On a suppression motion, the state trial court and court of appeals held that the view of the serial numbers was an additional search unrelated to the exigency of the search for the shooter. These holdings implied rejection of the idea that the actions were justified by the plain view doctrine. The evidence was suppressed, and the state appealed.]

[a] The three standard exigency exceptions to the warrant requirement are hot pursuit, automobile search, and search incident to arrest. The lawfulness of the entry in *Hicks* demonstrates that a general exigency (emergency) category exists. Police have a *community caretaking* function and may enter premises without warrants when reasonable to save lives or prevent serious injury.

II

* * * We agree that the mere recording of the serial numbers did not constitute a seizure. * * * In and of itself * * * it did not “meaningfully interfere” with respondent’s possessory interest in either the serial number or the equipment, and therefore did not amount to a seizure. * * *

Officer Nelson’s moving of the equipment, however, did constitute a “search” separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent’s privacy interest. **[b]** But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent’s privacy unjustified by the exigent circumstance that validated the entry. This is why * * * the “distinction between ‘looking’ at a suspicious object in plain view and ‘moving’ it even a few inches” is much more than trivial for purposes of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to the respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable.

[b] This paragraph implies that the plain view rule simply recognizes commonsense reality. If Officer Nelson saw obvious contraband—for example, drugs—sitting on a table in the apartment, it would be silly to hold that the officer could not act on that information. On the other hand, allowing Officer Nelson, lawfully in the apartment for the limited purpose of looking for the shooter, to expand that search into another could provide incentives for pretext searches of homes.

III

The remaining question is whether the search was “reasonable” under the Fourth Amendment.

* * * [W]e reject, at the outset, the * * * position * * * that because the officers’ action directed to the stereo equipment was unrelated to the justification for their entry into respondent’s apartment, it was *ipso facto* unreasonable. **[c]** That lack of relationship *always* exists with regard to action validated under the “plain view” doctrine; where action is taken for the purpose of justifying entry, invocation of the doctrine is superfluous. * * *

We turn, then, to application of the doctrine to the facts of this case. “It is well established that under certain circumstances the police may *seize* evidence in plain view without a warrant,” *Coolidge v. New Hampshire* * * * (*plurality opinion*) (emphasis added). Those circumstances include situations “[w]here the initial intrusion that brings the police within plain view of such [evidence] is supported . . . by one of the recognized exceptions to the warrant requirement. * * * It would be absurd to say that an object could lawfully be seized and taken from the premises, but could not be moved for closer examination.” It is clear, therefore, that the search here was valid if the “plain view” doctrine would have sustained a seizure of the equipment.

[c] The defendant argued that the police could seize only items in plain view that related to the shooting; such an argument would destroy the practical value of the plain view doctrine and would not adhere to its logic. Note that both the defense and the prosecution make extreme arguments to the Court in this case.

There is no doubt it would have done so if Officer Nelson had probable cause to believe that the equipment was stolen. **[d]** The State conceded, however, that he had only a "reasonable suspicion," by which it means something less than probable cause. * * *

We now hold that probable cause is required. To say otherwise would be to cut the "plain view" doctrine loose from its theoretical and practical moorings. The theory of that doctrine consists of extending to nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable, the police's longstanding authority to make warrantless seizures in public places of such objects as weapons and contraband. And the practical justification for that extension is the desirability of sparing police, whose viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place, the inconvenience and the risk—to themselves or to preservation of the evidence—of going to obtain a warrant. **[e]** Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require, *i.e.,* the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises.

We do not say, of course, that a seizure can never be justified on less than probable cause. **[f]** We have held that it can—where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. See, *e.g., United States v. Cortez (1981)* (investigative detention of vehicle suspected to be transporting illegal aliens);* * * *United States v. Place, (1983)* (dictum) (seizure of suspected drug dealer's luggage at airport to permit exposure to specially trained dog). No special operational necessities are relied on here, however—but rather the mere fact that the items in question came lawfully within the officer's plain view. That alone cannot supplant the requirement of probable cause.

The same considerations preclude us from holding that, even though probable cause would have been necessary for a *seizure,* the *search* of objects in plain view that occurred here could be sustained on lesser grounds. A dwelling-place search, no less than a dwelling-place seizure, requires probable cause, and there is no reason in theory or practicality why application of the "plain view" doctrine would supplant that requirement. * * * **[g]** [T]o treat searches more liberally would especially erode the plurality's warning in *Coolidge* that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." * * * In short, whether legal authority to move the equipment could be found only as an inevitable concomitant of the authority to seize it, or also as a consequence of some independent power to search certain objects in plain view, probable cause to believe the equipment was stolen was required. **[h]**

* * *

For the reasons stated, the judgment of the Court of Appeals of Arizona is *Affirmed.*

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

The Court today gives the right answer to the wrong question. The Court asks whether the police must have probable cause before either seizing an object in plain view or conducting a full-blown search of that object, and concludes that they must. I agree. In my view, however, this case presents a different question: whether police must have probable cause before conducting a cursory inspection of an item in plain view. **[i]** Because I conclude that such an inspection is reasonable if the police are aware of facts or circumstances that justify a reasonable suspicion that the item is evidence of a crime, I would reverse the judgment of the Arizona Court of Appeals, and therefore dissent.

[A *Coolidge* requirement is that for evidence to be within the "plain view" exception,] it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.

* * *

The purpose of the "immediately apparent" requirement is to prevent "general exploratory rummaging in a person's belongings." If an officer could indiscriminately search every item in plain view, a search justified by a limited purpose—such as exigent circumstances—could be used to eviscerate the protections of the Fourth Amendment. * * *

* * *

* * * When a police officer makes a cursory inspection of a suspicious item in plain view in order to determine whether it is indeed evidence of a crime, there is no "exploratory rummaging." Only those items that the police officer "reasonably suspects" as evidence of a crime may be inspected, and perhaps more importantly, the scope of such an inspection is quite limited. **[j]** In short, if police officers have a reasonable, articulable suspicion that an object they come across during the course of a lawful search is evidence of crime, in my view they may make a cursory examination of the object to verify their suspicion. If the officers wish to go beyond such a cursory examination of the object, however, they must have probable cause. This distinction between a full-blown search and seizure of an item and a mere inspection of the item * * * [is] based on their relative intrusiveness. * * *

* * *

[d] Why should the turntable be in "plain view" if Officer Nelson had probable cause to believe it was stolen but not if he had reasonable suspicion?

[e] The *practical* justification for the plain view rule is couched in terms of assisting police. The theoretical justification is not discussed in depth. Does the rule have practical justification that benefits the defendant?

[f] The examples in this paragraph are applications of the *Terry* "stop and frisk" doctrine. This simply does not apply to the facts of *Hicks.*

[g] To the dissent, lifting the stereo is not a search but a "cursory inspection." But the majority fears that to allow police to rummage in a home beyond their lawful purpose, to *create* plain view, opens a theoretical rift in the plain view doctrine that can have negative practical consequences.

[h] Is Justice Scalia's opinion "conservative" or "liberal"? what do you make of a "liberal" decision by a "conservative" justice?

[i] Justice O'Connor seeks to create a new rule: a "cursory inspection" plain view seizure.

[j] Do you think that a "cursory examination" doctrine based on reasonable suspicion would prevent police from engaging in "exploratory rummaging"? If this rule existed, do you think that Officer Nelson would have limited his exploration only to moving the turntable?

The answers to these questions depend on how the courts have defined the extent of the curtilage, which does extend Fourth Amendment protection to some area around a dwelling, and what is referred to as "open fields," which do not come under the protection of the amendment. As a result, police do not need a warrant to go onto open fields, and any contraband found there may be seized in plain view. Put another way, government intrusions in open fields are not "searches" in the constitutional sense.

CURTILAGE In ***Oliver v. United States*** (1984), the Supreme Court noted that "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,'. . . and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private."

More precisely, the curtilage includes the area under the eaves of the main house; small structures near the main house such as a shed, smokehouse, or garage; and the area around a house. The yard of a typical suburban home is a curtilage; the wall around O. J. Simpson's Brentwood estate (the scene of one of the most notorious police investigations of the twentieth century) described its curtilage, and before Detective Mark Fuhrman could enter, he should have had a search warrant or a valid warrant exception. Courts have, depending on specific facts, included chicken coops and backyards, and have differed over whether driveways are to be included.[45]

In ***United States v. Dunn*** (1987), Drug Enforcement Administration (DEA) agents, without a warrant, went onto Dunn's land to see if they could detect evidence of illegal amphetamine manufacture. Dunn's house was a half mile from a public road on a 198-acre ranch that was completely encircled by a perimeter fence. Two barns were located about fifty yards from the residence. The property contained several interior fences, constructed mainly of posts and multiple strands of barbed wire. The house and a small greenhouse were surrounded by a fence. One barn was enclosed by a wooden fence. The DEA agents crossed the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, they smelled what was believed to be the odor of phenylacetic acid coming from the direction of the barns. They then crossed another barbed wire fence and a wooden fence to get to the large barn. They walked under the barn's overhang and, using a flashlight, peered into the barn. "They observed what the DEA agent thought to be a phenylacetone laboratory. The officers did not enter the barn. At this point the officers departed from respondent's property." A warrant was issued on the basis of facts obtained by police observations of the barn (*United States v. Dunn,* 1987).

The Court ruled that the barn was not within the curtilage and that the police officers violated no Fourth Amendment expectation of privacy when they went up to the barn and observed an illegal drug factory inside. To decide whether property outside the dwelling fell in the protected curtilage or unprotected "open fields," the Court examined four factors: "the *proximity* of the area claimed to be curtilage to the home, whether the area is included within an *enclosure* surrounding the home, the nature of the *uses* to which the area is put, and the *steps taken* by the resident to *protect* the area from observation by people passing by" (*U.S. v. Dunn*, 1987, emphasis added). An astute commentary has noted that in the lower courts "the curtilage doctrine is far from consistently applied" and this is so in part "because the curtilage doctrine arose historically in the context of rural areas, in cases involving evidence seized from large tracts of land, which was the context in which the open fields/curtilage distinction was particularly relevant."[46] Perhaps as a result of this rural mind-set, while the Supreme Court has extended the Fourth Amendment protection of the home to places like hotel rooms, "courts have also generally ended this protection at the inside door of an individual apartment or motel room, largely on the basis of the *Dunn* factors," although there are some exceptions.[47] Furthermore, where curtilage protection is in conflict with the ruling that there is no constitutional protection in "abandoned" trash, courts have generally upheld "the increasingly routine law enforcement practice of trespassing within the cartilage of a residence to make a warrantless seizure of garbage prior to its collection by the regular trash collectors."[48] The limited protection that courts have extended to the curtilage in recent years has allowed police to extend and often abuse their powers to use dog-sniffing ca-

nines, the "talk and knock" technique (discussed in a following section), and the community caretaking function to conduct warrantless entries and searches of premises.

OPEN FIELDS "Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields" (*Oliver v. United States,* 1984). The rule was first stated tersely by Justice Oliver Wendell Holmes Jr. in *Hester v. United States* (1924): The "special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." After *Katz,* the question arose as to whether this distinction still stood under a modernized, nonproperty interpretation of the Fourth Amendment, or whether expectation of privacy analysis would extend Fourth Amendment protection to so-called open fields.

Oliver v. United States (1984) consolidated two cases. The essential facts were that police officers, without warrants or consent, went into the lands owned by defendants and discovered marijuana patches. The privately owned fields were posted with "No Trespassing" signs. One site was highly secluded, over a mile from the defendant's house, and a gate to the fields was locked. To reach the other site, officers had to walk a path between the defendant's house and a neighbor's house. In one case, the lower court upheld the search; in the other, the evidence was suppressed. The Supreme Court found that both searches passed constitutional muster.

Justice Powell's majority opinion provided several reasons for upholding the "open fields" rule. First, the explicit language of the Fourth Amendment "is not extended to the open fields." Second, open fields are not "effects" within the meaning of the Fourth Amendment. Significantly, a first draft of the Fourth Amendment included a protection of "other property" along with persons, houses, and papers. The change in wording confirms the idea that "effects" refers to personal property. Third, the majority felt there was no expectation of privacy in open fields that society is prepared to recognize as reasonable—in other words, *Katz* had not changed the "open fields" rule. Open land is put to uses, such as the cultivation of crops, that are not the kinds of intimate activities that occur in homes and have historically called for strong privacy protection.

