Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer unaccompanied. They left his home and his belongings intact—until a neutral Magistrate, finding probable cause, issued a warrant.

Fourth, the police imposed the restraint for a limited period of time, namely, two hours. As far as the record reveals, this time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. Compare United States v. Place (holding 90-minute detention of luggage unreasonable based on nature of interference with person's travels and lack of diligence of police), with United States v. Van Leeuwen (holding 29-hour detention of mailed package reasonable given unavoidable delay in obtaining warrant and minimal nature of intrusion). Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible.

* * *

* * * The Appellate Court of Illinois * * * found negatively significant the fact that Chief Love, with McArthur's consent, stepped inside the trailer's doorway to observe McArthur when McArthur reentered the trailer on two or three occasions. McArthur, however, reentered simply for his own convenience, to make phone calls and to obtain cigarettes. Under these circumstances, the reasonableness of the greater restriction (preventing reentry) implies the reasonableness of the lesser (permitting reentry conditioned on observation).

In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home's resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment's demands.

* * *

[JUSTICE SOUTER, concurring, noted that the law "can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one."]

[The dissenting opinion of JUSTICE STEVENS is omitted.]

H. ADMINISTRATIVE SEARCHES AND OTHER SEARCHES AND SEIZURES BASED ON "SPECIAL NEEDS"

While the warrant clause is still, at least rhetorically, the predominant clause of the Fourth Amendment, the Supreme Court has applied the reasonableness clause to searches conducted for purposes

other than traditional criminal law enforcement. The Court has reasoned that the traditional requirement of a warrant based on probable cause is not well-suited to searches for purposes as varied as enforcing school discipline, public safety, and administrative efficiency. If the government search or seizure is designed to effectuate special needs beyond criminal law enforcement, then the Court engages in a balancing of interests under the reasonableness clause to determine what safeguards must apply. Reasonableness analysis balances the need for a particular search or seizure against the degree of invasion upon personal rights that the search or seizure entails. And if the probable cause standard and/or the warrant requirement takes insufficient account of the state interest in light of the degree of the intrusion, then the Court finds it reasonable to dispense with such requirements in favor of lesser standards such as reasonable suspicion, area warrants, or other controls on official discretion.

On the other hand, if the purpose of the search is simply to obtain evidence for purposes of criminal law enforcement, then probable cause and a warrant are presumptively required. See Arizona v. Hicks, 480 U.S. 321 (1987) (holding that, absent "special operational necessities," probable cause is required for a search for evidence); Romo v. Champion, 46 F.3d 1013 (10th Cir.1995) (probable cause not required to search a person driving into a prison parking lot, where the search is conducted for safety purposes; however, if the officers "had executed the search for traditional law enforcement purposes, they presumptively would have needed probable cause.")

It is true that the Court in United States v. Knights and United States v. Samson, supra, in the section on stop and frisk, upheld searches of probationers on less than probable cause (and in *Samson*, without any suspicion at all), and held that it was not necessary in those cases to establish a special need beyond ordinary criminal law enforcement to support the searches; the searches, even though for law enforcement purposes, were found "reasonable" given the state interest on the one hand and the probationer's extremely diminished expectation of privacy on the other. But *Knights* and *Samson* cannot mean that the state is never required to establish special needs to justify searches on less than probable cause: that would be blithely throwing out 30 years of "special needs" case law; and it would also amount to rejecting the *Terry* doctrine's prohibition on using frisks to search for evidence. *Knights* and *Samson* do not contain enough analysis to justify such an extreme result (i.e., that searches for evidence of crime can be done without a warrant and on less than probable cause whenever "reasonable"); and neither case implies that it is doing anything more than deciding whether searches of *probationers and parolees* are reasonable under the circumstances. Yet the Court, in Maryland v. King, set forth later in this section, appears to

apply a free-from balancing test of reasonableness to uphold DNA testing of prisoners. So it is fair to state that the integrity of the "special needs" limitation on reasonableness balancing for searches is in some doubt after *King*.

1. Safety Inspections of Homes

In Camara v. Municipal Court, 387 U.S. 523 (1967), a homeowner claimed the right to refuse a warrantless entry by a health inspector who desired to inspect the house as provided for in the San Francisco housing code. The Court held that the Fourth Amendment covered these administrative searches. But Justice White's majority opinion said that government safety inspectors were not required to have probable cause to believe that a particular dwelling was in violation of the code being enforced. Rather, area-wide safety inspections are permissible and "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." Thus, while a warrant is required for an administrative safety inspection of a home, the warrant need not be based upon a finding of probable cause that a particular home is in violation of a safety code. Instead, the warrant can be issued upon a finding that a search is in compliance with a reasonable administrative scheme. Finally, the opinion noted that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law had traditionally upheld in emergency situations."

In a companion case, See v. City of Seattle, 387 U.S. 541 (1967), the Court, per Justice White, applied the *Camara* requirements—i.e., a warrant based on either probable cause or demonstrated compliance with some reasonable administrative inspection scheme—to inspections of non-residential commercial structures. But, the Court did "not in any way imply that business premises may not reasonably be inspected in many more situations than private homes."

Justice Clark, joined by Justices Harlan and Stewart, dissented in both *Camara* and *See*. They argued that the area warrant concept and the "boxcar" warrant procedure upheld by the Court would degrade the Fourth Amendment.

The Assessment of Cause for a Safety Inspection

An official who issues a warrant for a home safety inspection under *Camara* necessarily performs a different function than the magistrate assessing a search warrant application in a criminal investigation. This is because the standard of proof required for a home safety inspection is different from the traditional probable cause standard. A home inspection can be conducted on the basis of such generalized facts as passage of time

and the nature of the building, or as part of an area-wide inspection. The Court in *Camara* stressed that review of the reasons for a safety inspection should occur "without any reassessment of the basic agency decision to canvass an area." Thus, the officer issuing a safety inspection warrant is not charged with evaluating the legislative and administrative policy decisions as to frequency of inspection, resource expenditures, and the like. The officer need only decide whether an established inspection policy exists and whether the inspection for which a warrant is sought fits within that program.

What danger does an area-wide warrant, which is not based upon probable cause as to any specific home, guard against? What would be wrong with a rule prohibiting safety inspectors from entering a house without probable cause to believe that there was a safety violation? How would a safety inspector obtain enough information to constitute probable cause? Is a safety inspection of a home less intrusive than a search of a home by law enforcement officers investigating a crime?

Warrants Without Probable Cause?

The *Camara* Court imposed a unique requirement—that a warrant would be required, but that the warrant would be issued upon some objective standard other than probable cause. Subsequently, in Griffin v. Wisconsin, 483 U.S. 868 (1987), the Court again addressed the question whether the Fourth Amendment envisions a warrant that is not based upon particularized probable cause. Griffin, a probationer, challenged the search of his home by his probation officer. One argument in the case was that, even if probable cause was not required for the search of a probationer's home (due to a probationer's diminished expectation of privacy and the state's administrative interest in regulating a probationer), the Court should nonetheless require a warrant to be obtained. Justice Scalia, writing for the Court, contended that the Fourth Amendment could not be read to provide for such a warrant. He reasoned that a warrant based on something other than probable cause would violate the specific language in the Fourth Amendment that "no warrant shall issue, but upon probable cause." He distinguished *Camara* as a case where the Court "arguably came to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts." Justice Scalia emphasized that the general rule for judicial search warrants is that they can only be issued upon particularized probable cause. Thus, the Court refused to accept the solution of a warrant based on less than probable cause as a means of balancing state and individual interests. It held that a probation officer can conduct a warrantless search of a probationer's house, upon reasonable suspicion of a probation violation.

2. Administrative Searches of Businesses

The Court applied the *Camara* protections to businesses in *See,* but it is apparent that administrative searches of businesses involve different issues from searches of residences. For one thing, some entries into business premises may not be searches at all. For example, if a fire inspector walks through a hotel lobby and looks for fire exits, no reasonable expectation of privacy is implicated because it is an area open to the public. See Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984). Also, an administrative search of a business implicates more complex regulatory concerns: the state has an administrative interest not only in whether the business *structure* is safe, but also in whether the business is being safely and properly conducted. Moreover, the businessperson may have a diminished expectation of privacy given the nature of the business conducted. But on the other hand, the risk of an arbitrary use of official power to conduct a regulatory search of a business must be a cause for special concern. It is no secret that businesspersons have occasionally been subject to harassment and extortion by unscrupulous investigators. Moreover, it might be difficult to distinguish between a search done for "administrative" purposes and a search that is done to obtain evidence of a criminal violation. All of these considerations, and the special rules applicable to "closely regulated" businesses, are discussed in the following case.

NEW YORK v. BURGER

Supreme Court of the United States, 1987.
482 U.S. 691.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries. The case also presents the question whether an otherwise proper administrative inspection is unconstitutional because the ultimate purpose of the regulatory statute pursuant to which the search is done—the deterrence of criminal behavior—is the same as that of penal laws, with the result that the inspection may disclose violations not only of the regulatory statute but also of the penal statutes.

* * * Respondent Joseph Burger is the owner of a junkyard in Brooklyn, N.Y. His business consists, in part, of the dismantling of automobiles and the selling of their parts. * * * At approximately noon on November 17, 1982, Officer Joseph Vega and four other plainclothes officers, all members of the Auto Crimes Division of the New York City Police Department, entered respondent's junkyard to conduct an

inspection pursuant to N.Y.Veh. & Traf.Law § 415–a5 (McKinney 1986).[a] On any given day, the Division conducts from 5 to 10 inspections of vehicle dismantlers, automobile junkyards, and related businesses.

Upon entering the junkyard, the officers asked to see Burger's license and his "police book"—the record of the automobiles and vehicle parts in his possession. Burger replied that he had neither a license nor a police book. The officers then announced their intention to conduct a § 415–a5 inspection. * * * In accordance with their practice, the officers copied down the Vehicle Identification Numbers (VINs) of several vehicles and parts of vehicles that were in the junkyard. After checking these numbers against a police computer, the officers determined that respondent was in possession of stolen vehicles and parts. Accordingly, Burger was arrested and charged with five counts of possession of stolen property and one count of unregistered operation as a vehicle dismantler, in violation of § 415–a1.

[The trial court denied a motion to suppress, but the New York Court of Appeals reversed, finding that the statute authorizing the warrantless inspection was unconstitutional.]

The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. See v. City of Seattle. An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable, see Katz v. United States (Harlan, J., concurring). This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes. An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. * * *

The Court first examined the "unique" problem of inspections of "closely regulated" businesses in two enterprises that had "a long

---

[a] This statute reads in pertinent part:

"Records and identification. (a) * * * Every person required to be registered pursuant to this section shall maintain a record of all motor vehicles, trailers, and major component parts thereof, coming into his possession together with a record of the disposition of any such motor vehicle, trailer or part thereof and shall maintain proof of ownership for any motor vehicle, trailer or major component part thereof while in his possession. * * * Upon request of an agent of the commissioner or of any police officer and during his regular and usual business hours, a vehicle dismantler shall produce such records and permit said agent or police officer to examine them and any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises. . . . The failure to produce such records or to permit such inspection on the part of any person required to be registered pursuant to this section as required by this paragraph shall be a class A misdemeanor."

tradition of close government supervision." In Colonnade Corp. v. United States, 397 U.S. 72 (1970), it considered a warrantless search of a catering business pursuant to several federal revenue statutes authorizing the inspection of the premises of liquor dealers. Although the Court disapproved the search because the statute provided that a sanction be imposed when entry was refused, and because it did not authorize entry without a warrant as an alternative in this situation, it recognized that "the liquor industry [was] long subject to close supervision and inspection." We returned to this issue in United States v. Biswell, 406 U.S. 311 (1972), which [upheld] a warrantless inspection of the premises of a pawnshop operator, who was federally licensed to sell sporting weapons pursuant to the Gun Control Act of 1968. * * * We observed: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."