Fourth, "as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be." Rural land may be fenced and posted with "No Trespassing" signs, but these do not effectively keep hikers or hunters off the land. They certainly do not provide the same kind of psychological barrier that apartment and house doors and windows provide. Also, "the public and police lawfully may survey lands from the air." Fifth, the common law distinction between open fields and the curtilage supports the idea that the Framers did not intend to extend Fourth Amendment protection to open fields. Sixth, a defendant's property interest, such as ownership or leaseholding, that is violated by police committing a trespass to land, no longer decides the case under *Katz.* "The existence of a property right is but one element in determining whether expectations of privacy are legitimate."

The Court also provided practical reasons for supporting the "open fields" doctrine. An argument was made that in each case where police trespass on real estate and discover contraband, the courts should conduct a factual inquiry to discover whether the land and its uses come within the "open fields" rule. The Court rejected this. Under a case-by-case approach, "police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions. . . .'" A bright-line rule better serves law enforcement and ensures that constitutional rights will uniformly be enforced.

Justice Marshall, joined by Justices Brennan and Stevens, wrote a spirited dissent. He felt, first, that provisions that "identify a fundamental human liberty" should "be shielded forever from government intrusion" and so should be interpreted in an expansive manner "to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials." Next, he argued that if, as the majority believed, the Fourth Amendment offered no protection to real property, then the protection extended to the curtilage is inconsistent. Again, the objective expectation of privacy is seen in laws that allow the prosecution of trespassers. Posting and fencing are clear ways in which owners announce their expectation of privacy, and they are understood by all. Finally, the dissent disagreed with the majority that

the uses to which property owners put lands are not the sort of activities that society deems worthy of privacy:

> The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. . . . If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law. . . .
>
> Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind. Our respect for the freedom of landowners to use their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, . . . and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable." (*Oliver v. United States*)

The curtilage concept expands the Fourth Amendment definition of a house to a certain "reasonable" amount of land around a house. This gives the constitutional protections of the Fourth Amendment some "breathing room" and prevents the "open fields" exception from allowing police to tightly surround a house or creep up to windows to peer in or eavesdrop.

Airspace

If the curtilage is open to view, police may observe it from a public vantage point such as a road. What they may not do as a general rule is physically invade the curtilage itself to encroach on the zone of privacy that one expects to have around a dwelling. In several cases that the Framers surely could not have contemplated, the Supreme Court considered the extent to which the curtilage protection applied to airspace above premises.

The *Katz* doctrine provided no protection against the warrantless aerial surveillance by police of a backyard where marijuana was growing. The Court in ***California v. Ciraolo*** (1986) upheld the police action, saying that the defendant's expectation of privacy in his backyard was not one that society was prepared to honor. The owner surrounded his backyard, which also contained a swimming pool, with a six-foot outer fence and a ten-foot inner fence. Police could not observe the backyard to confirm an anonymous tip that Ciraolo was growing marijuana, so they hired a private *airplane* and buzzed the suburban backyard to gather visual evidence with the naked eye from about one thousand feet. The Court reasoned that the yard was *exposed to the public* because it was subject to the gaze of passengers in commercial airplane flights. The search was held to fit the "open fields" category. Justice Powell rebuked the Court, in a stinging dissent, for failing to uphold its role as a guardian of rights by allowing a "stealthy encroachment" on rights by the remote intrusion of commercial overflights. He believed that the curtilage protected against the use of a private airplane to peer down into Ciraolo's backyard, pool and all.

On the same day, the Court, in ***Dow Chemical v. United States*** (1986), upheld an aerial search of two thousand acres of commercial property by an airplane equipped with a sophisticated camera that could magnify its pictures to detect pipes a half-inch thick from twelve hundred feet. Even if the government officers could not, under the Fourth Amendment, physically go onto the commercial complex, the warrantless overflight was held not to be a search and seizure. *Dow Chemical* upheld the concept of an **industrial curtilage** but, as in *Ciraolo,* held that it did not protect property from aerial surveillance while using ordinary camera resolution.

The Court continued this approach in ***Florida v. Riley*** (1989). A four-justice plurality upheld the surveillance of a partially covered greenhouse in a residential backyard from a *helicopter* hovering four hundred feet above the ground. Justice White reasoned that this flight

did not violate any law or regulation, and any member of the public with a helicopter could have legally hovered above Riley's property and observed the contents of the greenhouse. This reasoning was not satisfactory to Justice O'Connor, who concurred only in the judgment. She thought that the Court relied too heavily on police compliance with Federal Aviation Administration (FAA) regulations and suggested that if lower overflights were sufficiently rare, even if they were in FAA compliance, in such a case, the householder would have a reasonable expectation of privacy. Justice Brennan dissented (joined by Justices Marshall and Stevens), arguing that by not taking into account the difficulty and lengths to which the police must go in making an "open fields" aerial search, the Court was ignoring the "the very essence of *Katz*."

In these cases, areas that are within the curtilage and nominally protected by the Fourth Amendment were, in fact, opened up to warrantless police surveillance under reasoning that stretched the traditional categories of open fields, thus narrowing curtilage protection. The fact that conservative justices such as Lewis Powell and Sandra Day O'Connor were bothered by the decisions shows the malleability of constitutional concepts and suggests that the Court's decisions are at times influenced by result-oriented jurisprudence.

Enhancement Devices

Is an item in plain view if it is detected, or its contraband nature is disclosed, by the use of an **enhancement device?** Logically, if the police have to resort to technology to determine whether evidence is incriminating, then it is not immediately apparent as such. If so, a judicial warrant based on probable cause is required to use the technology. This logic seemed to be at work in *Coolidge v. New Hampshire* (1971), where evidence obtained by the warrantless vacuuming of a car for fiber evidence was deemed inadmissible. Similarly, in *Katz* and other surreptitious electronic eavesdropping cases, private conversations that are obtained via enhancement devices that amplify the aural sense are protected by the Fourth Amendment. Such information is within the individual's zone of constitutionally protected privacy.

The Supreme Court's cases on the use of "beepers" provide a baseline of analysis. Beepers are radio transmitters, usually battery-operated, that emit periodic signals. They allow agents to trace the movement of an object in which the beeper is surreptitiously placed. As noted previously, the Court ruled that there is no constitutional impediment to the government's using beepers to enhance the senses (e.g., visual observation) if the device does not infringe on an expectation of privacy. In ***United States v. Knotts*** (1983), agents placed a beeper in a five-gallon can of chloroform and tracked its movement in an automobile driven on public streets. A person has no reasonable expectation of privacy in his movements from one place to another, and so the use of the beeper was held not to constitute a search. In ***United States v. Karo*** (1984), however, the Court ruled that detecting motion with the use of beepers inside a person's house equated to a search and required a prior warrant. The beeper was the equivalent of an agent secretly entering a house to verify that a drum of ether is inside, a clear Fourth Amendment violation. Justice White expressed the policy that "[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." For this kind of in-house tracking to be constitutional, a warrant must be obtained.

Some uses of enhancement devices pose no constitutional problems. In ***Texas v. Brown*** (1983), the Court said that it was "beyond dispute" that an officer "shining his flashlight to illuminate the interior of [a] car trenched upon no right secured . . . by the Fourth Amendment." Citing *United States v. Lee* (1927), the Court also found no constitutional objection to "the use of a marine glass or a field glass. It is not prohibited by the Constitution." Flashlights and field glasses are in such common use that allowing their use may be explained by the fact that they are common devices used everyday in ordinary situations. However, the Court has also found no Fourth Amendment impediment to more high-tech devices. In *Dow Chemical* (1986), the Court upheld a warrantless aerial surveillance of a two-thousand-acre chemical manufacturing facility, heavily secured against entry on the ground but partially exposed to visual observation from the air, by agents of the Environmental Protection Agency, to check emissions from the facility's power plant. The "EPA employed a commercial aerial photographer, using a standard floor-mounted, precision aerial-mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet." In upholding this level of surveillance as not protected by the Fourth Amendment, the Court noted, "The photographs at issue in this case are essentially like

those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them." With the end of the Cold War, "spy satellites" are now commercially available and have been used by "mining companies, mapmakers, geologists, city planners, ecologists, farmers, hydrologists, road makers, journalists, land managers, disaster-relief officials and others seeking to monitor the planet's changing face. The global market in such imagery is expected to reach as high as $5 billion by 2004."[49] The implications are that there are virtually no limits to aerial surveillance by the police for law enforcement purposes.[50]

Read Case and Comments: *Kyllo v. United States*

The Supreme Court has recently acted to exert some judicial control over the use of **thermal imaging** and has attempted to establish rules to guide the use of advanced information-gathering technology.

CONSENT SEARCHES

"The consent-based procedure is the bread and butter of the criminal justice system."[51] While precise figures are not available, "there is no dispute that [consent] searches affect tens of thousands, if not hundreds of thousands of people every year."[52] In one city, an estimated 92 percent of searches were **consent searches.**[53] Most consent searches occur in the course of traffic enforcement and automobile stops, and they play a significant role in racial profiling.[54] (See the "Law in Society" section in Chapter 5.) "Moreover, even if there is probable cause to search, obtaining a warrant may be time consuming or inconvenient. 'A consent search allows an officer to bypass paperwork and the need to locate a magistrate who can issue a warrant.'"[55] To an astonishing degree, criminal suspects plead guilty, confess to crime, allow police into their homes, and meekly submit to arrests rather than go to jury trial, stay mum, refuse to allow police entry without a warrant, and forcibly resist arrest. In these scenarios, suspects give up their constitutional rights to trial, self-incrimination, and privacy, which are guaranteed by the Sixth, Fifth, and Fourth Amendments. Defendants are allowed to give up these rights under proper conditions, although other fundamental rights, like prohibitions on cruel and unusual punishment or slavery or the guaranty of due process, cannot be voluntarily set aside.

Police favor consent searches and stops because they eliminate questions about a suspect's constitutional rights. "[B]ecause consent searches require no degree of suspicion on the officer's part, they allow an officer to pursue inarticulable hunches in detecting crime."[56] A person may have an absolute constitutional right to refuse to stop or to open the door to his or her home or automobile trunk when requested to do so by a police officer. But if the person consents, it matters not that the officer had no reasonable suspicion to stop or no warrant to enter. Once voluntarily allowed in, the officer is lawfully in the premises; if contraband is observed in plain view, it may be seized and the possessor arrested for possession. "[A] search authorized by consent is *wholly* valid."[57]

Voluntariness Requirement

The basic requirement of a valid consent search is that consent must be given voluntarily. A consent search obtained by threats or force will be voided by the courts. The test of voluntariness is the totality of circumstances, which courts routinely apply to determine whether an arrested person voluntarily consented to searches of cars, houses, or other protected areas. A consent obtained within minutes of a *routine* arrest, for example, will be upheld, while an arrest made by four officers with *guns drawn* will negate the voluntariness of consent to search.[58] This seems incongruous because an arrested person is by definition *in custody* of the police and "forcibly" detained. The incongruity is reflected in the holding in *Schneckloth v. Bustamonte* (1973), the Supreme Court's leading consent search decision, which defines voluntary consent as when the "subject of a search is *not in custody*" (emphasis added). Courts nevertheless continue to uphold most consents to search given by suspects under arrest.[59]

The burden of proof is on the government to prove consent: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority" (*Bumper v. North Carolina,* 1968). The following examples help to define voluntariness.

CASE AND COMMENTS

Kyllo v. United States

533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)

[a] After reading the entire case, do you think that the case and its rule apply only to thermal-imaging technology or to all sense-enhancing technology?

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment. **[a]**

I

[U.S. Department of Interior Agent Elliott suspected] that marijuana was being grown in the home belonging to * * * Danny Kyllo, part of a triplex * * * in Florence, Oregon. Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 A.M., * * * Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. * * *

[Kyllo was indicted and pled conditionally guilty. On appeal, the Court of Appeals upheld the conviction: Kyllo had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home, and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall."]

II

* * * With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. * * *

[b] Does Agent Elliott's thermal scan fit your idea of a search? Do you think what constitutes a search can be determined by an "objective" test, or should the definition of a search depend on the policy issues and values involved?