The *"Colonnade-Biswell"* doctrine, stating the reduced expectation of privacy by an owner of commercial premises in a "closely regulated" industry, has received renewed emphasis in more recent decisions. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), we noted its continued vitality but declined to find that warrantless inspections, made pursuant to the Occupational Safety and Health Act of 1970, of *all* businesses engaged in interstate commerce fell within the narrow focus of this doctrine. However, we found warrantless inspections made pursuant to the Federal Mine Safety and Health Act of 1977, proper because they were of a "closely regulated" industry. Donovan v. Dewey, 452 U.S. 594 (1981).

* * *

Because the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context. Rather, we conclude that, as in other situations of "special need" where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.

This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. See Donovan v. Dewey ("substantial federal

interest in improving the health and safety conditions in the Nation's underground and surface mines").

Second, the warrantless inspections must be necessary to further the regulatory scheme. For example, in *Dewey* we recognized that forcing mine inspectors to obtain a warrant before every inspection might alert mine owners or operators to the impending inspection, thereby frustrating the purposes of the Mine Safety and Health Act—to detect and thus to deter safety and health violations.

Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. To perform this first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Donovan v. Dewey. In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be "carefully limited in time, place, and scope." United States v. Biswell.

* * * Searches made pursuant to § 415–a5, in our view, clearly fall within this established exception to the warrant requirement for administrative inspections in "closely regulated" businesses. First, the nature of the regulatory statute reveals that the operation of a junkyard, part of which is devoted to vehicle dismantling, is a "closely regulated" business in the State of New York. The provisions regulating the activity of vehicle dismantling are extensive. An operator cannot engage in this industry without first obtaining a license, which means that he must meet the registration requirements and must pay a fee. Under § 415–a5(a), the operator must maintain a police book recording the acquisition and disposition of motor vehicles and vehicle parts, and make such records and inventory available for inspection by the police or any agent of the Department of Motor Vehicles. The operator also must display his registration number prominently at his place of business, on business documentation, and on vehicles and parts that pass through his business. Moreover, the person engaged in this activity is subject to criminal penalties, as well as to loss of license or civil fines, for failure to comply with these provisions. That other States besides New York have imposed similarly extensive regulations on automobile junkyards further supports the "closely regulated" status of this industry.

In determining whether vehicle dismantlers constitute a "closely regulated" industry, the duration of this particular regulatory scheme has

some relevancy. Section 415–a could be said to be of fairly recent vintage, and the inspection provision of § 415–a5 was added only in 1979. But because the automobile is a relatively new phenomenon in our society and because its widespread use is even newer, automobile junkyards and vehicle dismantlers have not been in existence very long and thus do not have an ancient history of government oversight. * * *

The automobile-junkyard business, however, is simply a new branch of an industry that has existed, and has been closely regulated, for many years. The automobile junkyard is closely akin to the secondhand shop or the general junkyard. * * * As such, vehicle dismantlers represent a modern, specialized version of a traditional activity. In New York, general junkyards and secondhand shops long have been subject to regulation. * * *

Accordingly, in light of the regulatory framework governing his business and the history of regulation of related industries, an operator of a junkyard engaging in vehicle dismantling has a reduced expectation of privacy in this "closely regulated" business.

* * * The New York regulatory scheme satisfies the three criteria necessary to make reasonable warrantless inspections pursuant to § 415–a5. First, the State has a substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry because motor vehicle theft has increased in the State and because the problem of theft is associated with this industry. In this day, automobile theft has become a significant social problem, placing enormous economic and personal burdens upon the citizens of different States. * * *

Second, regulation of the vehicle-dismantling industry reasonably serves the State's substantial interest in eradicating automobile theft. It is well established that the theft problem can be addressed effectively by controlling the receiver of, or market in, stolen property. Automobile junkyards and vehicle dismantlers provide the major market for stolen vehicles and vehicle parts. Thus, the State rationally may believe that it will reduce car theft by regulations that prevent automobile junkyards from becoming markets for stolen vehicles and that help trace the origin and destination of vehicle parts.

Moreover, the warrantless administrative inspections pursuant to § 415–a5 "are necessary to further [the] regulatory scheme." Donovan v. Dewey. * * * We explained in *Biswell:*

> "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible."

* * * Because stolen cars and parts often pass quickly through an automobile junkyard, "frequent" and "unannounced" inspections are necessary in order to detect them. In sum, surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.

Third, § 415–a5 provides a "constitutionally adequate substitute for a warrant." The statute informs the operator of a vehicle dismantling business that inspections will be made on a regular basis. Thus, the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute. Section 415–a5 also sets forth the scope of the inspection and, accordingly, places the operator on notice as to how to comply with the statute. In addition, it notifies the operator as to who is authorized to conduct an inspection.

Finally, the "time, place, and scope" of the inspection is limited to place appropriate restraints upon the discretion of the inspecting officers. The officers are allowed to conduct an inspection only "during [the] regular and usual business hours."[b] The inspections can be made only of vehicle-dismantling and related industries. And the permissible scope of these searches is narrowly defined: the inspectors may examine the records, as well as "any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises."

* * * The Court of Appeals, nevertheless, struck down the statute as violative of the Fourth Amendment because, in its view, the statute had no truly administrative purpose but was "designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property." The court rested its conclusion that the administrative goal of the statute was pretextual and that § 415–a5 really "authorize[d] searches undertaken solely to uncover evidence of criminality" particularly on the fact that, even if an operator failed to produce his police book, the inspecting officers could continue their inspection for stolen vehicles and parts. The court also suggested that the identity of the inspectors—police officers—was significant in revealing the true nature of the statutory scheme.

In arriving at this conclusion, the Court of Appeals failed to recognize that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions. Administrative statutes and penal laws may have the same *ultimate* purpose of

[b] Respondent contends that § 415–a5 is unconstitutional because it fails to limit the number of searches that may be conducted of a particular business during any given period. While such limitations, or the absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers. * * *

remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. An administrative statute establishes how a particular business in a "closely regulated" industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed. Such a regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.

* * * The New York penal laws address automobile theft by punishing it or the possession of stolen property, including possession by individuals in the business of buying and selling property. In accordance with its interest in regulating the automobile-junkyard industry, the State also has devised a regulatory manner of dealing with this problem. Section 415–a, as a whole, serves the regulatory goals of seeking to ensure that vehicle dismantlers are legitimate businesspersons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified. * * *

If the administrative goals of § 415–a5 are recognized, the difficulty the Court of Appeals perceives in allowing inspecting officers to examine vehicles and vehicle parts even in the absence of records evaporates. The regulatory purposes of § 415–a5 certainly are served by having the inspecting officers compare the records of a particular vehicle dismantler with vehicles and vehicle parts in the junkyard. The purposes of maintaining junkyards in the hands of legitimate businesspersons and of tracing vehicles that pass through these businesses, however, *also* are served by having the officers examine the operator's inventory even when the operator, for whatever reason, fails to produce the police book. Forbidding inspecting officers to examine the inventory in this situation would permit an illegitimate vehicle dismantler to thwart the purposes of the administrative scheme and would have the absurd result of subjecting his counterpart who maintained records to a more extensive search.

Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself. * * * The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.[c]

---

[c] The legislative history of § 415–a, in general, and § 415–a5, in particular, reveals that the New York Legislature had proper regulatory purposes for enacting the administrative scheme and was not using it as a "pretext" to enable law enforcement authorities to gather evidence of penal law violations. There is, furthermore, no reason to believe that the instant inspection was actually a "pretext" for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme. * * *

Finally, we fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the § 415–a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.

* * *

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE O'CONNOR joins in pertinent part, dissenting.

* * *

The provisions governing vehicle dismantling in New York simply are not extensive. A vehicle dismantler must register and pay a fee, display the registration in various circumstances, maintain a police book, and allow inspections. Of course, the inspections themselves cannot be cited as proof of pervasive regulation justifying elimination of the warrant requirement; that would be obvious bootstrapping. Nor can registration and recordkeeping requirements be characterized as close regulation. New York City, like many States and municipalities, imposes similar, and often more stringent licensing, recordkeeping, and other regulatory requirements on a myriad of trades and businesses. Few substantive qualifications are required of an aspiring vehicle dismantler; no regulation governs the condition of the premises, the method of operation, the hours of operation, the equipment utilized, etc. This scheme stands in marked contrast to, e.g., the mine safety regulations relevant in Donovan v. Dewey.

In sum, if New York City's administrative scheme renders the vehicle-dismantling business closely regulated, few businesses will escape such a finding. * * *

Even if vehicle dismantling were a closely regulated industry, I would nonetheless conclude that this search violated the Fourth Amendment. * * *

* * * There is neither an upper nor a lower limit on the number of searches that may be conducted at any given operator's establishment in any given time period. Neither the statute, nor any regulations, nor any regulatory body, provides limits or guidance on the selection of vehicle dismantlers for inspection. * * *

The Court also maintains that this statute effectively limits the scope of the search. * * * Plainly, a statute authorizing a search which can uncover *no* administrative violations is not sufficiently limited in scope to avoid the warrant requirement. This statute fails to tailor the scope of administrative inspection to the particular concerns posed by the regulated business. * * * The conduct of the police in this case underscores this point. The police removed identification numbers from a walker and a wheelchair, neither of which fell within the statutory scope of a permissible administrative search.

* * * The *sole* limitation I see on a police search of the premises of a vehicle dismantler is that it must occur during business hours; otherwise it is open season. The unguided discretion afforded police in this scheme precludes its substitution for a warrant.

* * *

The fundamental defect in § 415–a5 is that it authorizes searches intended solely to uncover evidence of criminal acts. * * *

Here the State has * * * circumvented the requirements of the Fourth Amendment by altering the label placed on the search. The crucial point is most clearly illustrated by the fact that the police copied the serial numbers from a wheelchair and a handicapped person's walker that were found on the premises, and determined that these items had been stolen. * * * The scope of the search alone reveals that it was undertaken solely to uncover evidence of criminal wrongdoing.

Moreover, it is factually impossible that the search was intended to discover wrongdoing subject to administrative sanction. Burger stated that he was not registered to dismantle vehicles as required by § 415–a1, and that he did not have a police book, as required by § 415–a5(a). At that point he had violated every requirement of the administrative scheme. There is no administrative provision forbidding possession of stolen automobiles or automobile parts. The inspection became a search for evidence of criminal acts when all possible administrative violations had been uncovered.

* * *

The Court thus implicitly holds that if an administrative scheme has certain goals and if the search serves those goals, it may be upheld even if no concrete administrative consequences could follow from a particular search. This is a dangerous suggestion, for the goals of administrative

schemes often overlap with the goals of the criminal law. * * * If the Fourth Amendment is to retain meaning in the commercial context, it must be applied to searches for evidence of criminal acts even if those searches would also serve an administrative purpose, unless that administrative purpose takes the concrete form of seeking an administrative violation.