On the other hand, the antecedent question of whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. **[b]** The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. * * * Visual surveillance was unquestionably lawful . . . As we observed * * * "the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." **[c]**

[c] Would it make sense to require a search warrant every time investigators "stake out" a house to see who enters and leaves?

* * * [W]e have held that visual observation is no "search" at all. * * * In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz* (1967).* * *

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical,* we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened." * * *

III

It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, * * * the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. * * * The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.

* * * While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated

area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," * * * constitutes a search—at least where (as here) the technology in question is not in general public use. **[d]** This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. **[e]** On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

The Government maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." * * * The dissent makes this its leading point, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz,* where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. **[f]** Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development. **[g]** The dissent's reliance on the distinction between "off-the-wall" and "through-the-wall" observation is entirely incompatible with the dissent's belief * * * that thermal-imaging observations of the intimate details of a home are impermissible. The most sophisticated thermal-imaging devices continue to measure heat "off-the-wall" rather than "through-the-wall"; the dissent's disapproval of those more sophisticated thermal-imaging devices * * * is an acknowledgment that there is no substance to this distinction. As for the dissent's extraordinary assertion that anything learned through "an inference" cannot be a search, * * * that would validate even the "through- the-wall" technologies that the dissent purports to disapprove. Surely the dissent does not believe that the through-the-wall radar or ultrasound technology produces an 8-by-10 Kodak glossy that needs no analysis (*i.e.,* the making of inferences). And, of course, the novel proposition that inference insulates a search is blatantly contrary to *United States v. Karo,* (1984), where the police "inferred" from the activation of a beeper that a certain can of ether was in the home. The police activity was held to be a search, and the search was held unlawful.

The Government also contends that the thermal imaging was constitutional because it did not "detect private activities occurring in private areas." * * * It points out that in *Dow Chemical* we observed that the enhanced aerial photography did not reveal any "intimate details." * * * *Dow Chemical,* however, involved enhanced aerial photography of an industrial complex, which does not share the Fourth Amendment sanctity of the home. The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman,* for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, * * * and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. **[h]** In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. Thus, in *Karo,* the only thing detected was a can of ether in the home; and in *Arizona v. Hicks,* (1987), the only thing detected by a physical search that went beyond what officers lawfully present could observe in "plain view" was the registration number of a phonograph turntable. These were intimate details because they were details of the home, just as was the detail of how warm—or even how relatively warm—Kyllo was heating his residence.

[It would be extremely difficult, if not impossible, to determine what is an "intimate detail" and what is a "nonintimate detail" in a house. Even if a rule could make out this distinction, police would not know in advance if the search with a thermal imager or other high-tech device would disclose an intimate or nonintimate detail.]

Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.

Since we hold the Thermovision imaging to have been an unlawful search, it will remain for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.

* * *

[d] Notice that the definition of a search has two parts. What are they? Also notice that the sentence preceding Justice Scalia's definition of a search is a statement of policy—a concern that a different definition could erode in-home protections.

[e] Notice this reference to the expectations of Congress and the states in 1791. As in Justice Thomas's *Wilson v. Arkansas* (1995) opinion, Justice Scalia, the other originalist on the Court, feels that the legitimacy of a ruling depends on whether it squares with the purported intent of the Framers and their common law environment.

[f] This statement seems to answer the question raised in Comment [a]: The Court always deals in questions of constitutional policy and has to consider the consequences of its decisions.

[g] One consequence, as Justice Scalia states, is to attempt to foresee a future when highly intrusive technology would allow easy observation into the privacy of houses and apartments. In a footnote, the opinion said, "The ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development."

[h] Is this distinction between business premises and a home sound? What if a person operates a business out of a home office? For purposes of a search, is this a home or a business? Similarly, is a fully mobile home, such as a recreational vehicle, a home, or a vehicle?

The judgment of the Court of Appeals is reversed; the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

* * *

I

* * * [S]earches and seizures of property in plain view are presumptively reasonable. * * * Whether that property is residential or commercial, the basic principle is the same: "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" That is the principle implicated here.

While the Court "takes the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," * * * this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. **[i]** All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others. As still images from the infrared scans show, * * * no details regarding the interior of petitioner's home were revealed. Unlike an x-ray scan, or other possible "through-the-wall" techniques, the detection of infrared radiation emanating from the home did not accomplish "an unauthorized physical penetration into the premises," * * * nor did it "obtain information that it could not have obtained by observation from outside the curtilage of the house." ***

[i] Was the heat emanating from Kyllo's house in *plain* view if it took a heat sensor to detect it?

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. * * * **[j]**

[j] Is this the same as thermal imaging by a government agent?

Thus, the notion that heat emissions from the outside of a dwelling is a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their . . . houses" against unreasonable searches and seizures [emphasis added]) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.'" * * *

* * * In my judgment, monitoring such emissions with "sense-enhancing technology," * * * and drawing useful conclusions from such monitoring, is an entirely reasonable public service.

On the other hand, the countervailing privacy interest is at best trivial. After all, homes generally are insulated to keep heat in, rather than to prevent the detection of heat going out, and it does not seem to me that society will suffer from a rule requiring the rare homeowner who both intends to engage in uncommon activities that produce extraordinary amounts of heat, and wishes to conceal that production from outsiders, to make sure that the surrounding area is well insulated. * * * The interest in concealing the heat escaping from one's house pales in significance to "the chief evil against which the wording of the Fourth Amendment is directed," the "physical entry of the home," * * * and it is hard to believe that it is an interest the Framers sought to protect in our Constitution.

Since what was involved in this case was nothing more than drawing inferences from off-the-wall surveillance, rather than any "through-the-wall" surveillance, the officers' conduct did not amount to a search and was perfectly reasonable.

II

[The application of the Court's holding to technology that is "not in general public use" means that as intrusive technology becomes commonplace, it will allow searches of private areas to be held constitutional. The dissent noted that over ten thousand thermal-sensing units had been manufactured and could be purchased by anyone. Another criticism is that the holding was limited to privacy only in the home; if new technology has the effect of getting information that otherwise could be obtained only by having an officer enter a place, under the expectation of privacy doctrine, it should apply to commercial places as well as to homes.]

* * *

I respectfully dissent.

In ***Amos v. United States*** (1921), two federal "revenuers" looking for untaxed whiskey came to Amos's house without a warrant. He was not there; his wife opened the door. They told her "that they were revenue officers and had come to search the premises 'for violations of the revenue law'; that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not quite a half-pint of illicitly distilled whisky, which they called 'blockade whisky.'" A unanimous Court summarily dismissed the contention that the officers were let in voluntarily because they *demanded* entry under *government authority*. A similar case is ***Bumper v. North Carolina*** (1968). Bumper, an at-large murder suspect, "lived with his grandmother, Mrs. Hattie Leath, a 66-year-old Negro widow, in a house located in a rural area at the end of an isolated mile-long dirt road." Four officers came to the house and told Mrs. Leath that they had a *search warrant*. In response, she allowed them to search the house, and they discovered a weapon. It was later determined that there never was a search warrant. The Supreme Court held that Mrs. Leath, who did not appear at all intimidated, nevertheless did not give valid consent to the warrantless search:

> A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.
>
> We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner. (*Bumper v. North Carolina,* 1968)

Officers who falsely claim to have a warrant or who demand entry as if the law required it are acting under color of law, and *Amos* and *Bumper* deem such action to be *legal coercion*. But it is not coercion for a police officer to ask a person, in a nonthreatening manner, if he or she may enter a home, search a car, or view a backpack and the like. If a person agrees, she has voluntarily relinquished her Fourth Amendment right to privacy. It does not matter whether the officer believes that the person is a suspect.

Despite these earlier cases, "it was not until 1973, in ***Schneckloth v. Bustamonte*** that the Supreme Court clearly articulated the requirements for a voluntary consent search consistent with the Fourth Amendment."[60] In *Schneckloth,* the Supreme Court found that the following scenario resulted in a voluntary consent to search the trunk of an automobile:

> While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: "The police officer asked Joe [Alcala], he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got the keys and opened up the trunk." Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash. (*Schneckloth v. Bustamonte,* 1973)

The majority decided (6–3) that Alcala's consent was voluntary and the checks were admissible. Justice Stewart, in his majority opinion, said the "precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was 'voluntarily' given." The issue included the subsidiary question of whether the police have to *inform* those from whom they request consent to search that they have a constitutional right to refuse, where police do not have probable cause or reasonable suspicion to force a search (discussed in the next section). In concluding that Alcala voluntarily consented, the Court noted that the atmosphere surrounding the search was said to be "congenial," there had been no discussion of any crime, and Alcala even tried to aid in the search.

Regarding voluntariness in general, Justice Stewart turned to the more than thirty Supreme Court confessions cases that explored their voluntariness under the due process "facts and circumstances" test. (See Chapter 7.) He concluded that there is no formula to determine whether a consent is voluntary. On the one hand, even a person subjected to torture retains some level of choice in deciding whether to talk, while on the other it can be said that consent is never voluntary because a person would never give up his or her rights "in the absence of official action of some kind." As a result, the Court was guided, in sorting out voluntary from involuntary confessions, by "the complex of values implicated in police questioning of a suspect." This involved balancing the need of law enforcement to question suspects against a "set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness." The Court accommodated these competing interests in confessions cases by looking at several circumstances: the suspect's age, education, and intelligence; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment. The decision in each case depended on a qualitative evaluation of factors. In sum, "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."

Professor Marcy Strauss suggests that the voluntariness test "is so vague that it provides little guidance to courts, litigants or police officers."[61] Moreover, although *Schenckloth* emphasized subjective factors about the suspect's understanding of events, "lower courts may ignore or short-change subjective factors of the suspect because judges may believe that *Schneckloth* has been overturned sub silentio, or, at a minimum, may be confused about the appropriate standard to apply. Recent Supreme Court decisions . . . seem to be moving the law away from subjective considerations and towards an *objective* standard."[62] Thus if the voluntariness of consent is determined exclusively by objective factors of police behavior (e.g., whether the officer brandished a gun), determining whether the suspect's will was *in fact* overborne will disappear as a test.

Chapter 4 presents many cases in which the validity of a person's search turns on whether the person was arrested, temporarily stopped on the basis of reasonable suspicion, or gave consent. *United States v. Mendenhall* (1980) demonstrates the difficulty of determining consent and the use of an objective standard for a seizure. Sylvia Mendenhall deplaned at the Detroit Metropolitan Airport. She was observed by two DEA agents, who thought her conduct appeared "characteristic of persons unlawfully carrying narcotics." They approached Mendenhall, identified themselves as federal agents, and *asked* to see her identification and airline ticket. The name on her driver's license, Sylvia Mendenhall, and that on the ticket, Annette Ford, did not match. When asked why, she replied that she "just felt like using that name." One agent then specifically identified himself as a narcotics agent, and Mendenhall "became quite shaken, extremely nervous. She had a hard time speaking." She was then asked if she would accompany the agents to offices just fifty feet away. Once there, she was asked if she would allow a search of her person and handbag. She was told she had the right to decline if she desired. She responded, "Go ahead." A female police officer asked Mendenhall if she consented to the search and she replied that she did. Heroin was found in her undergarments, and she was arrested and convicted. The District Court concluded that Mendenhall had consented to the search.

Two justices, Stewart and Rehnquist, believed that Mendenhall had *consented* to the initial stop. Justice Stewart's **plurality opinion** reasoned that not every police–citizen encounter is a seizure of the person requiring reasonable suspicion or probable cause to be lawful. The test that distinguishes between a consent stop and a seizure is whether, in view of all the facts and circumstances, a reasonable person would believe that he or she is not *free to leave*; "a person is 'seized' only when, by means of physical force or show of authority, his freedom of movement is restrained." The plurality opinion therefore concluded that Mendenhall could have walked away from the agents at any point. No grabbing or touching occurred. The agents were not in uniform, and no weapons were displayed. The initial encounter occurred in public. They asked, but did not

demand, to see her identification. The consequences of this objective test will be discussed in the next section.

Three justices (Burger, Powell, and Blackmun) felt that the initial stop was a *seizure* but that it was constitutional because the officers had *reasonable suspicion* to believe that Mendenhall was a drug courier. These five justices agreed that she had consented to going to the office and to the search of her person—that is, that there was no arrest until the heroin was found. Four dissenting justices (White, Brennan, Marshall, and Stevens) concluded, to the contrary, that Mendenhall was *seized without reasonable suspicion* and subject to an unconstitutional arrest and that the search was unconstitutional. Although the legality of airport drug stops has been clarified by the Court's acceptance of drug courier profiles as constituting reasonable suspicion, the inability of nine Supreme Court justices in *Mendenhall* to agree demonstrates the difficulty of sorting out the facts that constitute consent.

Knowledge of One's Rights

A major issue in *Schenckloth v. Bustamonte* (1973) was whether consent is possible when a defendant has no knowledge that he or she has a right to refuse a police request to search. The court of appeals had held that "a consent was a *waiver* of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demonstrate, not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the District Court had not determined that Alcala had *known* that his consent could have been withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings" (emphasis added). In reversing the decision, the Supreme Court held that the police are under no obligation to inform those from whom they seek consent to search that they have a constitutional right to refuse.

One reason was the fear that police, without probable cause or reasonable suspicion, would have no other way of getting evidence. "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence" (*Schneckloth,* 1973). The Court did not define "some evidence," so the police could be requesting to search based only on a hunch or perhaps on categorical information (e.g., the person is a white male). Another reason is that a consent search could clear an innocent person of suspicion and stop the police from applying for a warrant where they have probable cause (but are in error) that contraband is in a place. A further reason is that it may be difficult to prove the person's subjective understanding of his or her rights, and after a consent search any defendant "could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent" (*Schneckloth,* 1973).

Borrowing from the Fifth and Sixth Amendments' *Miranda* and right-to-counsel cases, where a defendant must be informed of his or her rights, Bustamonte had argued that there is a Fourth Amendment obligation on the police to inform a person that he or she has a right to refuse consent. The Court rejected this contention. A Fourth Amendment consent is not the same as a *waiver* of the rights to silence or an attorney under the Fifth or Sixth Amendments. Waivers are valid only if made knowingly, and to ensure knowledge, suspects or defendants must be informed of these rights before giving them up. Waivers are "applied only to those rights which the Constitution guarantees to a criminal defendant in order to *preserve a fair trial*.. . .The requirement of a 'knowing' and 'intelligent' waiver was articulated in a case involving the validity of a defendant's decision to forgo a right constitutionally guaranteed to protect a fair trial and the *reliability* of the truth-determining process" (*Schneckloth,* 1973, emphases added). Violations of the privilege against self-incrimination or right to counsel might result in the conviction of innocent persons. "The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial" (*Schneckloth,* 1973). Consents to search that result in the seizure of evidence of crime provide good evidence that might not otherwise be obtained. This analysis demonstrated that the Court's majority believed that Fourth Amendment rights are of lesser importance than other provisions of the Bill of Rights.

In addition, the Court believed it "would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination" that occurs in courthouses when informing a defendant of his or her right to counsel. Similar considerations precluded extending the reasoning of *Miranda v. Arizona* (1966) to consent situations. The impracticality of obtaining written consents to search is a reasonable argument, although the extension of modern technology makes it less so, and many police departments utilize written consent-to-search forms. The Court did say that the suspect's knowledge, and whether he or she was informed of the right to refuse consent, are factors in assessing voluntariness.

In a brief dissent, Justice Brennan wrote: "It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by 'linguistics,' nor by 'epistemology,' nor, indeed, by 'common sense'" (*Schneckloth v. Bustamonte,* 1973, Brennan, J., dissenting). A more elaborate dissent by Justice Marshall offered a different basis for accepting the validity of consent searches. He felt that the Court was mistaken to rely on the confessions cases because consent cases do not deal with the "coercion" present during custodial interrogation. Rather than extolling consent, as did the majority, Justice Marshall noted that police have weaker interests when they lack probable cause, suggesting that the Court ought not encourage police to seek consents. He put the basis of consent on a different footing: "[C]onsent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to *choose* whether or not they wish to exercise their constitutional rights" (*Schneckloth v. Bustamonte,* 1973, Marshall, J., dissenting, emphasis added). In this view, consent is a freedom to give up a constitutional right and as such should be narrowly construed. This disagreed sharply with Justice Stewart's view that consent is a law enforcement tool that courts should broadly construe and support.

Indeed, Justice Marshall was sharply critical of the majority: "[W]hen the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights" (*Schneckloth v. Bustamonte,* 1973). But more than ignorance may be at work in consent searches. Quoting from the Ninth Circuit opinion, Justice Marshall concluded that "under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law." This alludes to what Prof. Strauss called the "fiction of consent"—the observation supported by substantial scholarship and common sense "that most people would not feel free to deny a request by a police officer," a position that some judges agree with.[63] Sylvia Mendenhall, for example, was told that she had a right to not be searched, but she agreed anyway (*United States v. Mendenhall,* 1980).

To the extent that this is true, *Schneckloth*'s consent rules significantly weaken Fourth Amendment protections. Potential solutions, if desired, include (1) partially overruling *Schneckloth* and requiring police to inform people that they have a constitutional right to refuse to a search when asking for consent, a position that only three states have followed;[64] (2) requiring that police have reasonable suspicion before requesting consent, a rule that has been imposed on New Jersey state troopers in a consent decree following a major racial profiling case;[65] (3) allowing racial minorities to raise cultural arguments that, in view of the history of racially biased police action, the subjective attitude of blacks and Hispanics is to see most police requests for consent as coercive—a rule that Strauss believes would be difficult for courts to apply and would raise claims that the system is unfair in allowing this "strange form of affirmative action";[66] or (4) overruling *Schneckloth* and abolishing the consent exception to searches based on evidence, a position supported by Strauss.[67]

Schneckloth's approach was confirmed in ***Ohio v. Robinette*** (1996). A police officer stopped a motorist for speeding and issued a *warning* but did not tell him that he was "free to go," as was then required under a controversial Ohio Supreme Court decision.[68] In answer to the officer's question, Robinette said he was not carrying any contraband. The officer then asked if he could search the car. Robinette consented and the officer uncovered contraband. The Supreme Court found that the search was constitutional because Robinette consented voluntarily and that the officer did not have to inform him that he was "free to go." After the U.S. Supreme Court's decision, the Ohio Supreme Court rescinded its 1995 decision that required police to warn motorists that they did not have to allow a police search without individualized suspicion, finding

that the added warning was not required under the state constitution.[69] An empirical study of written and verbal warnings issued by the Ohio Highway Patrol (OHP) during the year and a half that the Ohio Supreme Court required "*Robinette* warnings" shows that the number and rate of requests for consent by OHP officers *increased* during the period that they had to issue *Robinette* warnings. This finding allays the fears underlying *Schneckloth* that consent warnings would undermine law enforcement effectiveness.[70]

CONSENT-ONCE-REMOVED A somewhat related "knowledge" issue is whether consent, validly given to an undercover agent who deceives an occupant about his true identity, can be extended to other police who forcibly enter a premises to search for contraband. This so-called "consent-once-removed" doctrine was upheld in several federal circuits when the undercover agent was a police official. The reasoning was that one police agent could extend his or her consent to a fellow officer. There was less support for the rule when the consent to enter was initially given not to a police agent, but to a "confidential informant," who typically is a drug user seeking to avoid prosecution. The Supreme Court indirectly approved of consent-once removed by holding that an officer who is signaled to enter by a confidential informant is entitled to qualified immunity from a civil suit (***Pearson v. Callahan,*** 2009). In *Callahan* a confidential informant was invited to Callahan's house to buy drugs. He was fitted with a wire and gave a signal as soon as he made the purchase. Police entered without a warrant and seized the contraband. The "'consent-once-removed' doctrine applies when an undercover officer [or confidential informant] enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance."

Third-Party Consent

When two or more people share a room or common area, one person may voluntarily consent to a police search of the *common area*. Evidence found that incriminates the other party may be admitted in evidence. The prosecution need only show by a *preponderance of the evidence* that the person who gave consent had authority to do so, based on her or his relationship to the property.

In the leading third-party consent search case, ***United States v. Matlock*** (1974), police searched the bedroom of a house, with the consent of Gayle Graff, who was living with Matlock. Evidence of a bank robbery was found and admitted to prove guilt. The fact that the couple was not married was irrelevant for Fourth Amendment purposes to negate consent. The authority of a third party to consent to the search depends not on property law concepts or on rules of evidence that apply in a trial, "but rests rather on *mutual use* of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched" (*United States v. Matlock,* 1974, emphasis added). Similarly, a roommate who shares a duffel bag may consent to its search (*Frazier v. Cupp,* 1969).

In contrast to *Matlock,* the Court held in ***Stoner v. California*** (1964) that a *hotel clerk* did not have authority to consent to a police search of a guest's room. The Court said, "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's or the hotel's." Although *Stoner* was decided before the "expectation of privacy" principle of *Katz* (1967) was enunciated, as a rule of thumb it seems that only those with an expectation of privacy over an area may consent to a search. *Stoner* was preceded by *Chapman v. California* (1967), which held that a *landlord* may not give consent to a police search into a tenant's apartment or house, even though the landlord has a general right of entry for normal inspection purposes.

Illinois v. Rodriguez (1990) upheld a warrantless entry into a man's apartment when consent was given by a person with reasonably *apparent authority*. Gail Fisher complained to Chicago police that Edward Rodriguez had beaten her. Officers accompanied Fisher from her mother's to Rodriguez's apartment to get her stuff. She let them in with a key. On the drive to Rodriguez's apartment, she referred to "our" place. The officers did not know that she had moved out a month earlier, removed her clothing, did not invite friends there, was never in the house when Rodriguez was not there, did not contribute to the rent, and did not have her name on the lease. In reality, Fusher did *not* possess common authority over the premises; but the

police *reasonably believed* that she had. The Court held the entry to be *reasonable* under the Fourth Amendment. By analogy to probable cause cases, a police officer's reasonable mistake in a consent case does not violate the individual's Fourth Amendment rights.

The *Rodriguez* Court, extending the scope of third-party consent, differentiated *Stoner,* which is still good law. A motel clerk's apparent authority to enter a room can never be the basis for a third-party police search, because police know that ordinarily, motel personnel do not have general authority to enter a guest's room outside of normal cleaning and maintenance functions. On the other hand, when a woman with a key to an apartment claims that her boyfriend beat her, there is no reason why the police should not believe that she lives in the apartment.

Justice Marshall dissented in *Rodriguez* (joined by Justices Brennan and Stevens). A home entry without a warrant is *presumptively unreasonable*; police cannot dispense with a person's rights where that person has not limited his expectation of privacy by sharing his home with another. Under this analysis, the reasonableness of the police officers' action is irrelevant. The police should have obtained a warrant in this situation even if inconvenient.

In ***Georgia v. Randolph*** (2006), Scott and Janet Randolph had separated; she moved out and took their son. She returned to the marital residence a few months later, but after a domestic dispute with Scott called police saying that he took their son. When the police arrived, Janet told them that Scott used cocaine. Scott returned shortly, having taken his son to a neighbor's. He denied cocaine use and accused Janet of abusing drugs and alcohol. After the police went with Janet to retrieve the son, she said that Scott had drugs in the house. At the door to the house, the officer asked for consent to enter. Scott flatly refused, but Janet gave consent. Janet led the officer to Scott's bedroom, where he saw a straw with a powdery residue, which was seized. Under a warrant, police later found more evidence of drug use. Scott was convicted of cocaine possession. The Georgia appellate courts reversed the conviction on the grounds that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search" (*Georgia v. Randolph,* 2006, quoting the Georgia Supreme Court).