* * *

Administrative Searches of Businesses After Burger

What precisely are the limitations on administrative inspections of businesses after *Burger?* Has the Court imposed sufficient controls on official discretion? Did Justice Brennan overreact? Analysis in some lower court cases after *Burger* would suggest that he did not. For example, in United States v. Hernandez, 901 F.2d 1217 (5th Cir.1990), an FBI agent who suspected that a commercial truck was carrying drugs followed the truck for twenty-four hours and 600 miles. He then notified the Texas Department of Public Safety that a truck believed to be carrying drugs was traveling on the interstate with no license plates. The DPS officer stopped the truck and demanded a driver's license and a bill of lading describing the cargo. The driver failed to produce evidence of Texas Interstate Commerce Commission Motor Carrier authorization. The officer then walked to the back of the truck and opened an inspection port, a small door used to check the temperature of the cargo. He smelled marijuana, obtained the keys to the cargo door, and a search of the truck uncovered 98 bales of marijuana. The court of appeals found that, while there was probable cause to arrest for the license plate violation, this did not provide probable cause to search the truck; nor was the search permissible as a search incident to arrest, because it went beyond the passenger compartment; nor was it permissible as a protective search under *Terry,* because the officer had no reasonable suspicion of bodily harm that necessitated looking into the cargo area. But the search was permissible as an administrative search under *Burger.* The court concluded that a Texas civil statute regulating motor carriers authorized any Department of Public Safety Officer to inspect any load of commodities being transported for hire over the highways of the state. Could the DPS officer have searched a car to determine whether it was carrying commercial goods without a commercial license? If so, wouldn't that mean that the DPS officer could search any car on the highway without suspicion?

Substitute for a Warrant

In order to satisfy *Burger's* requirement of a constitutionally adequate substitute for a warrant, a regulatory regime must 1) advise the

owner of the regulated business that the inspection is being made pursuant to law; and 2) impose some meaningful limitation on the officer's discretion to search (e.g., time, place and manner restrictions). In *Burger*, discretion was found sufficiently limited by the provision in the statute requiring that the search be made during daytime hours. Is this enough limitation on discretion, given that *Burger* authorizes a suspicionless search? See also United States v. Castelo, 415 F.3d 407 (5th Cir. 2005) (holding that an administrative scheme allowing weighing and inspection of commercial trucks imposed sufficient limits on officer discretion because only commercial vehicles could be inspected, and only when such vehicles were operating on the highways of the state: "These limitations are markedly similar to the limits on officer discretion in *Burger*.").

Although a statute authorizing administrative searches may be constitutional, actual searches purportedly conducted under that authority may not. If a search clearly goes beyond the statutory limitations that substitute for a warrant, it will be found unreasonable under the Fourth Amendment. See Bruce v. Beary, 498 F.3d 1232 (11th Cir. 2007) (search of vehicle dismantling business would be unreasonable if the owner could prove that it lasted 8 hours and involved both a display of automatic weapons by the officers and detention of shop employees. such a search would be "far beyond the statutory authorization" and "hardly seems to be what the Supreme Court in *Burger* had in mind when it held that the Constitution is not offended by * * * the regular, routine inspection of books and records required to be kept by auto salvagers."). See also Turner v. Dammon, 848 F.2d 440 (4th Cir. 1988) (disapproving officers' conduct in performing over 100 administrative inspections of a particular bar, where there was no evidence to support the need for such repeated searches).

The Element of Surprise

The Court justified the warrantless search in *Burger* partly because surprise was necessary. The concern was that the officer would go to Burger's business without a warrant, and would be refused admission; then, when the officer went to get a warrant, Burger would destroy or cover up evidence of an administrative violation. The Court therefore held that Burger had no right to refuse a warrantless inspection; to permit such refusal would deprive the inspector of the element of surprise that is often necessary to further regulatory interests in heavily regulated industries.

But concern about loss of the element of surprise does not really explain why an officer shouldn't have to get a warrant *before* approaching Burger's business the first time around. Then the officer could conduct a

surprise inspection *with a warrant.* The court in Lesser v. Espy, 34 F.3d 1301 (7th Cir.1994), confronted the question about the element of surprise discussed in *Burger*, and proffered an explanation. *Lesser* involved the constitutionality of a warrantless inspection of a farm that raised rabbits to be used as laboratory animals. The court discussed the surprise element as follows:

> In rabbit farming many of the potential deficiencies that would violate the [Animal Welfare] Act can be quickly concealed. See, e.g., 9 C.F.R. §§ 3.50(c) (improper storage of food); 3.50(d) (improper waste disposal); 3.50(e) (unclean washrooms); 3.56(a) (unsanitary primary enclosures). Thus the Department correctly observes that preserving the element of surprise and the possibility of frequent inspections is necessary in order to detect violators. In response the Lessers rightly point out that the element of surprise may be easily maintained even with a warrant requirement—a warrant may be issued ex parte and executed without prior notice. Nevertheless, we believe a warrant requirement for the most routine inspection would interfere with the Department's ability to function and unnecessarily increase the cost of the Secretary's operations without a significant increase in privacy, especially since all licensed suppliers of research animals have a reasonable expectation of at least a couple of regular inspections * * * each year.

Thus, the need for surprise is really a false issue—the question is whether officials who undoubtedly need to make surprise inspections should be burdened with a warrant requirement. The *Lesser* court, following *Burger*, determines that the minimal privacy interest protected by a warrant requirement is outweighed by the inconvenience of having to obtain a warrant before every single administrative inspection.

Is the *Lesser* reasoning based on the fact that most businesspersons would find it in their interest to consent to an administrative inspection anyway, which would mean that administrative inspectors would be obtaining warrants that they would by and large never have to use? Is that a legitimate reason for dispensing with the warrant requirement for those business owners who don't consent?

By the way, what would be wrong with having the rabbit farmer "cover up" his violations during the period after his refusal when the administrative inspector would have to go and get a warrant (assuming the inspector did not get one in the first instance)? Doesn't "cover up" mean "fix" in this circumstance? Isn't the goal of the administrative inspection to get the owner to repair the premises?

Administrative Inspections by Law Enforcement Officers

The Court in *Burger* held that the administrative nature of an inspection was not negated simply because the inspector was a law enforcement officer. Nonetheless, courts after *Burger* have applied a stricter scrutiny to so-called "administrative" searches when they are conducted by law enforcement officers—the concern being that the "administrative" search is simply a pretext to evade the warrant and probable cause requirements that apply to searched for criminal law enforcement. For example, in United States v. Johnson, 994 F.2d 740 (10th Cir.1993), an FBI agent received information (not amounting to probable cause) that Johnson, a taxidermist, was involved in the illegal smuggling of protected animals. He called a state administrative officer, who agreed to accompany the federal agent, ostensibly to conduct an administrative taxidermy inspection. The applicable statute authorized warrantless administrative inspections of taxidermists, but only when performed by state agents. The federal agent drove 300 miles to Johnson's taxidermy shop in order to be present for the inspection; he also participated actively in the search of the business. The investigators discovered several specimens of illegally imported animals. The court held that "the administrative search was employed solely as an instrument of criminal law enforcement." Consequently, all of the evidence was illegally obtained. The court reasoned as follows:

> The presence and active participation of the federal agent during the search of Mr. Johnson's shop, and the federal agent's insistence that the state agent accompany him establish as a matter of law that the federal agent used the state regulatory inspection as a pretext for an investigatory search. Federal agents may not cloak themselves with the authority granted by state inspection statutes in order to seek evidence of criminal activity and avoid the Fourth Amendment's warrant requirement.

Recall the discussion of pretext earlier in this Chapter. Was the inspection in *Johnson* really pretextual, given the fact that the state agent had the right to conduct a warrantless administrative inspection? Or, can it be argued that *Whren* permits otherwise pretextual searches and arrests only when there is probable cause? If that is so, then courts can still regulate for pretext when police officers seek to conduct a suspicionless "administrative" search that is really for purposes of criminal law enforcement. See also United States v. Knight, 306 F.3d 534 (8th Cir. 2002) (police officer's search of a truck, purportedly pursuant to a state safety inspection program, became illegal when it was extended to the trucker's briefcase: "We believe that, as a general matter, rummaging through a person's belongings is more likely to serve the purpose of crime control than the enforcement of a regulatory scheme."). Note that the

Court in *Burger*, in upholding the inspection, specifically noted that there was "no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws."

3. Searches and Seizures of Individuals Pursuant to "Special Needs"

The Court has used its special needs balancing analysis in a series of cases to uphold civil-based searches of individuals in the absence of a warrant and probable cause. The first cases upheld suspicion-based searches, where the government had reasonable suspicion—but not probable cause—to justify a civil-based search. Then the Court decided a series of cases raising the question whether civil-based searches could be conducted in the absence of any suspicion at all.

a. Searches and Seizures on the Basis of Reasonable Suspicion Rather Than Probable Cause

In New Jersey v. T.L.O., 469 U.S. 325 (1985), a school official searched the handbag of a student. The official had reasonable suspicion, but not probable cause, to believe that cigarettes were in the student's purse. In the absence of probable cause, the search could not be justified as a criminal-based search for evidence. Nor could the search be justified under the *Terry* doctrine, because *Terry* searches are for safety only, and the school official had no basis for believing that the student posed a risk of bodily harm. Nonetheless, the Court upheld the search. The Court reasoned that the search effectuated "special needs" beyond ordinary criminal law enforcement—specifically the state's need to assure a safe and healthy learning environment. This finding of special needs permitted the Court to balance the state interest at stake in the search against the student's interest in privacy.

The *T.L.O.* Court found that the reasonable suspicion standard was sufficient to protect the student's diminished expectation of privacy in the school environment, while permitting the government the proper degree of leeway in maintaining standards of school discipline. It reasoned that if probable cause were required, school officials would be unable to regulate disciplinary problems at an early stage, before they became serious and intractable problems. That is, while waiting for probable cause to develop, the state's interest in regulation would already be undermined, as it is important to the state to nip disciplinary problems in the bud. Finally, the Court held that a warrant would not be required for searches conducted by school officials; school officials could not be expected to obtain a judicial warrant before seeking to enforce school disciplinary standards.

The *T.L.O.* analysis was used by the Court to uphold warrantless searches of the office of a government official, and of the house of a probationer. O'Connor v. Ortega, 480 U.S. 709 (1987); Griffin v. Wisconsin, supra. In both *O'Connor* and *Griffin,* as in *T.L.O.,* the Court found that conditioning searches on probable cause would be deleterious to the state interest, and that the reasonable suspicion standard was an appropriate balance between state and (diminished) individual interests in privacy.

Limitations on Strip Searches of Students: Safford Unified School District v. Redding

In *T.L.O.*, the Court required individualized suspicion for a search of a student's handbag. This raises the question whether a "special needs" search could be so intrusive as to require a more substantial showing than mere reasonable suspicion of a school violation. Justice Souter wrote his last opinion for the Court in Safford Unified School District #1 v. Redding, 577 U.S. 364 (2009). He described the issue:

> whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.

The Court held that "[b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, * * * the search did violate the Constitution, but because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability."

Justice Souter reasoned that an assistant principal's (Wilson's) suspicion of the student's (Savanah's) distributing drugs to other students was enough to justify a search of her backpack and outer clothing, because "[i]f a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today." But, Justice Souter found that the scope of the search was not justified:

> Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect

that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. * * * [N]ondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear. * * *

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

There were separate opinions of Justices Stevens, Ginsburg and Thomas concurring in part and dissenting in part.

b. *Suspicionless Searches of Persons on the Basis of "Special Needs"*

Drug-Testing of Employees: Skinner v. Railway Labor Executives

T.L.O. permitted "special needs" searches on the basis of reasonable suspicion rather than probable cause. The *T.L.O.* Court did not decide whether a "special needs" search could be conducted *without any suspicion* that the person searched has violated any law or regulation. Subsequently the Court, in companion cases, considered the constitutionality of suspicionless drug-testing of public employees. In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), the Court upheld a program mandating drug tests for all railroad personnel involved in certain train accidents. Thus, the plan called for suspicionless testing of all personnel involved in the accident. Failing the test would result in loss of employment. Justice Kennedy, writing for the Court, made the following points:

1. The program was subject to Fourth Amendment scrutiny, because the drug-testing was essentially required by federal regulation. Therefore, even though it was administered by a private employer, it was not a private party search beyond the purview of the Fourth Amendment.

2. Drug testing of urine is a search within the meaning of the Fourth Amendment, because it can reveal private information (such

as pregnancy or epilepsy), and because the process of monitoring the employee's act of urination implicates privacy interests.

3. The government's interest in regulating the conduct of railroad employees to ensure safety "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."

4. A warrant was not required to subject the railroad employees to drug-testing, because, "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." Moreover, the railroad supervisors responsible for administering the testing program "are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence."

5. The drug-testing program was reasonable even though it provided for testing in the absence of any individualized suspicion of drug use. Justice Kennedy declared: "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." The urine-testing was found not very intrusive, because "[t]he regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample. The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination." Furthermore, the expectations of privacy of covered employees was "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." On the other side of the balancing equation, the Court found that the state interests at stake were "compelling," and could not be accommodated by a requirement of individualized suspicion. Employees subject to the tests "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Drug-testing provides an effective means of deterring drug use, because employees in safety-sensitive positions "know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty." Also, drug-testing will "help railroads obtain invaluable information about the causes of major

accidents, and to take appropriate measures to safeguard the general public."

6. The state's interest in a suspicionless testing plan was strengthened by the fact that there was a documented drug problem among railroad employees. Thus, the government was not simply enforcing some hypothetical interest.

7. A requirement of particularized suspicion of drug use would "seriously impede an employer's ability to obtain this information, despite its obvious importance." This is because "[o]btaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident."

8. There was no indication that the suspicionless testing was a pretextual means of enforcing the criminal law.

Justice Stevens concurred in part and in the judgment in *Skinner*. He was dubious, however, about the deterrent effect of drug-testing in the railroad context. He noted that the testing was undertaken *after* an accident, not before. He reasoned that workers would "not go to work with the expectation that they may be involved in a major accident," and that "if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior."

Justice Marshall, joined by Justice Brennan, dissented in *Skinner*. He criticized the Court for rejecting the probable cause requirement for "a manipulable balancing inquiry under which, upon the mere assertion of a 'special need,' even the deepest dignitary and privacy interests become vulnerable to governmental incursion."

Drug-Testing of Employees: National Treasury Employees v. Von Raab

In National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), a case decided the same day as *Skinner*, the Court upheld compelled urinalysis of certain Customs Service employees. Drug tests were made a condition of obtaining employment for three types of positions in the Customs Service: those involving drug interdiction, those requiring the employee to carry a firearm, and those in which the employee would handle "classified documents." The employee was allowed to produce the sample privately, but to protect against adulteration, "a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination." Customs employees who tested positive for drugs and who could offer no satisfactory explanation were

subject to dismissal from the Service; but the testing results could not be turned over to a criminal prosecutor without the employee's consent.

Justice Kennedy again wrote the opinion for the Court. He found that the drug-testing served special needs beyond criminal law enforcement, specifically the need for safety and to ensure that customs employees responsible for controlling the flow of drugs into the country are not on drugs themselves. Balancing the state and individual interests, Justice Kennedy concluded that a warrant was not required for the testing, because the event that triggered the testing was "the employee's decision to apply for a covered position." There was thus no factual question similar to probable cause for a magistrate to decide.

The *Von Raab* Court found that suspicionless testing was reasonable as applied to two of the three covered types of employees—those involved in drug interdiction and those carrying handguns. Justice Kennedy noted that "the Government has a compelling interest in ensuring that front-line personnel are physically fit, and have unimpeachable integrity and judgment," and that the public interest "likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm." The majority asserted that these two classes of employees had a diminished expectation of privacy, because the positions depended uniquely on the employees' "judgment and dexterity." Justice Kennedy also emphasized that the testing procedures were designed to minimize the intrusion involved, to the extent possible without sacrificing the reliability of the test.

The Court in *Von Raab* found itself unable to assess the reasonableness of suspicionless testing as applied to the third category of employees, those handling classified documents. The Court remanded this aspect of the case, and explained as follows:

> It is not clear * * * whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger." * * * [I]t is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary to meet the purposes of the Commissioner's directive.

What if There Is No Record of Drug Abuse?

The most difficult issue for the majority in *Von Raab* was that the Customs Service had implemented the drug-testing program even though there was no documented drug problem among Customs employees. This was unlike the situation in *Skinner,* where the drug problem among railroad employees, and the risk therefrom, was well-documented. Those who challenged the plan in *Von Raab* argued that suspicionless drug-testing was unreasonable unless it could be justified as responsive to and effective against a documented drug problem. Justice Kennedy rejected this argument in the following analysis:

> Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. * * * In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.
>
> The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. * * * The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

In a footnote, Justice Kennedy compared suspicionless drug-testing to suspicionless searches at airports.

> As Judge Friendly explained in a leading case upholding such searches:
>
> > "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air." United States v. Edwards, 498 F.2d 496, 500 (C.A.2 1974) (emphasis in original).

> * * * [W]e would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline. It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.

Justice Marshall, joined by Justice Brennan, dissented in *Von Raab* for the reasons stated in *Skinner*.

Justice Scalia, joined by Justice Stevens, both of whom found suspicionless drug-testing to be reasonable in *Skinner,* dissented in *Von Raab*. Justice Scalia explained his differing votes in the two cases as follows:

> I joined the Court's opinion [in *Skinner*] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

Justice Scalia rejected the majority's generalization that no American workplace is free from the drug problem. He responded that such a generalization could perhaps suffice "if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant for example." Justice Scalia noted that suspicionless testing for nuclear power plant employees in sensitive jobs had been upheld even without a showing of a drug problem. See Rushton v. Nebraska Public Power District, 844 F.2d 562 (8th Cir.1988). See also Thomson v. Marsh, 884 F.2d 113 (4th Cir.1989) (suspicionless testing of personnel in chemical weapons plant upheld). He responded, however, that if the majority considered that the threat posed by drug-addicted Customs officials was comparable to that found in *Rushton,* "then the Fourth Amendment has become frail protection indeed." He noted that this reasoning would extend approval of suspicionless drug testing to vast numbers of public employees, including "automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards."

Drug-Testing of Schoolchildren

The Supreme Court has taken up the question of suspicionless testing of schoolchildren in two cases after *Von Raab*: Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), and Board of Education of

Independent School District No. 2 v. Earls, 536 U.S. 822 (2002). In *Vernonia*, the Court upheld (6–3) the suspicionless drug testing of athletes, reasoning that students had a lesser expectation of privacy and that this was especially true of athletes whose privacy was affected by having to dress and shower in close proximity to each other. Justice Scalia wrote for the Court. Justice O'Connor, joined by Justices Stevens and Souter, dissented. In *Earls*, the Court expanded its holding to uphold (5–4) suspicionless drug testing of all students engaged in extracurricular activities. Justice Thomas wrote for the Court in *Earls*. Justice Thomas relied heavily on *Vernonia*. He wrote as follows:

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.
>
> Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia*. This distinction, however, was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority.
>
> In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. * * * This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. We therefore conclude that the students affected by this Policy have a limited expectation of privacy.
>
> * * *
>
> Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must "listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student. This procedure is virtually identical to that reviewed in *Vernonia*, except that it additionally protects privacy by allowing

male students to produce their samples behind a closed stall. Given that we considered the method of collection in *Vernonia* a "negligible" intrusion, the method here is even less problematic.

In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. * * * Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities.

* * *

Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.

* * * Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. * * * The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the "drug situation." We decline to second-guess the finding of the District Court that "[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy."

* * *

Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *Von Raab* the Court upheld the drug testing of customs officials on a purely preventive basis, without any documented history of drug use by such officials.

> * * * Likewise, the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.
>
> * * *
>
> Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a "crucial factor" in applying the special needs framework. * * * Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.

Justice Thomas challenged the argument that a program requiring reasonable suspicion would be a less intrusive alternative to suspicionless drug testing:

> [W]e question whether testing based on individualized suspicion in fact would be less intrusive. * * * A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use. In any case, this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.

Justice Breyer wrote a short concurring opinion that emphasized the fact that "the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community the opportunity to be able to participate" in developing the drug policy. The board used this "democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program." He also argued that "a contrary reading of the Constitution, as requiring individualized suspicion in this public school context, could well lead schools to push the boundaries of individualized suspicion to its outer limits, using subjective criteria that may unfairly target members of unpopular groups, or leave those whose behavior is slightly abnormal stigmatized in the minds of others."

Justice Ginsburg, joined by Justices Stevens, O'Connor, and Souter, dissented in *Earls*. She argued that "*Vernonia* cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them." She further noted that the Court's reliance on voluntary participation in extracurricular activities was misplaced:

> While extracurricular activities are "voluntary" in the sense that they are not required for graduation, they are part of the school's educational program * * *. Participation in such activities is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered them.

Justice Ginsburg concluded as follows:

> At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address. * * * Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.

QUESTIONS AFTER EARLS

Can a school district now mandate random drug-testing of *all* public school students, whether or not they wish to participate in extracurricular activities? If not, why not?

What about suspicionless searches of student property? Will they be automatically permissible without suspicion, so long as they are done neutrally? See Doe v. Little Rock School Dist., 380 F.3d 349 (8th Cir. 2004) (random suspicionless searches of students belongings were unreasonable; generalized concerns about the presence of weapons and drugs was not sufficient to justify such intrusive searches, even after *Earls*, especially because evidence obtained in the searches was routinely turned over to the police: "Rather than acting *in loco parentis,* with the goal of promoting the students welfare, the government officials conducting the searches are in large part playing a law enforcement role with the goal of ferreting out crime and collecting evidence to be used in prosecuting students.").

How does *Earls* square with *Safford, supra*? *Earls* permits a search of virtually every student in the school without any suspicion at all, while

Safford prohibits a search of a particular student even though the official had reasonable suspicion that the student violated the school's rule against possession of medication without permission. How would you advise school officials who want to enforce a drug or medication policy given these two cases?

Drug-Testing of Politicians

In the following case, the Court appeared to draw back somewhat from its previous cases supporting suspicionless drug-testing on the basis of "special needs."

CHANDLER v. MILLER

Supreme Court of the United States, 1997.
520 U.S. 305.

JUSTICE GINSBURG delivered the opinion of the Court.

* * *

Georgia requires candidates for designated state offices to certify that they have taken a drug test and that the test result was negative. We confront in this case the question whether that requirement ranks among the limited circumstances in which suspicionless searches are warranted. Relying on this Court's precedents sustaining drug-testing programs for student athletes, customs employees, and railway employees, * * * the United States Court of Appeals for the Eleventh Circuit judged Georgia's law unconstitutional. We reverse that judgment. Georgia's requirement that candidates for state office pass a drug test, we hold, does not fit within the closely guarded category of constitutionally permissible suspicionless searches.