The U.S. Supreme Court affirmed (5–3). The reasoning of Justice Souter's majority opinion was based on the idea that *widely shared social expectations*, a source outside the Fourth Amendment, should be used to interpret the amendment's Reasonableness Clause and the expectation of privacy. Widely shared social expectations made it reasonable for police to enter the Matlock residence when a person who obviously belonged there came to the door and voluntarily let the police in to look around. Likewise, a tenant or motel occupant does not expect that a landlord or motel clerk would have implied permission to allow others to enter the occupant's apartment or room. Therefore, "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some *very good reason,* no sensible person would go inside under those conditions" (*Georgia v. Randolph,* 2006, emphasis added). In coming to this conclusion, the majority placed the "centuries-old principle of respect for the privacy of the home" above law enforcement convenience needs. "Disputed permission is . . . no match for this central value of the Fourth Amendment" (*Georgia v. Randolph,* 2006). The police could have obtained a warrant and could have prevented the residents from destroying any property while waiting for the warrant (*Illinois v. McArthur,* 2001). The majority noted that its decision was in accord with the preference for search warrants (*United States v. Ventresca,* 1965). It took special pains to make it clear that its decision did not prevent police from entering a premises for the very good reason that an occupant made a complaint about domestic violence, which was not a factor in this case. The majority also made it clear that the police have no responsibility to search for another occupant who might object to the consent to enter (as long as they do not deliberately remove a potentially objecting occupant from the entrance). The Court acknowledged the contingent nature of the holding, depending as it does on the fortuitous circumstance of a consenting and an objecting occupant standing at the entrance to the premises.

Chief Justice John Roberts dissented. He pointed out that a number of differing social situations could give rise to different social expectations about entering where two occupants differ, as where the entering person is a close friend or relative, or where the premises of the "feuding roommates" is a single room or a spacious house; or where there are more than two occupants and a majority invite a guest in. The dissent's basic reasoning is that the Fourth Amendment protects privacy, and when the privacy of an area is shared, the occupant assumes the risk that the

privacy will be breached by the other occupant. Finally, the dissent raised an alarm that the decision would be an impediment to entry in domestic violence cases.

Scope of Consent

> Dade County police officer, Frank Trujillo, overheard . . . Enio Jimeno, arranging what appeared to be a drug transaction over a public telephone. Believing that Jimeno might be involved in illegal drug trafficking, Officer Trujillo followed his car. The officer . . . pulled Jimeno over to the side of the road in order to issue him a traffic citation [for making an illegal turn]. Officer Trujillo told Jimeno that he had been stopped for committing a traffic infraction. The officer went on to say that he had reason to believe that Jimeno was carrying narcotics in his car, and asked permission to search the car. He explained that Jimeno did not have to consent to a search of the car. Jimeno stated that he had nothing to hide and gave Trujillo permission to search the automobile. After Jimeno's spouse, respondent Luz Jimeno, stepped out of the car, Officer Trujillo went to the passenger side, opened the door, and saw a folded, brown paper bag on the floorboard. The officer picked up the bag, opened it, and found a kilogram of cocaine inside.
>
> The Jimenos were charged with possession with intent to distribute cocaine in violation of Florida law. (***Florida v. Jimeno,*** 1991, pp. 249–50)

The Florida Supreme Court ruled that the officer had to receive specific consent to open the container. The U.S. Supreme Court reversed, holding that under the Fourth Amendment the scope of a consent search depends on whether the search was reasonable. In this case, the search was reasonable because, according to Chief Justice Rehnquist, the "scope of a search is generally defined by its expressed object." Jimeno "did not place any explicit limitation on the scope of the search," and a "reasonable person may be expected to know that narcotics are generally carried in some form of a container." He stressed that Jimeno could have limited the scope of the search, and he concluded with the policy expressed in *Schneckloth* that "[t]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime."

Justice Marshall dissented, joined by Justice Stevens. He noted that under the Court's precedent, there is a lesser expectation of privacy in cars, but a heightened expectation of privacy in the content of closed containers. These "distinct privacy expectations. . . do not merge when the individual uses his car to transport the container." Also, the way in which "reasonableness" is used by the majority could lead to absurd or unacceptable results. After all, if "a reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities," then consent to search a car could lead to a body-cavity search. He argued that Jimeno, in fact, did not consent to a search of the paper bag and the Court should interpret rights expansively and should interpret limitation of rights (such as consent) narrowly.

"Knock and Talk"

In recent years a number of cases have defined the parameters of a police practice labeled "knock and talk" (not to be confused with the search warrant knock-and-announce requirement). The Supreme Court has not yet ruled on the practice but different decisions by federal Courts of Appeal may generate a future case. Knock and talk is "a procedure used by law enforcement officers, under which they approach the door of a residence seeking to speak to the inhabitants, typically to obtain more information regarding a criminal investigation or to obtain consent to search where probable cause is lacking."[71] Police estimate that as many as 80 percent of people asked, consent to home searches at the doorstep even though the police have not probable cause or even reasonable suspicion to enter.[72] This is proper if the consent is truly voluntary, for then the search "does not trigger the Fourth Amendment's constitutional protections."[73]

Because knock and talk involves police going to residences, it involves *curtilage* issues. When police enter the curtilage in a manner that is socially prescribed for anyone approaching a residence, they do not violate the curtilage protection. This typically requires that police stay on walkways and approach at reasonable times of day. In some cases late-night knock and talks were upheld, depending on the facts and circumstances of a case. Likewise, in some cases it was deemed reasonable for police to go to the back yard of a house to knock, but in other cases it was not.[74]

A number of court decisions and commentaries have been very critical of knock and talk as a way for police to circumvent the search warrant requirement to enter homes. The Arkansas Supreme Court modified its usual rule of interpreting the Arkansas constitution in accord with the United States Supreme Court's interpretation of the Fourth Amendment, to rule in a knock and talk case that the Arkansas constitution imposed "greater restrictions on police activity" and evidence obtained in violation of Arkansas law is inadmissible in court (*Griffin v. State*, 2002).[75] In this case, four or five police officers, armed with flashlights but not with a search warrant or probable cause, hid their parked cars from Griffin's home and approached from the rear. They had one uncorroborated informant's statement that Griffin, an optician, dealt amphetamines. Griffin lived in a ground-level apartment of his parent's house; a sitting room had glass doors. It was after 10:00 p.m. and pitch-black outside. Police came upon and searched unlocked cars outside the home, finding no contraband. While Griffin was in a back room talking to his daughter on the telephone, a guest, Karen Horton, "saw a bunch of flashlights out in the vicinity of the shed coming through the woods." She told Griffin "that four or five men were approaching the house." As Griffin came into the room, the officers told Horton "not to move, and then ordered her to open the door." An officer testified that he knocked and no search began until consent was given. No written consent form was signed. Nor was Griffin advised that he could refuse to consent to search. A "sealed container containing methamphetamine in a locked cabinet in Griffin's bedroom" was found.

The Arkansas Supreme Court held that an illegal search occurred before the police knocked on the glass door to Griffin's apartment. Police, stealthily coming through the woods, with flashlights in the pitch-black night, is the antithesis of "anyone open and peaceably, at high noon, . . . walk[ing] up the steps and knock[ing] on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof." The evidence was excluded. Three justices concurred in opinions sharply critical of knock and talk. Justice Corbin noted that before "this type of consent search became so fashionable, the police were forced to investigate anonymous or unreliable tips before they could attempt to seize evidence" suggesting one rule that would reduce errors produced by knock and talk. He also would have held that under the Arkansas constitution, knock and talk should be prohibited at night. Justice Brown alluded to the "the intimidation factor (usually two to four police officers are involved) and the message conveyed, either verbally or by insinuation, that if a consent is not given, the police officers will simply get a search warrant and come back." Such practices led the Washington Supreme Court to require police to inform householders that they have a right to refuse consent to enter.[76] Justice Brown argued that having a written consent from in knock and talk cases was better practice. Justice Hannah, in a powerful concurrence, said the "'knock and talk' practice of police poses a serious threat to the right of privacy and right against unlawful search and seizure." He argued "for greater restraints on police use of the 'knock and talk'" and would require written consent as a constitutional mandate.

A commentary reviewed a Michigan case where four police officers (two approached Frohriep while two remained hidden) got vague oral consent one May evening to "look around" Larry Frohriep's property. He opened the door to a pole barn; it was disputed whether he consented that police enter. While he was talking to one officer the others searched diligently and one shouted "Bingo" when marijuana was found in a freezer. Relying on Fourth Amendment consent search cases, the Court of Appeals upheld police practices in this case.[77] The Casenote pointed out that federal statutes impose greater limits on the behavior of door-to-door salespersons than the Fourth Amendment, as interpreted by the Michigan court, imposed on the police. It viewed any request for consent to enter a *home* as far more intrusive than other kinds of requests for consent to search. "The special sanctity afforded the home under the Fourth Amendment should protect citizens from having to shoo away police that do not even have reasonable articulable suspicions."[78] While this could lead to a warrant requirement, the Casenote advocated that police audiotape all knock and talks, that police be required to inform householders that they have a right to refuse to consent, that they may revoke consent at any time, and that they may limit consent to particular areas of their home.[79]

Aside from the issue of voluntariness, which can evaporate when police act in egregious ways, a couple of other problems arise with knock and talk. One is *constructive entry*, whereby "police use tactics that force the individual to exit his home" or "conduct a 'knock and talk' with weapons drawn, while yelling at the occupant, using a bullhorn, or while preventing the occupant from leaving the premises."[80] The other is when the police knock and talk creates an exigency that is then used by the police as a reason to enter and search. In *U.S. v. Gomez-Moreno*,[81] the exigency of a man running out of a house was created by ten to twelve police and Immigration and

Customs Enforcement Officers in labeled jackets, accompanied by an overhead helicopter, swarming around a house, trying the front door handle, and shouting "Police! Police! Open the door." This was not a knock to inquire about a crime but a way to generate an unwarranted raid for illegal aliens. In the case of suspicion of drug possession, an exigency may be created by police without warrants announcing themselves, and then breaking in if they "hear people running around" on the fear that drugs are being destroyed.[82] Several federal circuit Courts of Appeal, including the Third, Fifth and Sixth, explore the deliberate intentions or bad faith of police officers in using these tactics as pretexts to gain entry without warrants. This contrasts with the Second Circuit, which relies on objective factors regarding the tactics used by the police.[83] These Circuit differences could provide a basis for the Supreme Court to rule on knock and talk.

LAW IN SOCIETY:

Police Perjury and the Fourth Amendment

A decade ago, police perjury was "the dirty little secret of our criminal justice system."[84] Now it is common knowledge, thanks in large part to the exposed perjury of Detective Mark Fuhrman in the O. J. Simpson murder trial.[85] A law professor reports that his students frequently interrupt classroom hypotheticals involving illegal police conduct with questions like "What if the police just lie about what happened?"[86] And this, indeed, is the critical point. People in all walks of life, from presidents on down, have been known to lie; and it is necessary for society to prosecute business fraud, for professional organizations to investigate and sanction falsehoods by their members, and so forth. "What distinguishes police officers is their unique power—to use force, to summarily deprive a citizen of freedom, to even use deadly force, if necessary—and their commensurately unique responsibilities—to be the living embodiment of the 'law' in our communities, as applied fairly to every member."[87] If police officers routinely commit perjury about the legality of arrests or searches and routinely get away with it, then the true result is not a personal benefit (a good arrest record) or even a misguided belief that this enhances public safety—it effectively destroys the basic constitutional rights of every person who is subject to such illegal action and threatens the rights of the rest of us (including cops) who have not yet been framed by police lies. This kind of perjury occurs most frequently in drug enforcement.

It is important to begin with Professor Morgan Cloud's observation that it's not true that "all police officers lie under oath, or that most officers lie, or that even some officers lie all the time."[88] An insightful article by Professor Andrew McClurg notes a profound paradox: "Most police officers are honorable, moral persons," yet "many of these same police officers lie in the course of their official duties." Any resolution of the problem of police perjury requires understanding the pressures that proliferate police perjury.

The kind of police perjury most likely to undermine Fourth Amendment rights occurs when (1) a police officer thinks that a defendant was in possession of contraband or incriminating evidence, (2) the officer obtained the evidence by an unconstitutional act, and (3) in a suppression hearing the officer "embellishes" the truth by testifying so as to make it appear as if the stop, arrest, or search was performed in a constitutional manner. "Routine" perjury is a greater threat to rights than more outrageous action, such as planting evidence on innocent individuals or "booming" (illegally breaking into homes without a warrant or pretense of legality),[89] because most cops, being honorable, draw the line at such over-the-top behavior. But they will "shade" the truth if they view constitutional rights as "mere technicalities"—as impediments to effective law enforcement. Professor Richard Uviller, who spent a year observing a New York Police Department street crimes unit, notes that like most people, "cops were raised with a strong sense of justice, and they naturally apply it when the occasion arises."[90]

Scholars who have studied this issue believe that routine perjury in regard to the seizure of incriminating evidence began as a result of the federalization of the exclusionary rule in *Mapp v. Ohio* (1961). A frequently cited 1971 article by Irving Younger, a former prosecutor and judge, noted that before *Mapp,* police easily testified to making illegal stops and finding contraband—"This had the ring of truth." After *Mapp,* judges suppressed evidence obtained in this way. Police officers then discovered "that if the defendant drops the narcotics on the ground, after which the policeman arrests him, then the search is reasonable and the evidence

is admissible." Hence "dropsy" testimony increased enormously.[91] Younger's observations were substantiated by a before–after empirical study of police testimony in misdemeanor narcotics arrests showing that the percent of arrests where narcotics were "hidden on the body" dropped from about 25 percent of all arrests to about 5 percent, while "dropsy" cases, which accounted for about 10 to 15 percent of arrests before *Mapp,* increased to 41 percent for narcotics officers.[92]

"Routine" perjury is close to impossible for defense lawyers, prosecutors, or judges to detect because it is so simple:

> Lying about search and seizure matters "was part of everyday police work" according to a former New York City police officer interviewed for an article announcing that cops in New York must now go to school to learn to tell the truth. The Mollen Commission cataloged a "litany" of manufactured search and seizure tales uncovered by its investigation:
>
> For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person's pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant or claim they saw the drugs in plain view after responding to the premises on a radio run. To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.[93]

A Harvard Law School conference held shortly after the verdict in the O. J. Simpson case concluded: "There are no national studies or statistics on police perjury, and there is considerable disagreement on how widespread the problem is."[94] Nevertheless, a great deal of anecdotal evidence from police commissions and others indicates that police perjury is widespread.[95] A study of twenty-six Chicago narcotics detectives asked them: "In your experience, do police officers ever shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact?" Sixteen officers responded "yes," and five responded "no."[96] Of course, the actual number is unknown because "[b]y their very nature, successful lies will remain undetected, and we would expect a perjurer to attempt to conceal his crime."[97] Former Kansas City and San Jose police chief and Hoover Institution research fellow Joseph D. McNamara estimated "that hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests." He based this estimate on the fact that about one million drug arrests a year are for possession, not selling, and that hundreds of thousands of police swear under oath that the drugs were in plain view or that the defendant gave consent to a search. "This may happen occasionally but it defies belief that so many drug users are careless enough to leave illegal drugs where the police can see them or so dumb as to give cops consent to search them when they possess drugs."[98]

"Routine" perjury has serious consequences. First, there is the danger that police fabrication will lead to the charging or conviction of innocent people. In some cases, the police have convinced themselves, against the evidence, that the victim of their lies was guilty. Well-known cases include Richard Jewell, suspected of bombing Olympic Park at the 1996 Atlanta Olympics, and Rolando Cruz, who was on death row in Illinois, but there are many others.[99]

Second, the frequent commission of "pious perjury" creates an enabling atmosphere that allows a minority of "rogue cops" to go over the top by planting evidence on innocent people or booming. There is no way of knowing whether such abuses are widespread. Commission reports and the anecdotes of police and lawyers do not indicate that such practices are routine. Nevertheless, when such cases do occur, they are reported, and quite a few have appeared in the last decade:

- In Philadelphia's 39th District scandal, six "rogue cops" planted evidence on many innocent people, including a grandmother who pestered them with questions when they came looking for her grandson and spent two years in prison for her verbal challenges. The city paid out at least seven million dollars, and fourteen hundred cases were reviewed.[100]

- In the mid–1990s NYPD 30th Precinct scandal, wrongful arrests and booming were connected to police participation in illegal drug sales.[101]
- Five New York State Troopers were convicted of faking fingerprint evidence in thirty cases. In one case, they lifted fingerprints from a corpse and planned to plant the evidence on anyone charged with the crime.[102]
- In Hartford, Connecticut, police officers committed perjury to cover up a police ring that systematically shook down drug dealers.[103]
- Eufrasio G. Cortez, a California narcotics Officer of the Year, was convicted after he admitted that he stole a half million dollars from drug busts, committed perjury thirty times, beat suspects on twenty occasions, and used false statements in search warrants one hundred times over his fifteen-year police career.[104]

Third, the practice cannot be kept hidden and eventually leads to a loss of public confidence in the police. As a result, jurors become skeptical of police testimony, which undermines fair prosecutions; minorities become less willing to call the police for protection; and the public is less interested in law enforcement as a career.[105]

Fourth, the practice undermines the morale and diminishes the sense of pride felt by honest officers.[106] When police lie to cover their corruption, the professional self-esteem of honest cops is injured. Uviller noted in honest cops "a sense of betrayal by the corrupt members who have demeaned the job and made it harder for the rest to convince the public of their probity."[107]

Fifth, the practice leads to corrupt police work, including the use of drugs by undercover officers who then lie to the jury about such practices. East Texas police officer and FBI undercover agent Kim Wozencraft admitted routinely planting evidence, using drugs with suspects, and lying about it in court. She was convicted of perjury, served time, and later resumed her life as a novelist and editor of *Prison Life* magazine.[108]

Sixth, police perjury forces honest cops into the risky role of becoming whistle-blowers and suffering the consequences, or joining the "blue wall of silence" and tolerating the corruption around them. Officer Michael McEvoy of the Arlington Heights, Illinois, Police Department "blew the whistle" on a case of police perjury and would have been fired by his chief, but the Arlington Heights Board of Fire and Police Commissioners reinstated McEvoy when his account was substantiated by a third officer.[109] It is not implausible to believe that a number of whistleblowers were not as lucky as McEvoy.

Seventh, the practice drives a wedge between judges who occasionally suppress evidence and police who become angry at judges who do not accept their lies. Judge Joseph Q. Koletsky of Hartford, Connecticut, threw out evidence of a crime after the testimony of arresting police officers was clearly contradicted by physical evidence. Detectives told a plausible story of stopping a suspect next to his truck. He was arrested because he reached behind himself, establishing the basis for an arrest and a search incident to arrest during which cocaine was supposedly found. However, spilled powder cocaine in the cab of the truck supported the defendant's testimony that the officers simply drew guns and arrested him, illegally, in his truck. After the evidence was suppressed, the detectives insisted that they did the right thing. "It's a bad decision, but what can you do?" Officer Murzin said. "Some people live in the real world and some people don't."[110] In the "real world," people with power can lie and get away with it.

In a more famous case, federal judge Harold Baer suppressed evidence in a New York City drug bust. A former member of the Mollen Commission on Police Corruption, he had expressed skepticism of the police in his decision. After media coverage, it quickly became a national issue during the 1996 presidential campaign. In an unusual move, the judge ordered a second hearing, heard more testimony, and decided that the search and seizure had been lawful.[111]

Finally, and most important, police perjury diminishes liberty and undermines the constitutional order. In addition to the growing subcultural belief that the Constitution is an impediment to be overcome, judicial acceptance of police perjury undermines the very rationale given for the exclusionary rule: deterrence of police illegality.

An important reason why police perjury is pervasive is that it is in large measure condoned by the courts. According to Alan Dershowitz, "[a] judge in Detroit after listening on one day to more than a dozen 'dropsy' cases . . . chastised the police for not being more 'creative,' but nonetheless accepted their testimony."[112] Cloud gives five reasons why judges accept police perjury:

1. It can be difficult to determine if a witness is lying.
2. Judges dislike the exclusionary rule.
3. Judges cynically believe that "most defendants in the criminal justice system are guilty," and "even if they are innocent of these specific crimes, [they] are guilty of something." Therefore "it is not too disturbing that evidence will not be suppressed."
4. Judges assume that criminal defendants will commit perjury and so distrust the testimony of suspects.
5. "Judges simply do not like to call other government officials liars—especially those who appear regularly in court. It is distasteful; it is indelicate; it is bad manners."[113]

To this list McClurg adds that "judges do not want to generate adverse publicity that portrays them as being 'soft on crime.'" Elected judges, in particular, "are afraid of jeopardizing their chances of reelection."[114]

Numerous proposals have been made to deal with this issue, and many involve modifying legal rules and procedures:

- Eliminating the exclusionary rule.
- Eliminating the exclusionary rule for violent crimes but not for crimes like drug possession.
- Expanding the use of judicial warrants to all nonexigent searches and seizures while narrowing the exigency exception.
- Admitting polygraphs of witnesses in suppression hearings.
- Making probable cause more flexible to allow commonsense judgments.
- Permitting impeachment of police testimony through proof of bias and motive to lie and by allowing evidence of the prevalence of the blue wall of silence.
- Allowing judges to order discovery and allow cross-examination where there is an initial showing of police perjury in a suppression hearing.[115]

Some of these proposals are implausible, but some may have a limited impact on police perjury. Institutional changes have been proposed. Jerome Skolnick and James Fyfe propose major changes in police departments and a move toward community policing as a way to ameliorate the problem.[116] McClurg believes that "[w]e cannot rely with confidence on external actors or institutions to control police lying" and that "[p]olice lying will be substantially reduced only when more police officers come to view it as an unacceptable practice."[117] He believes that police perjury is so pervasive because of the contradiction between the fact that most police officers are moral persons and that many will commit "routine" perjury, which causes cognitive dissonance. To reduce the tension, the officers rationalize their behavior by coming to believe that lying is moral behavior.[118] To deal effectively with police perjury, he proposed a system of police academy training and on-the-street mentoring to show that the "end justifies the means" reasoning that supports perjury is shortsighted and injurious. He suggests fortifying the initial decency that rookies bring to the academy before it becomes hardened into cynicism.[119] The details of this interesting proposal are beyond the scope of this section. Clearly, though, it can work only if the head of the law enforcement agency and the political leadership of the municipality support it.

To sum up, "routine" police perjury is pervasive, and it seriously threatens the existence of Fourth Amendment rights. As noted in Chapter 1, the most important aspect of the Rule of Law is "congruence." The practices of the government must be congruent with the law as written. The glorious promises of procedural justice enshrined in the Bill of Rights can quickly become hollow and breed a terrible cynicism against government and law if they are routinely ignored. Such cynicism is widespread, and it is vital that judges and especially the police take rights seriously.

Summary

The Supreme Court has expressed a preference for search warrants over warrantless searches. Most important, a warrant places the judgment of a detached and neutral judicial officer between the police and the citizen in deciding whether probable cause exists to effect a search. A judicial officer who receives fees from warrants issued or who becomes too closely attached to the police search effort is not a neutral and detached magistrate. To obtain a search warrant, an officer must present a written affidavit to a magistrate and swear to the truth of the facts in an *ex parte* hearing that purports to show probable cause. An officer who serves a patently deficient warrant is personally liable. A statute can authorize a telephonic warrant. The place to be searched must be precisely described, but a reasonable mistake in describing the place will not make the search illegal.

Search warrants for materials protected by the First Amendment must describe the materials exactly. Anticipatory warrants authorize police to seize evidence from places that do not contain contraband at the time the warrant is issued, but reasonably expect the contraband to be delivered to the location. Anticipatory search warrants are constitutional.

A defendant can obtain a hearing to challenge an executed search warrant where a preliminary showing indicates that the officer who made out the affidavit intentionally lied about material facts or made statements with reckless disregard for the truth. Search warrants must be executed within ten days of issuance. Business papers and items in news offices can be seized under warrants rather than requested by subpoena. The Fourth Amendment requires that police officers knock and announce their presence when executing a warrant; the "knock and announce" element can be set aside by a magistrate in a no-knock warrant where potential danger to officers or loss of evidence is likely if the police knock and announce. However, a blanket no-knock policy violates the Fourth Amendment. The exclusionary rule does not apply if the knock-and-announce rule is violated. After warrant execution, the officer must inventory each item seized, and return copies to the court and the premises owner. "Sneak and peek" warrants allow officers to enter without seizing evidence and delay notification of the search.