* * *

The prescription at issue, approved by the Georgia Legislature in 1990, orders that "each candidate seeking to qualify for nomination or election to a state office shall as a condition of such qualification be required to certify that such candidate has tested negative for illegal drugs." Georgia was the first, and apparently remains the only, State to condition candidacy for state office on a drug test.

Under the Georgia statute, to qualify for a place on the ballot, a candidate must present a certificate from a state-approved laboratory, in a form approved by the Secretary of State, reporting that the candidate submitted to a urinalysis drug test within 30 days prior to qualifying for nomination or election and that the results were negative. The statute lists as "illegal drugs": marijuana, cocaine, opiates, amphetamines, and phencyclidines. The designated state offices are: "the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School

Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission."

* * * A candidate may provide the test specimen at a laboratory approved by the State, or at the office of the candidate's personal physician. Once a urine sample is obtained, an approved laboratory determines whether any of the five specified illegal drugs are present, and prepares a certificate reporting the test results to the candidate.

Petitioners were Libertarian Party nominees in 1994 for state offices subject to the requirements of [the statute]. * * * [P]etitioners requested declaratory and injunctive relief barring enforcement of the statute. * * * In January 1995, the District Court entered final judgment for respondents.

[The Eleventh Circuit upheld the statute, despite the fact that there was no showing of a drug problem among candidates for office. The Court of Appeals relied heavily on *Von Raab*. It stated that "those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use." It also found that candidates have a diminished expectation of privacy, because "candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position."]

To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. See *Vernonia*. But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. * * *

[The Court reviews *Skinner, Von Raab, and Vernonia,* noting as to *Vernonia* that the drug-testing program's "context was critical, for local governments bear large responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."]

* * * Because the State has effectively limited the invasiveness of the testing procedure, we concentrate on the core issue: Is the certification requirement warranted by a special need?

Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress

the Fourth Amendment's normal requirement of individualized suspicion. Georgia has failed to show * * * a special need of that kind.

Respondents' defense of the statute rests primarily on the incompatibility of unlawful drug use with holding high state office. The statute is justified, respondents contend, because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. The statute, according to respondents, serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office. Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.

Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity. The statute was not enacted, as counsel for respondents readily acknowledged at oral argument, in response to any fear or suspicion of drug use by state officials * * *. A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, see *Von Raab*, would show up an assertion of special need for a suspicionless general search program. Proof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use. Thus, the evidence of drug and alcohol use by railway employees engaged in safety-sensitive tasks in *Skinner*, and the immediate crisis prompted by a sharp rise in students' use of unlawful drugs in *Vernonia*, bolstered the government's and school officials' arguments that drug-testing programs were warranted and appropriate.

In contrast to the effective testing regimes upheld in *Skinner*, *Von Raab*, and *Vernonia*, Georgia's certification requirement is not well designed to identify candidates who violate antidrug laws. Nor is the scheme a credible means to deter illicit drug users from seeking election to state office. The test date—to be scheduled by the candidate anytime within 30 days prior to qualifying for a place on the ballot—is no secret. As counsel for respondents acknowledged at oral argument, users of illegal drugs, save for those prohibitively addicted, could abstain for a pretest period sufficient to avoid detection. * * * Moreover, respondents have offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals, should they appear in the limelight of a public stage. * * *

Respondents and the United States as amicus curiae rely most heavily on our decision in *Von Raab*, which sustained a drug-testing program for Customs Service officers prior to promotion or transfer to

certain high-risk positions, despite the absence of any documented drug abuse problem among Service employees. * * *

Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. * * * We stressed that "drug interdiction had become the agency's primary enforcement mission," and that the employees in question would have "access to vast sources of valuable contraband." Furthermore, Customs officers "had been the targets of bribery by drug smugglers on numerous occasions," and several had succumbed to the temptation.

Respondents overlook a telling difference between *Von Raab* and Georgia's candidate drug-testing program. In *Von Raab* it was "not feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." Candidates for public office, in contrast, are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments.

What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse. The suspicionless tests, according to respondents, signify that candidates, if elected, will be fit to serve their constituents free from the influence of illegal drugs. But Georgia asserts no evidence of a drug problem among the State's elected officials, those officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is symbolic, not "special," as that term draws meaning from our case law.

* * *

* * * However well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake. The Fourth Amendment shields society against that state action.

* * *

We reiterate * * * that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

* * *

CHIEF JUSTICE REHNQUIST, dissenting.

* * * It would take a bolder person than I to say that * * * widespread drug usage could never extend to candidates for public office such as Governor of Georgia. The Court says that "nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." But surely the State need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become Governor before it installs a prophylactic mechanism.

* * *

Under normal Fourth Amendment analysis, the individual's expectation of privacy is an important factor in the equation. But here, the Court perversely relies on the fact that a candidate for office gives up so much privacy * * * as a reason for sustaining a Fourth Amendment claim. The Court says, in effect, that the kind of drug test for candidates required by the Georgia law is unnecessary, because the scrutiny to which they are already subjected by reason of their candidacy will enable people to detect any drug use on their part.

* * *

Drug-Testing Cases After Chandler

It should come as no surprise that drug-testing cases are all over the map after *Chandler*. In *Chandler*, the Court second-guessed whether a drug-testing plan would be effective in controlling drug abuse—such second-guessing was missing in the Court's previous cases. In *Chandler*, the Court held that people with minimal privacy interests could not be subject to drug-testing that was relatively non-intrusive. The emphasis in the previous cases was to the contrary.

For a taste of the differing results after *Chandler*, see, e.g., 19 Solid Waste Dept. Mech. v. City of Albuquerque, 156 F.3d 1068 (10th Cir.1998) (invalidating suspicionless searches of trash truck mechanics as not justified by a "special need"; stating that after *Chandler*, "even if the privacy interest is virtually non-existent, the special need requirement prevents suspicionless searches where the government has failed to show either that it has a real interest in testing or that its test will further its proffered interest."); Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007) (random drug-testing of sanitation workers found reasonable, because they performed a safety-sensitive job and used large and dangerous vehicles); Knox County Educ. Assoc. v. Knox County Board of Education, 158 F.3d 361 (6th Cir.1998) (random testing of all teachers permitted, even though no showing of a drug problem was made; *Chandler* distinguished on the grounds that teachers are more important than

politicians, and teachers "are not subject to the same day-to-day scrutiny as are candidates for public office"); United Teachers v. School Bd. Through Holmes, 142 F.3d 853 (5th Cir.1998) (suspicionless testing of all teachers injured in the course of employment violates the Fourth Amendment; the court concluded that "there is an insufficient nexus between suffering an injury at work and drug impairment"); Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008) (drug testing of applicants for position of library worker was not reasonable; there was no evidence of a drug problem in the targeted population, and library workers do not perform high-risk or safety-sensitive tasks).

In *19 Solid Waste Dept.*, supra, the court found it necessary after *Chandler* to inquire into the effectiveness of the drug-testing plan. It held the plan ineffective (thus not furthering a "special need") in part because the employees were tested only once every four years. It therefore concluded that "this program is not at all well-designed to detect drug use among its employees and lacks deterrent effect." Would the court have been happier with a plan that required employees to be tested every day? Does the court mean that the more pervasive (and intrusive) the testing plan, the more it is likely to fulfill a special need and thus be reasonable? Can't the same perverse argument be found in *Chandler*, where the Court says that the plan is unreasonable because candidates receive 30 days advance notice? Is the court saying that surprise inspections, though obviously more upsetting to the citizen, are more reasonable?

NOTE ON VERNONIA, EARLS AND CHANDLER

Does it make sense to you that a 13-year-old who wants to join the school chess team can be forced to take a drug test, while a candidate for Governor of a State cannot be so forced? In light of the privacy interests that each of these people could be thought to have, shouldn't it be the other way around? Can it simply be explained by the fact that the Court considers the school environment, and the state's relationship to schoolchildren, unique? For a critique of the school drug-testing cases and *Chandler*, see Dery, Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing, 40 Ariz.L.Rev. 73 (1998).

Drug-Testing for Special Needs, or for Criminal Law Enforcement? Ferguson v. City of Charleston

In Ferguson v. City of Charleston, 532 U.S, 67 (2001), the Court continued along the difficult path of distinguishing those searches that serve special needs beyond ordinary criminal law enforcement and those that do not. In an opinion by Justice Stevens, the Court struck down a state hospital policy requiring drug testing of pregnant mothers suspected of cocaine use. The Court held that the drug tests were not "special

needs" searches because "the central and indispensable feature of the policy" was fulfillment of the State's law enforcement goals. The Medical University of South Carolina (MUSC) was concerned about the effect of drug use by mothers on their babies and instituted a policy that required the drug testing of urine samples from maternity patients suspected of using cocaine. A patient who tested positive was required to undergo subsequent tests and could be arrested and prosecuted if subsequent tests were positive. Police and prosecutors participated in the development and implementation of the program. As the evidence was collected for the specific purpose of incriminating the patients, the Court held that the Fourth Amendment's prohibition against warrantless and suspicionless searches applied in the absence of consent. The Court did not reach the issue of the sufficiency of the evidence with regard to consent and assumed, for purposes of the decision, that the searches were conducted without the patient's consent.

The Court distinguished this case from its previous cases upholding drug tests as fulfilling legitimate "special needs" because the the test results were disseminated to the police and prosecutors, and the program was developed with input of police and prosecutors. The Court found the most critical difference was that in prior cases the "special need" advanced was totally divorced from the State's general interest in law enforcement while the purpose of the MUSC policy was precisely to engage in law enforcement. While the ultimate goal of the policy may have been to help addicted patients (by scaring them straight), the immediate objective was "to generate evidence for law enforcement purposes in order to reach that goal."

Justice Kennedy concurred in the result. Justice Scalia dissented, joined by the Chief Justice and Justice Thomas. Justice Scalia contended that the urine tests were not protected by the Fourth Amendment because they were obtained with the patient's consent.

On remand, the Fourth Circuit held that the mothers did not consent to use of the urine tests in a criminal prosecution. Ferguson v. City of Charleston, 308 F.3d 380 (4th Cir. 2002). The Court remanded for a determination of damages.

Suspicionless Safety Searches in Airports, Subways, Public Buildings, etc.

In *Von Raab, supra,* the Supreme Court cited favorably some lower court cases from the 1970's that upheld—as reasonable under the "special needs" doctrine—magnetometer searches of persons and carry-on luggage at airports. Those searches were found reasonable because: 1) the searches were safety-based and not primarily intended to enforce the criminal law; 2) the state interest in protecting the safety of air travel

was high; 3) the state interest could not be accommodated by limiting the searches to those who were reasonably suspected of presenting a safety risk—suspicionless searches were required because some travelers may pose a safety risk even though they have no intent to violate the law (e.g., a security officer carrying a weapon that might be stolen on board by a highjacker), and because some people might not look suspicious on a cursory view but in fact may be intending to highjack or blow up an airplane; and 4) the searches are minimally intrusive, because a) all travelers are searched (minimizing the humiliation), b) travelers are notified in advance, and c) travelers are free to refuse the search and choose some other form of travel.

After 9/11, it is no secret that suspicionless searches at airports and other public places are now more intrusive and inconvenient than previously. Air passengers are usually required to take their shoes, belts and coats off; at some airports, passengers are required to pass through a machine that blows air at them (and the microscopic particles thus blown off them are tested for traces of explosives); at others, the scan of the person shows everything including genitalia to the officer viewing the monitor; the old x-ray machines have been replaced by more sophisticated 3-D technology so that the viewer can determine, with precision, what property is in handbags, luggage, etc.; some passengers are selected for a more thorough inspection, including the use of an electric wand, a thorough search of personal effects, and what is in effect a *Terry* patdown and frisk. The selection for a more intrusive search is ordinarily done without particularized suspicion; the agents' discretion is purportedly controlled by the use of neutral criteria—the searches are either on a random basis, or because of some factual trigger like purchasing a one-way ticket or setting off the magnetometer.

Are these more intrusive searches reasonable under the special needs line of cases? While the Supreme Court has not yet reviewed the reasonableness of a post 9/11 airport security search, the lower courts have ordinarily upheld these more intrusive searches as within "special needs." For example, in United States v. Marquez, 410 F.3d 612 (9th Cir. 2005), the defendant was randomly selected for an airport wand search and a pat-down, and was found to have two kilograms of cocaine stashed in his pants. The court analyzed the search as follows:

> This case presents a legally novel, yet practically ubiquitous, set of facts. The issue here is whether the random selection of Marquez to go to the selectee lane, where he would automatically be subjected to the wanding of his person with the handheld magnetometer in addition to the walkthrough magnetometer and the x-ray luggage scan, was reasonable. We conclude that it was.

Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment. United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973) (noting that airport screenings are considered to be administrative searches because they are "conducted as part of a general regulatory scheme" where the essential administrative purpose is "to prevent the carrying of weapons or explosives aboard aircraft"). Thus airport screenings must be reasonable. To judge reasonableness, it is necessary to balance the right to be free of intrusion with society's interest in safe air travel.

In *Davis* and its progeny, we have established a general reasonableness test for airport screenings. An airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly.

Airport screening Reasonableness Test

* * *

It is hard to overestimate the need to search air travelers for weapons and explosives before they are allowed to board the aircraft. As illustrated over the last three decades, the potential damage and destruction from air terrorism is horrifically enormous. The random, additional screening procedure in this case satisfies the *Davis* reasonableness test for airport searches. The procedure is geared towards detection and deterrence of airborne terrorism, and its very randomness furthers these goals. This was a limited search, confined in its intrusiveness (both in duration and scope) and in its attempt to discover weapons and explosives. Given the randomness, the limited nature of the intrusion, the myriad devices that can be used to bring planes down, and the absence of any indicia of improper motive, we hold that the random, more thorough screening involving scanning of Marquez's person with the handheld magnetometer was reasonable. The district court properly denied Marquez's motion to suppress the contraband found during TSA screening

See also United States v. Hartwell, 436 F.3d 174 (3d Cir. 2006) (Alito, J.) (when defendant set off the magnetometer, a wand inspection was reasonable; stating that the search is "less offensive" because air passengers "are on notice that they will be searched" and noting that "the events of September 11, 2001, only emphasize the heightened need to conduct searches" at airports).

Some courts have reasoned that because air travel is "voluntary", the intrusion of an airport search is minimized. Is air travel really voluntary? The Ninth Circuit, in United States v. Aukai, 497 F.3d 955 (9th Cir. 2007), had to confront the relevance of "consent" as diminishing the

traveler's expectation of privacy, because Aukai was put in a situation in which he could not just turn around and get to his destination by some other mode of transportation. Aukai checked in at his flight but did not produce an appropriate identification. His ticket was stamped "no ID" and he proceeded to security. He went through the magnetometer without incident, and presented his boarding pass to the TSA officer. Under TSA procedures, a person who has no ID is subjected to a secondary inspection with a wand, etc. During the secondary inspection, Aukai said he no longer wished to board a plane and wanted to leave the airport. But TSA continued the inspection and eventually the agent discovered a glass pipe and a small quantity of drugs. The TSA procedures called for a secondary inspection to continue even if the traveler decides at some point not to fly.

The *Aukai* court began by noting that its case law "has erroneously suggested that the reasonableness of airport screening searches is dependent upon consent, either ongoing consent or irrevocable implied consent." The court explained its "error" and justified the search of Aukai in the following passage:

> The constitutionality of an airport screening search, however, does not depend on consent, and requiring that a potential passenger be allowed to revoke consent to an ongoing airport security search makes little sense in a post-9/11 world. Such a rule would afford terrorists multiple opportunities to attempt to penetrate airport security by "electing not to fly" on the cusp of detection until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks. Likewise, given that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening search on an irrevocable implied consent theory.
>
> Rather, where an airport screening search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger's election to attempt entry into the secured area of an airport. Under current TSA regulations and procedures, that election occurs when a prospective passenger walks through the magnetometer or places items on the conveyor belt of the x-ray machine. The record establishes that Aukai elected to attempt entry into the posted secured area of Honolulu International Airport when he walked through the magnetometer, thereby subjecting himself to the airport screening process.

Should we give the *Aukai* court credit for at least being honest, that consent has nothing to do with the reasonableness of a post 9/11 security search?

Another factor used to support security searches is that the public is on notice that the searches are occurring. Does this mean that if the TSA announces a program of random body cavity searches of air travelers, in order to combat terrorism, that those searches are now reasonable because the public has been notified?

Does it make sense that the more intrusive searches are random? Some have suggested that the search plan would be more efficient and reasonable if it was targeted at Muslim men. See Charles Krauthammer, The Case for Profiling, Time Magazine, Mar. 18, 2002, at 104. Professor Maclin rejects the suggestion that racial profiling is necessary or reasonable in "Voluntary" Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 Miss. L.Rev. 471 (2003). Professor Maclin argues that the proposal for racial profiling of suspect air terrorists relies on the same invalid premise that justified the detention of Japanese citizens during World War II.

In New York City, the police established a search plan for the subway system shortly after the terrorist bombings of commuter trains in Madrid and London. The plan calls for daily inspection checkpoints at selected subway stations. Passengers are randomly selected for a search of their effects before they enter the subway. The targeted stations change from day to day. The court in MacWade v. Kelly, 460 F.3d 260 (2d Cir. 2006), rejected a Fourth Amendment challenge to these searches that was brought by some subway passengers. The court first found that "preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation." Under the special needs doctrine, the program of suspicionless searches of subway passengers was found reasonable, the court determining that:

> 1) the government interest in searching was "immediate and substantial" given terrorist threats on the system and actual bombings of commuter trains elsewhere;
>
> 2) the searches were minimally intrusive, because a) passengers receive notice "and may decline to be searched so long as they leave the subway", b) "police search only those containers capable of concealing explosives" and "inspect eligible containers only to determine whether they contain explosives", c) the searches last only a few seconds, and d) "uniformed personnel conduct the searches out in the open, which reduces the fear and stigma that removal to a hidden area can cause."

The citizens challenging the subway search plan argued that it was ineffective because any terrorist could avoid searches simply by refusing to submit to a search and walking a few blocks to an unmonitored subway station. But in response to that argument, the court stated that it was not its place to conduct "a searching examination of effectiveness" and that

officers combating terrorism are entitled to some deference as to the methods chosen and that the apparent flaw was a strength because "we always have viewed notice and the opportunity to decline as beneficial aspects of a suspicionless search regime because those features minimize intrusiveness" and "if a would-be bomber declines a search, he must leave the subway or be arrested—an outcome that, for the purpose of preventing subway bombings, we consider reasonably effective, especially since the record establishes that terrorists prize predictability."

Is it odd that the citizens are essentially arguing that the plan would be more effective and thus reasonable if all passengers were searched? On the other hand, is it odd that the government is arguing that the plan is reasonable because people can easily avoid searches, and yet the plan is reasonably effective even though people can easily avoid searches?

For other cases upholding post-9/11 security searches, see, e.g., Cassidy v. Chertoff, 471 F.3d 67 (2nd Cir. 2006) (upholding searches of persons, luggage and cars on Lake Ticonderoga ferry; noting that passengers receive ample notice, and that searches promote a special need of preventing terrorist attacks on large vessels engaged in mass transportation: "Although the plaintiffs may be correct that Lake Champlain ferries are a less obvious terrorist target than ferries in, for example, New York City or Los Angeles, the airline cases make it clear that the government, in its attempt to counteract the threat of terrorism, need not show that every airport or every ferry terminal is threatened by terrorism in order to implement a nationwide security policy that includes suspicionless searches."); Johnston v. Tampa Bay Sports Authority, 530 F.3d 1320 (11th Cir. 2008) (upholding pat-down security searches at the Super Bowl on grounds of implied consent).

Searching Beyond the Scope of Safety

A safety-based search must be conducted within the limits of protecting safety. If the officer engages in tactics that are not safety-related, it is possible that the search will be found unreasonable. Illustrative is United States v. McCarty, 648 F.3d 820 (9th Cir. 2011). McCarty was traveling from Hilo Airport to Honolulu. He checked bags that were screened by two TSA screeners (who were, oddly enough, mother and daughter). They were using the "CTX" superscanner machine, and one of the bags set off an alarm for having a dense item requiring further inspection. Under TSA policy, dense items triggering a CTX alarm must be removed and inspected. In this case, the dense item turned out to be an envelope of photos and other papers. Because of the possibility of "sheet explosives"—which may be disguised as a piece of paper or cardboard—the TSA official is required to thumb through papers or photographs that trigger a CTX alarm. The TSA screeners saw in the

envelope some photos of children that looked "improper" according to the screeners. The screeners also found letters and newspaper clippings and read through them briefly. These letters and clippings increased the suspicion of a child pornography violation. Eventually the local police were called, and the defendant was arrested and ultimately convicted for transportation and possession of child pornography.

The court noted that "because TSA screeners are limited to the single administrative goal of search for possible safety threats related to explosives, the constitutional bounds of an airport administrative search require that the individual screener's actions be no more intrusive that necessary to determine the existence or absence of explosives that could result in harm to the passengers and aircraft." In this case, the screeners conceded that, at the point when they read the content of the letters and newspaper clippings, they were no longer searching for explosives—rather they were searching to confirm their suspicion that the photos they had thumbed through were evidence of child pornography. The court therefore concluded that the review of the letters and newspaper clippings "clearly fell outside the permissible scope of the lawful administrative search and violated McCarthy's Fourth Amendment rights." In contrast, the screeners' review of the pictures in the envelope was found proper because it was "consistent with the TSA protocol requiring [screeners] to thumb through the photographs in order to clear the bag." The court remanded to determine whether the photographs alone established probable cause of a crime to support McCarty's arrest.

McCarty argued that the screeners, when looking through the photographs, were not motivated by safety but rather were looking for evidence of child pornography. The court found the screeners' motivation to be irrelevant, so long as the search was justified by the safety concerns attendant to sheet explosives. Why would the screeners' motivations be irrelevant?

Safety-Based Strip Searches of Detainees Without Reasonable Suspicion: Florence v. Board of Chosen Freeholders

In Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510 (2012), Justice Kennedy wrote for the Court as it upheld the reasonableness of a policy of strip-searching jail detainees, even when those detainees are arrested on minor offenses.

Florence was arrested for a minor offense and was placed in the Burlington County Detention Center and then in the Essex County Correctional Facility. Justice Kennedy described the procedures in the two facilities:

> Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for

scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. (It is not clear whether this last step was part of the normal practice.) Petitioner shared a cell with at least one other person and interacted with other inmates following his admission to the jail.

The Essex County Correctional Facility, where petitioner was taken after six days, is the largest county jail in New Jersey. It admits more than 25,000 inmates each year and houses about 1,000 gang members at any given time. When petitioner was transferred there, all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. He was released the next day, when the charges against him were dismissed.

Florence brought an action under 42 U.S.C. § 1983, contending that persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process. The lower court granted summary judgment for Florence, reasoning that a policy of strip-searching of minor offenders without reasonable suspicion violates the Fourth Amendment. The court of appeals reversed that order. The Supreme Court affirmed the court of appeals.