In the 1960s, search and seizure law was modernized by creating the "expectation of privacy" doctrine (*Katz v. United States*), eliminating the mere evidence rule, by utilizing the Fourth Amendment Reasonableness Clause to weaken the particularity requirement for administrative search warrants, and to authorize investigative stops on less than probable cause (*Terry v. Ohio*). These changes made Fourth Amendment interpretation more flexible. The "expectation of privacy" doctrine includes a subjective and an objective, or societal, measure of privacy. Under the "expectation of privacy" doctrine, electronic eavesdropping was authorized and controlled by statute. Property interests are still protected by the Fourth Amendment, but the Court looks to the subjective and objective expectation of privacy balanced against the needs of effective law enforcement. The expectations given the greatest weight are those of the privacy of the home and bodily integrity. Under *Camara v. Municipal Court*, nonpolice government employees can enter homes without the owner's consent to enforce administrative ordinances with a judicial area warrant that need not be as specific as a criminal search warrant. The Fourth Amendment does not prohibit the use of undercover agents who are invited into homes and private areas under false pretense. Such an agent cannot conduct a general search of the premises but can testify as to any criminal activity that occurs in his or her presence.

Probable cause is defined as known facts that could lead a reasonably prudent person to draw conclusions about unknown facts. It is a standard of evidence sufficiency that allows a law enforcement official to arrest a person, obtain a warrant, or perform a warrantless search. Probable cause may be based on hearsay. When the hearsay is provided by a secret informant, the Supreme Court has required magistrates to examine the affidavits carefully. Under the older *Aguilar–Spinelli* two-pronged test, the magistrate had to be convinced that the officer's affidavit supplied credible information about the informant's veracity and his or her basis of knowledge. The Court in *Illinois v. Gates* replaced the two-pronged test with a "totality of the circumstances" test, which it applied to an anonymous tip so that a deficiency in one prong can be compensated for by a strong showing as to the other or by some other indicia of reliability in determining the overall reliability of a tip.

The plain view doctrine allows the seizure of contraband when a police officer who makes the seizure is lawfully in the place (by a warrant or by virtue of being in a public place) and the illegal nature of the thing seized is immediately apparent. "Plain view" pertains to the five senses, and allows "plain feel" search and seizures. The "immediately apparent" rule is, in effect, a rule of probable cause. A police officer cannot create plain view by illegally entering a premises or by manipulating evidence beyond that authorized by the purpose of the officer's mandate. Open fields are not protected by the Fourth Amendment; evidence seized by officers who trespass on open land is admissible. The curtilage, the area and buildings immediately surrounding a house, is protected by the Fourth Amendment to the extent that the expectation of privacy in the area is secured. Airplane and helicopter flyovers may lawfully obtain evidence of what is visible in a curtilage, even if fenced, because commercial overflights have eliminated the expectation of privacy from the air. Ordinary devices, such as flashlights and field glasses, that enhance the senses do not undermine the "immediately apparent" rule. The use, without a warrant, of an enhancement device such as a beeper or a thermal imager that detects movement within a home and suggests criminal activity violates the Fourth Amendment. A warrant must be obtained for enhancement devices that are not in general public use (*Kyllo v. United States*).

A person may consent to relinquish to a law enforcement officer his or her Fourth Amendment right to privacy. An officer seeking consent to search need not have reasonable suspicion or probable cause to do so. An officer need not inform a person, when requesting consent to search, that the person has a constitutional right to refuse. Facts and circumstances of a consent encounter must show that the consent was voluntary. The burden of proof is on the government to show voluntariness. Entry under the pretense of having a search warrant negates consent. An undercover officer or agent invited into a house may transfer consent to enter to other officers when the informer has probable cause that contraband is present.

A person who shares a common area with another may give consent to the police to search, as may a person who reasonably appears to share a place. Landlords or hotel keepers cannot give consent for a criminal search. Police may rely on consent given by a person who reasonably appears to have shared control over an area even if, in fact, the person has no authority or control over the area. Consent to search an area, such as a car, gives police the right to open containers located in the area. When two people have apparent authority over a place and one gives police permission to enter but the other does not, the police have not received valid consent and must obtain a warrant to lawfully enter the premises.

Legal Puzzles

HOW HAVE COURTS DECIDED THESE CASES?

Search Warrant

3-1. Thomas was shot and injured. A friend called 911. Two officers responded to Thomas's residence, located at 3958 Balley Castle Court. While attending to Thomas the officers smelled a strong odor of marijuana inside the residence. Based upon this information, a detective with the Drug Task Force submitted an affidavit and application for a warrant to search for marijuana and drug-related documents and paraphernalia at "3958 Balley Castle Court." A magistrate granted the search warrant at 11:28 p.m., but the warrant listed the address for the search as "5365 Williams Road, Georgia, Gwinnett." The warrant did not name Thomas or any other owner or occupant. The warrant also provided that the affidavit submitted by the detective "shall not be served upon the premises—only the [search warrant] shall be served." After obtaining the search warrant the detective and the two responding officers searched Thomas's residence (3958 Balley Castle Court) early the next morning and found more than 42 pounds of marijuana.

Was the search warrant valid?

Held: NO

3-1. The detective who submitted the affidavit and application for the search warrant had created the documents using a template on her computer, which inadvertently contained an address from a prior warrant application. It was this proposed search warrant that the magistrate signed, resulting in the warrant having the wrong address. Where, as here, "the name of the owner or occupant is not given in the warrant, the description of the premises must be exact." Hence, "where the premises are described by street and number, that description will not authorize a search of the premises at another street or number." The search warrant in this case, contained an entirely different address from that which was searched, was unconstitutional.

The error was not a mere technical irregularity. (1) The warrant did not contain other elements of description sufficiently particular to identify the premises to be searched. (2) Nor did the accurate affidavit accompany the warrant. (3) The fact that the officers executing the warrant knew facts about the place to be searched (omitted from the warrant) that were essential to a proper description, will not correct the omission. A purpose of having a particularized warrant is to "assure[ ] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search," a purpose that goes unfulfilled if the particularized information justifying the warrant is not made available to the individual presented with the warrant.

Groh v. Ramirez (2004); *Thomas v. State*, 287 Ga.App. 262, 651 S.E.2d 183 (Ga. Court of Appeals 2007).

Scope of Search Warrant; Expectation of Privacy

3-2. Dayle Lynn Johnson operated the Village Pub, operating on the ground floor of a colonial-style house. The upper stories were Johnson's living space and storage. Johnson's closely regulated business required a liquor license and was subject to inspection by agents of the liquor licensing authority. Maine's drug agency (MDEA) received information that marijuana was being cultivated on the Village Pub premises. Also alleged was that Johnson began unauthorized renovations of the pub's bathrooms that required approval from the liquor inspectors and/or the state fire marshal. Agents of the MDEA, the liquor board, and the fire marshal agreed to have regulators inspect the pub, and if they detected marijuana, bring in MDEA agents, who had a draft search warrant affidavit. This was done and marijuana leaves were found by the fire marshal on the third floor landing of the stairwell that connected the three floors of the building, not in the pub. No administrative warrants were obtained. Knowledge of the marijuana was the basis of criminal search warrants that were executed, finding evidence that led to a conviction for possession.

(1) Was the administrative search of the pub appropriate without an administrative warrant? (2) Was the search of the premises for drugs invalid as a pretext administrative search? (3) Was the fire marshals' inspection, during which marijuana was found, appropriate as a third party who "aided in the execution of the warrant?" (4) Did the scope of the search exceed the lawful scope of the administrative searches?

Holding available from instructor.

Plain Feel Rule

3-3. Police officer Davis, assigned as a housing authority agent, was patrolling a residential complex around 12:40 a.m. in December. He approached Darrio Cost, sitting in the passenger seat of a vehicle in a parking lot designated for housing complex residents. Cost immediately reached across his body toward his left front pants pocket. Davis asked Cost what he was reaching for, but Cost did not answer. Davis told Cost to get away from his pocket, but Cost reached toward the pocket again. Davis then directed Cost to exit the vehicle. Upon exiting the vehicle, Cost immediately told Officer Davis, "You can't search me, but you can pat me down." Davis conducted a "pat down" search of Cost for concealed weapons. In doing so, Davis immediately frisked the left front pants pocket toward which Cost had been reaching. When Davis touched the pocket, he felt numerous capsules inside. Davis reached into Cost's pocket and removed a plastic bag containing twenty capsules. Subsequent analysis of the contents of those capsules showed that they contained heroin.

Davis contended that upon feeling the capsules in Cost's pocket he "knew" that they were heroin because "through my training and experience, I know that that's what heroin is packaged in." On cross-examination, Davis admitted that over-the-counter medications such as "Motrin, Tylenol, or something along those lines" are sometimes "packaged in capsules."

Was the search (entry) into Cost's pocket constitutional?
Holding available from instructor.

Dog Sniff; *Kyllo*

3-4. Officer Pedraja obtained a warrant to search the Jardines's house for marijuana, based on a crime stoppers tip, a dog sniff (by a dog who was previously reliable) conducted at the door of Jardines's house alerting for marijuana, and the fact that the air-conditioning unit of the residence ran continuously without recycling. Jardines argued that the dog sniff was a through-the-door

intrusion into the privacy of his home and a violation of the Fourth Amendment.

Was the dog sniff evidence admissible to obtain the search warrant?

Holding available from instructor.

Consent

3-5. Police agents, acting on a tip that prison escapee Purcell was at a motel, went there and arrested him outside without incident. Fearing an explosion resulting from methamphetamine manufacture, police knocked on the door of Purcell's room. They heard a shower running and a fan blowing. After three minutes Purcell's girlfriend, Yolande Crist, opened the door. She gave agents consent to take a quick look around. The agents observed "two duffel type bag suitcases near the door" and a green-brown backpack located between the bed and window. Some items in the room looked suspicious. Agents received permission from Crist to conduct a more complete search. Asked if there was anything dangerous in the room, Crist replied that a firearm was in one of the bags but did not indicate which one.

An agent pointed toward one duffel bag and asked, "Is it this bag?" Crist responded that "it might be." The agent opened that first duffel bag near the door, and as he searched it Crist "said that was her bag because she set her purse on top of it." Upon opening the bag, the agent discovered marijuana but no firearm. The bag did not contain Crist's personal effects, but instead contained only men's clothing, indicating it was actually Purcell's bag, which he did not share with her. The agent did not ask her to verify whether she owned any of the other bags in the room. Shortly thereafter, another agent found the firearm in the brown-green backpack. After discovering the firearm, Crist said that she gave the backpack to Purcell for his use. The firearm was introduced to convict Purcell.

Did Crist give authority to conduct a warrantless search of the green-brown backpack for the firearm?

Holding available from instructor.

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Useful Web Sites

Police Foundation

http://www.policefoundation.org/

Includes a research-based publication and links to Internet sites on diverse topics, including domestic violence policing and racial profiling.

Police Executive Research Forum (PERF)

http://www.policeforum.org/

Publications on many issues related to criminal procedure, such as police use of force. Free document library includes a variety of topics, such as policing and terrorism. PERF members lead large police agencies.

End Notes

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17. Adams, "Anticipatory Search Warrants," 715, 727–29.
18. Adams, "Anticipatory Search Warrants," 709–10.
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JUSTICES OF THE SUPREME COURT

Roosevelt's Liberals: Douglas, Murphy, Jackson, and Rutledge

Franklin Roosevelt appointed no justices during his first term in office and yet ended up appointing more justices (nine) than any president except George Washington, thanks in large part to his unprecedented four terms in office. Roosevelt's primary goal was to name individuals who would support New Deal legislation on economic and labor issues. For a half century, a conservative Supreme Court had, on behalf of the wealthy, more or less restricted the ability of the Democratic branches of government to pass legislation to improve working conditions and to benefit workers, farmers, and the lower middle class.

The ascendancy of the Roosevelt administration during the great economic crisis of the 1930s finally led to a liberalization of the bench. As the Supreme Court reduced its role in passing on the wisdom of economic legislation, a new wave of civil rights cases began to press forward for hearing. The civil liberties cases of the 1940s and 1950s included freedom of speech, freedom of the press, religious freedom, freedom of conscience regarding loyalty issues, and criminal procedure. It was not a foregone conclusion that justices who were liberal on economic matters would also be liberal on civil rights and criminal procedure questions. Four of Roosevelt's appointees—Justices Hugo Black, William O. Douglas, Frank Murphy, and Wiley B. Rutledge—were "liberal" in favoring the incorporation of the Bill of Rights into the Fourteenth Amendment. They tended to vote for criminal defendants and, when joined by Justices Felix Frankfurter and Robert H. Jackson, placed limits on local police officers whose actions were found to have violated the Due Process Clause of the Fourteenth Amendment.