After observing that the term "strip search" was imprecise in describing the jail procedures, Justice Kennedy noted that operating a detention center posed major challenges to officials that a court should not underestimate. He cited Bell v. Wolfish, 441 U.S. 520 (1979), which upheld a Federal Bureau of Prisons rule that detainees in any correctional facility were required "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." Justice Kennedy reasoned that correctional officials must be permitted to devise reasonable search policies to detect and deter possession of contraband, to assure that lice and contagious infections were not introduced into the prison population, to discover gang tattoos that might indicate a need for special housing,

and to discover weapons that may be especially dangerous in prison settings in which there are feuding gangs.

Florence acknowledged that correctional officials had to conduct effective intake searches and this would include having at least some detainees lift their genitals or cough in a squatting position, but argued that there was little benefit in imposing such procedures on a new detainee who has not been arrested for a serious crime involving weapons or drugs. Justice Kennedy rejected the argument and stated that "[i]t is reasonable * * * for correctional officials to conclude that this standard would be unworkable." One reason is that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals." Another is that "[i]t * * * may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search"; and "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset." Justice Kennedy cited *Atwater* for the proposition that it was important that officials in charge of jails, like police officers, can rely on readily administrable rules. In the end, Justice Kennedy stated that "[t]his case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."

Chief Justice Roberts concurred and emphasized that the majority's opinion does not foreclose the possibility of an exception to the general rule. Justice Alito concurred and emphasized "that the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population."

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, dissented and stated that "I have found no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests mentioned above [to detect injuries or diseases, to identify gang tattoos which might reflect a need for special housing, or to detect contraband]."

"Special Needs" Search of Text Messages of a Public Employee: City of Ontario v. Quon

In City of Ontario v. Quon, 560 U.S. 476 (2010), a police officer was given a pager with a monthly text allotment. He exceeded that allotment in a number of consecutive months. This led his supervisors to review his text messages, in order to determine whether they were work-related and

whether a greater monthly allotment was required. The review indicated that many of Quon's texts were not work-related, and some were sexually explicit. The supervisors concluded that Quon had violated Police Department rules about use of the department-issued pagers, and Quon was disciplined. Quon challenged the review of his text messages as an unreasonable search. But the Court found no such violation, relying on the "special needs" exception.

Justice Kennedy, writing for eight members of the Court, found that the "there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work-related purpose"—specifically the supervisors were trying to determine whether the character limit under the monthly plan with the provider was sufficient to meet the City's needs. The City and the Police Department "had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications."

Justice Kennedy also found that the review of the text messages was reasonable in scope "because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." Moreover, Quon's expectation of privacy, if any, was at least diminished by the fact that the Department had made Quon aware that his text messages were subject to auditing. Justice Kennedy noted that the audit of messages on an employer-provided pager "was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters."

The lower court had found the search of the texts unreasonable because the supervisors could have issued Quon a warning about overages, or they could have had Quon provide the messages to them in redacted form. But Justice Kennedy found that analysis to be inconsistent with the Court's Fourth Amendment jurisprudence. He noted that the Court "has refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment. That rationale could raise insuperable barriers to the exercise of virtually all search-and-seizure powers because judges engaged in post-hoc evaluations of government conduct can always imagine some alternative means by which the objectives of the government might have been accomplished."

It should be noted that the *Quon* Court assumed arguendo that the review of the text messages was a search in the first place. The City contended that Quon had *no* expectation of privacy in his text messages

because the Department gave him the pager and he was aware of the possibility of monitoring. Justice Kennedy responded that it was necessary to "proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." It was unnecessary to decide whether there was a search, because even if there was, it was reasonable under the special needs exception.

Justice Stevens wrote a concurring opinion in *Quon*. Justice Scalia wrote an opinion concurring in part and concurring in the judgment.

4. Roadblocks, Checkpoints and Suspicionless Seizures

Individual Stops Without Suspicion

In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that an officer could not, in the absence of reasonable suspicion, stop an automobile and detain the driver in order to check his license and registration. The officer in *Prouse* made an ad hoc, suspicionless stop, and the Court expressed its concern with "the unconstrained exercise of discretion." The Court concluded that such an ad hoc stop was not "sufficiently productive mechanism to justify the intrusion" and that there were other, better ways to effectuate the state interest in vehicle registration and safety, such as yearly inspections. The majority emphasized that it was not foreclosing as one possible alternative the "questioning of all oncoming traffic at roadblock-type stops." In response to the majority's roadblock alternative, Justice Rehnquist argued in dissent that the majority had "elevated the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." Why is it better to stop everybody rather than anybody?

Permanent Checkpoints

The dictum in *Prouse* concerning the reasonableness of roadblock-type stops was supported by the Court's earlier decision in United States v. Martinez-Fuerte, 428 U.S. 543 (1976). In *Martinez-Fuerte* the Court, invoking *Terry* principles, approved suspicionless stops at permanent checkpoints removed from the border. The Court emphasized that suspicionless stops were necessary to implement the state interest in regulating the flow of illegal aliens, and noted that the fixed checkpoint was minimally intrusive. Justice Powell, writing for the Court, argued that motorists are not surprised by a fixed checkpoint; that such checkpoints limit the discretion of the officer; and that "the location of a fixed checkpoint is not chosen by officers in the field, but by officials

responsible for making overall decisions as to the most effective allocation of limited enforcement resources." Justice Powell stressed that it was permissible to dispense with particularized suspicion because "we deal neither with searches nor with the sanctuary of private dwellings."

Temporary Checkpoints to Check for DUI

The Court upheld suspicionless stops at temporary sobriety checkpoints in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). The Michigan program allowed checkpoints to be set up by officers in the field according to a list of considerations including "safety of the location," "minimum inconvenience for the driver," and available space "to pull the vehicle off the traveled portion of the roadway for further inquiry if necessary." Under the program, all motorists passing through the checkpoint were stopped and briefly examined for signs of intoxication. If the driver appeared intoxicated, he or she was directed to another area where license and registration was checked, and further sobriety tests were conducted if warranted. The only checkpoint operated under the program resulted in a stop of 126 vehicles, and one arrest for drunk driving. The challenge in the Supreme Court focused solely on the initial detention and associated preliminary investigation of motorists for signs of intoxication.

Chief Justice Rehnquist's opinion for five members of the Court relied heavily on *Martinez-Fuerte,* and applied the "misery loves company" rationale that then-Justice Rehnquist had criticized in *Prouse.*

Respondents in *Sitz* argued that a reasonableness balancing approach could not be employed to evaluate sobriety checkpoints, because there was no special need beyond criminal law enforcement at stake. They argued that sobriety checkpoints are simply used to enforce criminal laws prohibiting drunk driving.

The majority responded that a special need beyond criminal law enforcement was not required to support reasonableness balancing for stops at fixed checkpoints. The Chief Justice stated that the special needs analysis of *Skinner* et al. "was in no way designed to repudiate our prior cases dealing with police stops." Thus, the Court relied on the *Terry* line of cases rather than on the "special needs" line of cases.

Balancing the interests of the state and the individual, as permitted for law enforcement seizures by *Terry*, the Chief Justice quoted from *Martinez-Fuerte,* and concluded that the intrusiveness of a sobriety checkpoint was extremely limited:

> At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the

> intrusion. * * * Here, checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle. The intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.

Against this limited intrusion, the Court balanced the State's heavy interest in eradicating drunk driving. Chief Justice Rehnquist rejected the argument that sobriety checkpoints did not effectively advance this undeniable state interest. He stated that references to effectiveness of searches and seizures in previous cases, such as *Prouse*, were not intended "to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." The Court concluded that "the choice among such reasonable alternatives remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources." The majority faulted the lower court for its "searching examination" of the effectiveness of sobriety checkpoints.

Justice Stevens wrote a dissenting opinion joined in large part by Justices Brennan and Marshall. He argued that unlike the permanent, fixed checkpoint in *Martinez-Fuerte*, the police operating a sobriety checkpoint "have extremely broad discretion in determining the exact timing and placement of the roadblock." Moreover, a temporary checkpoint is more intrusive because of the element of surprise that it presents:

> A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply "business as usual," and may likewise infer, again correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point.

QUESTIONS AFTER SITZ

The Court in *Sitz* chided the lower court for second-guessing the legislature's determination that roadblocks would be an effective means of investigating and deterring drunk driving. Yet in *Chandler*, supra, the Court second-guessed the legislature's determination that its drug-testing plan would be an effective means of detecting and deterring drug use in candidates for public office. How do you square the two cases?

On the problems of figuring out the effectiveness of a sobriety checkpoint—and the consequent need to defer to police on such questions—see Judge Boudin in United States v. William, 603 F.3d 66 (1st Cir. 2010), a

case in which the defendant was stopped at a sobriety checkpoint and drugs were eventually found in his car:

> William argues that * * * the data offered to support the use of this checkpoint at this location was inadequate and that the results in arrest numbers were unimpressive. Certainly one can imagine a purported sobriety checkpoint whose location or timing was demonstrably unlikely to be of use. But in *Sitz,* Chief Justice Rehnquist went out of his way to say that whether and where to establish a stop is primarily a judgment for state or local officials. In addition, using the number of drunk driving arrests resulting from a specific checkpoint has at least two problems: one is that the reasonableness of the effort is primarily a forward-looking exercise (in fact, the percentage of arrests in *Sitz* was very low); and the other is that sobriety checkpoints likely have a deterrent value apart from immediate detentions resulting from the stops.

If *Martinez-Fuerte* is the correct analogy, can *Sitz* stand for the proposition that daily stops are permissible at *any* location? Can *Martinez-Fuerte* justify roving or moveable checkpoints? If so, who decides where these checkpoints should be placed? Does it make a difference that the location of the checkpoint in *Martinez-Fuerte* was chosen by high level officials rather than by officers in the field?

Drug Checkpoints

In the following case, the Court essentially revised its analysis in *Sitz* and distinguished sobriety roadblocks from checkpoints designed to check for drugs. The Court invalidates a roadblock program because its primary purpose was to enforce the criminal law. How is a court supposed to determine whether the state has an improper purpose after this case?

CITY OF INDIANAPOLIS v. EDMOND

Supreme Court of the United States, 2000.
531 U.S. 32.

JUSTICE O'CONNOR delivered the opinion of the Court.

In Michigan Dept. of State Police v. Sitz and United States v. Martinez-Fuerte we held that brief, suspicionless seizures at highway checkpoints for the purposes of combating drunk driving and intercepting illegal immigrants were constitutional. We now consider the constitutionality of a highway checkpoint program whose primary purpose is the discovery and interdiction of illegal narcotics.

* * *

In August 1998, the city of Indianapolis began to operate vehicle checkpoints on Indianapolis roads in an effort to interdict unlawful drugs. The city conducted six such roadblocks between August and November

that year, stopping 1,161 vehicles and arresting 104 motorists. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs. The overall "hit rate" of the program was thus approximately nine percent.

The parties stipulated to the facts concerning the operation of the checkpoints by the Indianapolis Police Department (IPD) for purposes of the preliminary injunction proceedings instituted below. At each checkpoint location, the police stop a predetermined number of vehicles. * * * Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence. * * * [C]heckpoint locations are selected weeks in advance based on such considerations as area crime statistics and traffic flow. The checkpoints are generally operated during daylight hours and are identified with lighted signs reading, "NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." Once a group of cars has been stopped, other traffic proceeds without interruption until all the stopped cars have been processed or diverted for further processing. * * * [T]he average stop for a vehicle not subject to further processing lasts two to three minutes or less.