Justices Douglas, Rutledge, and Jackson have been ranked as "near great" and Justice Murphy as average by a poll of scholars, but Murphy's originality in criminal procedure stands as a real contribution to criminal jurisprudence, as it defined the actual position taken during the due process revolution of the 1960s.

Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

William O. Douglas

Connecticut, 1898–1980
Democrat
Appointed by Franklin Delano Roosevelt
Years of Service: 1939–1975

Life and Career. Douglas grew up in relative poverty in Yakima, Washington; he was six years old when his father, a Presbyterian missionary, died. He entered Whitman College in 1916 and taught school for a few years before entering law school. He graduated second in his class at Columbia Law School, practiced briefly at a Wall Street law firm, and then taught at Columbia and Yale law schools, gaining recognition as an expert in financial law and as a proponent of the pragmatic jurisprudence of legal realism.

Douglas joined President Roosevelt's New Deal administration in 1934 to work on the Securities and Exchange Commission (SEC), a new watchdog agency designed to regulate the stock market. He became a member of the SEC in 1936 and its chairman in 1937. First known as antibusiness, Douglas built bridges to the business world and tried to stimulate internal reform in the stock exchange to minimize governmental intrusion. He became an advisor to the president and was Roosevelt's fourth nominee to the Court at the young age of forty. Intensely ambitious, Douglas was seen as a potential presidential candidate before President Roosevelt ran for a third term, and he was a leading candidate for the vice presidential post in 1940 and 1944 after he had been appointed to the Supreme Court.

A restless man and a hard worker, he traveled to all parts of the world, authored thirty-two books (many were travelogues), was a frequent speaker on issues of foreign policy, and was a staunch environmentalist long before the environment was a popular issue. When not traveling, he spent his summers hiking and camping in Washington State. He was married four times and divorced three times, indicating a somewhat chaotic personal life.

Contribution to Criminal Procedure. Despite his enormous output of cases, Justice Douglas wrote relatively few criminal procedure opinions. In his early years on the Court, he was tentative in taking a consistent liberal position; in fact, he wrote a 1944 opinion holding that an arrest in a public place involving public property was not entitled to the same protection as a search of the home, a decision severely criticized by Justice Frankfurter. Nevertheless, he became a very liberal justice and consistently voted for the "incorporation plus" doctrine. His solid liberal vote on criminal issues under five chief justices was a critical element in the due process revolution.

Signature Opinion. *Griffin v. California* (1965). In this case, the Court held that a state judge could not tell a jury that although a defendant had a right to remain silent, the jury could take the defendant's failure to deny or explain facts in the case into consideration in determining whether the facts were true. The Court held that the federal rule against such comment was based on the Fifth Amendment privilege against self-incrimination and that it therefore applied to the states via the Due Process Clause of the Fourteenth Amendment. "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege."

Assessment. Justice Douglas served longer than any other justice: thirty-six years. He was steeped in the philosophy of legal realism, which holds that a judge's policy preferences are the prime determiner of the judge's decisions. His outspoken activism made him one of the most controversial justices. He was a hard worker; he wrote a large number of opinions (many on antitrust and economic issues), but he wrote them very quickly. Despite his acknowledged brilliance, his opinions did not always spell out the doctrinal foundation of his decisions. His *Douglas v. California* (1963) opinion, holding that a defendant has a right to counsel on first appeal, did not clarify whether the decision rested on due process or equal protection.

In addition to his contributions to the law of business regulation, Justice Douglas helped to advance an absolutist concept of free speech with his dissent in *Dennis v. United States* (1951), arguing against the conviction of Communist Party leaders for advocating the violent overthrow of the government. His dissent became the law in the 1970s. He wrote, "Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy." His *Griswold v. Connecticut* (1965) contraception law opinion established the right of privacy, based on values inherent in the First, Fourth, and Fifth amendments. *Griswold* laid the foundation for the *Roe v. Wade* (1973) abortion rights ruling.

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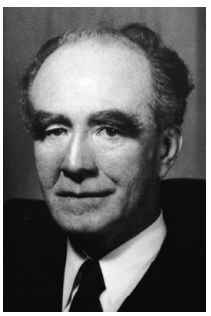

Collection of the Supreme Court of the United States. Photographer: Pach Brothers Studio.

Frank Murphy

Michigan, 1890–1949
Democrat
Appointed by Franklin Delano Roosevelt
Years of Service: 1940–1949

Life and Career. Murphy, a native of Michigan, obtained his undergraduate and law degrees from the University of Michigan. He had an extensive public career prior to his appointment to the Court. He served as an army officer in World War I; a federal assistant prosecutor; a judge of the Detroit Recorder's Court; mayor of Detroit from 1930 to 1933, when he gained national fame for innovative attempts to ease the burden of the Great Depression; governor-general of the Philippines from 1933 to 1937, on a presidential appointment; governor of Michigan from 1937 to 1939, during which time he refused to order the violent suppression of automobile workers' sit-down strikes; and attorney general of the United States from 1939 to 1940, when he established the civil rights division. His vigor and compassion made him a leading political figure and even a potential presidential candidate despite the fact that he was Catholic, a handicap at that time.

Contribution to Criminal Procedure. In criminal procedure cases, Justice Murphy voted in favor of the defendant's right to counsel in every case; wrote a majority opinion that struck down the systematic exclusion of day laborers from juries; and dissented in cases that allowed the government to wiretap and electronically eavesdrop without a warrant. With one exception, he sided with the defendant in coerced confessions cases.

Signature Opinion. Dissent in *Adamson v. California* (1947). The majority held that the Fifth Amendment is not incorporated into the Fourteenth Amendment. Justice Black dissented, arguing for total incorporation. Justice Murphy's dissent best anticipated the due process revolution of the 1960s by establishing the "incorporation plus" concept, which supported both the incorporation of the Bill of Rights into the Fourteenth Amendment *and* the independent use of the Due Process Clause to strike down unfair government action. "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."

Assessment. Justice Murphy was, with Justices Douglas and Rutledge, one of the most liberal justices on the Court in the 1940s. He dissented in the case upholding the removal of Japanese Americans from their homes to relocation centers during World War II. He wrote many pro-worker opinions in the field of labor law. He consistently favored the expansion of First Amendment rights, opposed racial segregation, favored gender equality, and generally supported the underdog.

Murphy was not a great legal stylist or a profound legal thinker and has been rated an average justice by scholars. He probably delegated more drafting to his law clerks than other justices did. However, he brought to the Court his extensive experience in public life and "a great heart attuned to the cries of the weak and suffering." His unwavering commitment to civil liberties strengthened the "solid minority" of criminal procedure liberals in the Stone and Vinson Courts and helped pave the way to the due process revolution.

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Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

Robert H. Jackson

New York, 1892–1954
Democrat
Appointed by Franklin Delano Roosevelt
Years of Service: 1941–1954

Life and Career. Robert Jackson developed a reputation as the most skillful government litigator in Washington, D.C., in the heady days of the New Deal. Yet his formal educational background consisted only of high school and a year at Albany Law School. He trained for the law as an apprentice in a law office and opened his own practice in Jamestown, New York, in 1913. Over the next twenty years, he developed a prosperous practice and became a respected attorney in his region.

Treasury Secretary Henry Morgenthau persuaded Jackson to join the New Deal administration in 1934 as general counsel for the Bureau of Internal Revenue. His reputation soared by winning complex cases for the government. He was appointed assistant attorney general in charge of the Antitrust Division in 1936 and argued ten cases for the government before the Supreme Court. He won the important case upholding the Social Security Act on broad grounds that made the laws easier to administer. He supported President Roosevelt's "court-packing" plan. He became solicitor general in 1938, where he "showed a remarkable insight into both basic governmental policy and the tactics of advocacy." His service as attorney general from January 1940 to mid-1941 was marked more by careful legal advice than by administrative innovations. His most brilliant achievement was his Attorney General's Opinion justifying President Roosevelt's controversial "lend-lease" program in the dark days before America's entry into World War II, whereby fifty over-age destroyers were transferred to the British navy in return for military bases in Bermuda.

Contribution to Criminal Procedure. Justice Jackson generally joined Justice Frankfurter in opposing incorporation. His votes were mixed; in some Fourth Amendment cases, he was quite critical of abusive police work, but he was not as consistently liberal as Justices Black, Douglas, Murphy, and Rutledge. He believed in judicial restraint and was a strong proponent of federalism. Thus, in state confessions cases he often voted to uphold the confession under the Due Process Clause, especially where a very serious crime was charged, unless the police action made it perfectly clear that the confession was obtained involuntarily.

Signature Opinion. *Johnson v. United States* (1948). Police standing outside a hotel room smelled opium and entered without a warrant. In holding that this was a violation of the Fourth Amendment, Justice Jackson issued the classic statement about the value of a search warrant: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Assessment. Justice Jackson generally was liberal on civil rights issues, writing the decisive compulsory flag-salute opinion (holding that requiring schoolchildren to salute the flag violated First Amendment rights). In substantive criminal law, he wrote a ringing affirmation of the common law principle that the government cannot create a legislative definition of a serious crime, such as theft, without the element of criminal intent (*mens rea*).

He was a great stylist, and many of his opinions are filled with engaging and quotable passages. He was interested in the improvement of criminal justice and chaired the American Bar Association's special committee on the administration of criminal justice. He interrupted his service as a justice for over a year after World War II to serve as the chief American prosecutor at the Nuremberg War Crimes trials of the top Nazi leaders. In this role, he made an abiding contribution to international law and the development of human rights.

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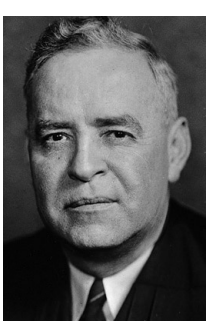

Collection of the Supreme Court of the United States. Photographer: Harris and Ewing.

Wiley B. Rutledge

Iowa, 1894–1949
Democrat
Appointed by Franklin Delano Roosevelt
Years of Service: 1943–1949

Life and Career. Rutledge was the son of a fundamentalist Baptist minister who preached in Kentucky, Tennessee, and North Carolina. A biographer notes that "although in later life he became a Unitarian, his father's fervor was reflected in his zeal for justice and right." He graduated from the University of Wisconsin in 1914, taught school for a few years, and nearly died from tuberculosis. Following his recovery, he received his LL.B. degree from the University of Colorado in 1922. After two years of law practice in Boulder, he became a law professor and then dean of the University of Iowa College of Law in the 1930s. He developed a reputation as an inspiring teacher and civic activist.

Moved by the plight of the poor and unemployed during the Great Depression, he spoke out publicly against the Supreme Court's rulings that struck down New Deal legislation. As one of the few academics to support President Roosevelt's "court-packing" scheme in 1937—a stance that led several Iowa state legislators to threaten to withhold law school salaries in reprisal—Rutledge came to the attention of the Roosevelt administration. He was appointed to the U.S. Court of Appeals for Washington, D.C., in 1939 and served for four years before his nomination to the Supreme Court.

Contribution to Criminal Procedure. Rutledge joined Justice Black in supporting incorporation of the Bill of Rights in *Adamson* (1947), helping to make incorporation a respectable, if controversial, position. Indeed, he joined the more liberal "incorporation plus" position with Justices Murphy and Douglas.

Signature Opinion. *Brinegar v. United States* (1949). Writing for the majority in upholding an automobile search of a bootlegger, Justice Rutledge stated the classical definition of probable cause that has been oft-repeated by the Court: "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

Assessment. Justice Rutledge's tenure on the Court was marked by a fierce dedication to the principles of liberty. His most famous opinion, a dissent in the *Yamashita* (1946) case, acknowledged the authority of the United States to try the former Japanese commander of the Philippines, who was accused of authorizing or allowing atrocities by his troops, but he dissented bitterly that the proceeding was characterized by none of the hallmarks of due process. He agreed with the Court in another case that a naturalized citizen could not have his citizenship revoked merely because he had belonged to the Communist Party at the time of his naturalization.

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