Respondents James Edmond and Joell Palmer were each stopped at a narcotics checkpoint in late September 1998. Respondents then filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints. Respondents claimed that the roadblocks violated the Fourth Amendment of the United States Constitution. * * * [The court of appeals held that the checkpoints violated the Fourth Amendment.]

* * * A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. Chandler v. Miller. While such suspicion is not an "irreducible" component of reasonableness, *Martinez-Fuerte*, we have recognized only limited circumstances in which the usual rule does not apply. For example, we have upheld certain regimes of suspicionless searches where the program was designed to serve "special needs, beyond the normal need for law enforcement." [The Court

describes its drug-testing cases.] We have also allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited. See, *e.g.*, New York v. Burger (warrantless administrative inspection of premises of "closely regulated" business); Camara v. Municipal Court of City and County of San Francisco (administrative inspection to ensure compliance with city housing code).

* * *

In *Sitz*, we evaluated the constitutionality of a Michigan highway sobriety checkpoint program. The *Sitz* checkpoint involved brief suspicionless stops of motorists so that police officers could detect signs of intoxication and remove impaired drivers from the road. * * * This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional.

In *Prouse*, we invalidated a discretionary, suspicionless stop for a spot check of a motorist's driver's license and vehicle registration. The officer's conduct in that case was unconstitutional primarily on account of his exercise of "standardless and unconstrained discretion." We nonetheless acknowledged the States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Accordingly, we suggested that "[q]uestioning of all oncoming traffic at roadblock-type stops" would be a lawful means of serving this interest in highway safety.

We further indicated in *Prouse* that we considered the purposes of such a hypothetical roadblock to be distinct from a general purpose of investigating crime. * * * [T]he common thread of highway safety thus run[s] through *Sitz* and *Prouse* * * *.

It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. See United States v. Place. * * * [W]hat principally distinguishes these checkpoints from those we have previously approved is their primary purpose.

As petitioners concede, the Indianapolis checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics.

In their stipulation of facts, the parties repeatedly refer to the checkpoints as "drug checkpoints" and describe them as "being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis." In addition, the first document attached to the parties' stipulation is entitled "DRUG CHECKPOINT CONTACT OFFICER DIRECTIVES BY ORDER OF THE CHIEF OF POLICE.". These directives instruct officers to "[a]dvise the citizen that they are being stopped briefly at a drug checkpoint." * * * Further, * * * the checkpoints are identified with lighted signs reading, "NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP." * * *

We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. * * * [E]ach of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

Petitioners propose several ways in which the narcotics-detection purposes of the instant checkpoint program may instead resemble the primary purposes of the checkpoints in *Sitz* and *Martinez-Fuerte*. Petitioners state that the checkpoints in those cases had the same ultimate purpose of arresting those suspected of committing crimes. Securing the border and apprehending drunk drivers are, of course, law enforcement activities, and law enforcement officers employ arrests and criminal prosecutions in pursuit of these goals. If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.

Petitioners also emphasize the severe and intractable nature of the drug problem as justification for the checkpoint program. There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude. * * * But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.

Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz*. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

Petitioners also liken the anticontraband agenda of the Indianapolis checkpoints to the antismuggling purpose of the checkpoints in *Martinez-Fuerte*. Petitioners cite this Court's conclusion in *Martinez-Fuerte* that the flow of traffic was too heavy to permit "particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens," and claim that this logic has even more force here. The problem with this argument is that the same logic prevails any time a vehicle is employed to conceal contraband or other evidence of a crime. This type of connection to the roadway is very different from the close connection to roadway safety that was present in *Sitz* and *Prouse*. Further, the Indianapolis checkpoints are far removed from the border context that was crucial in *Martinez-Fuerte*. * * *

* * * We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example * * * the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route. The exigencies created by these scenarios are far removed from the circumstances under which authorities might simply stop cars as a matter of course to see if there just happens to be a felon leaving the jurisdiction. While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.

Petitioners argue that our prior cases preclude an inquiry into the purposes of the checkpoint program. For example, they cite Whren v. United States, * * * to support the proposition that "where the government articulates and pursues a legitimate interest for a

suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid." These cases, however, do not control the instant situation.

In *Whren*, we held that an individual officer's subjective intentions are irrelevant to the Fourth Amendment validity of a traffic stop that is justified objectively by probable cause to believe that a traffic violation has occurred. * * * In so holding, we expressly distinguished cases where we had addressed the validity of searches conducted in the absence of probable cause. * * *

Whren therefore reinforces the principle that, while "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. Accordingly, *Whren* does not preclude an inquiry into programmatic purpose in such contexts. It likewise does not preclude an inquiry into programmatic purpose here.

* * *

Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful. As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar. While reasonableness under the Fourth Amendment is predominantly an objective inquiry, our special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.[a]

* * *

Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the

[a] Because petitioners concede that the primary purpose of the Indianapolis checkpoints is narcotics detection, we need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics. Specifically, we express no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.

need for such measures to ensure public safety can be particularly acute. Nor does our opinion speak to other intrusions aimed primarily at purposes beyond the general interest in crime control. Our holding also does not impair the ability of police officers to act appropriately upon information that they properly learn during a checkpoint stop justified by a lawful primary purpose, even where such action may result in the arrest of a motorist for an offense unrelated to that purpose. Finally, we caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.

Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment. The judgment of the Court of Appeals is accordingly affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, and with whom JUSTICE SCALIA joins [in relevant part], dissenting.

* * *

* * * The only difference between this case and *Sitz* is the presence of the dog. We have already held, however, that a "sniff test" by a trained narcotics dog is not a "search" within the meaning of the Fourth Amendment because it does not require physical intrusion of the object being sniffed and it does not expose anything other than the contraband items. And there is nothing in the record to indicate that the dog sniff lengthens the stop. Finally, the checkpoints' success rate—49 arrests for offenses unrelated to drugs—only confirms the State's legitimate interests in preventing drunken driving and ensuring the proper licensing of drivers and registration of their vehicles. These stops effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude upon the privacy of the motorists. They should therefore be constitutional.

* * *

[T]he Court's newfound non-law-enforcement primary purpose test is both unnecessary to secure Fourth Amendment rights and bound to produce wide-ranging litigation over the "purpose" of any given seizure. Police designing highway roadblocks can never be sure of their validity, since a jury might later determine that a forbidden purpose exists.

* * * [I]f the Indianapolis police had assigned a different purpose to their activity here, but in no way changed what was done on the ground to individual motorists, it might well be valid. [The Chief Justice cites the majority's footnote concerning the possible permissibility of a checkpoint whose secondary purpose is drug interdiction.] The Court's non-law-

enforcement primary purpose test simply does not serve as a proxy for anything that the Fourth Amendment is, or should be, concerned about in the automobile seizure context.

* * *

JUSTICE THOMAS, dissenting.

Taken together, our decisions in Michigan Dept. of State Police v. Sitz and United States v. Martinez-Fuerte stand for the proposition that suspicionless roadblock seizures are constitutionally permissible if conducted according to a plan that limits the discretion of the officers conducting the stops. I am not convinced that *Sitz* and *Martinez-Fuerte* were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered "reasonable" a program of indiscriminate stops of individuals not suspected of wrongdoing.

Respondents did not, however, advocate the overruling of *Sitz* and *Martinez-Fuerte,* and I am reluctant to consider such a step without the benefit of briefing and argument. For the reasons given by THE CHIEF JUSTICE, I believe that those cases compel upholding the program at issue here. I, therefore, join his opinion.

NOTE ON EDMOND AND CHECKPOINTS AFTER 9/11

The *Edmond* majority was concerned that checkpoints would become "a routine part of American life." After 9/11, checkpoints have indeed become routine. Many of the checkpoints are not simply seizures, but intrusive searches as well (e.g., airport checkpoints). But the checkpoints seem to fall within the majority's perhaps prophetic paragraph that permits terrorism-related checkpoints without any showing of suspicion. And if these are "special needs" checkpoints, then the additional step of a search can usually be justified by balancing the government's interest in rooting out terrorism against the individual's diminished interest in privacy.

Terrorism-related checkpoints after 9/11 have routinely been upheld. An example is United States v. Green, 293 F.3d 855 (5th Cir. 2002), upholding a suspicionless roadblock check on an open military installation. The court declared as follows:

> We believe that this case differs substantially from *Edmond* in two respects. First, the protection of the nation's military installations from acts of domestic or international terrorism is a unique endeavour, akin to the policing of our borders, and one in which a greater degree of intrusiveness may be allowed. Second, those cases focusing not on unique, national challenges, but instead on road safety, are concerned with dangers specifically associated with vehicles and therefore justify suspicionless checkpoint seizures. Since we know from painful experience that vehicles are often used to transport and deliver explosives in the form of "car bombs," and that military installations

have historically faced greater risk than civilian communities of such a bombing, vehicles pose a special risk.

The majority in *Edmond* also seemed to approve of emergency roadblocks to catch a dangerous criminal, such as were used during the Washington, D.C. area sniper attacks. Where is the line, then, between crime enforcement and special needs?

Drug Interdiction as a Secondary Purpose

The majority in *Edmond* dropped a footnote to state that it was not deciding whether checkpoints are invalid if they have drug interdiction as a *secondary* purpose. Throughout the opinion, the Court emphasizes that the *primary* purpose of the Indianapolis checkpoint was drug interdiction, as opposed to a vehicle-related threat to public safety. After *Edmond,* courts have upheld checkpoints where the articulated primary purpose effectuates special needs beyond law enforcement—even though there is also a secondary purpose of drug interdiction. See, e.g., United States v. Davis, 270 F.3d 977 (D.C.Cir. 2001) (checkpoint not invalidated by secondary purpose of drug interdiction, noting that *Edmond* "more than suggests that if the 'primary purpose' had been for a purpose the Court endorsed—such as detecting drunk drivers, or checking licenses—the roadblock would be constitutional."); United States v. Moreno-Vargas, 300 F.3d 489 (5th Cir. 2002) (use of drug-detecting dogs at a permanent fixed immigration checkpoint does not invalidate the checkpoint stops; drug interdiction was a permissible secondary purpose of the checkpoint).

Assuming there is a constitutional distinction between primary and secondary purposes, how hard is it for the government to evade the Court's holding in *Edmond*? What prevents the government from labeling its checkpoint a "sobriety" or "registration" checkpoint, and keeping a drug detecting dog at the checkpoint as part of a specified "secondary" purpose?

Drug-Detection as a Vehicle-Related Safety Interest

The *Edmond* Court distinguished sobriety checkpoints from the Indianapolis drug interdiction checkpoint on the ground that drunk drivers present an immediate, vehicle-related safety threat while drug dealers do not raise a specific safety issue merely by driving. Does this mean that suspicionless drug checkpoints would be permitted if they are styled as an attempt to detect those who are driving *under the influence* of drugs?

What if the state can make a reasonable argument that drug dealers do indeed create a vehicle-related threat to safety? After all, drug dealers are probably not the safest drivers. They are likely to double park,

commit illegal u-turns, and generally act without concern of the traffic laws. In United States v. Davis, 270 F.3d 977 (D.C.Cir. 2001), the court upheld a checkpoint that was in response to community complaints that drug dealers and buyers in cars were speeding, committing illegal u-turns, and causing traffic congestion. The Court noted that the primary purpose of the roadblock was to remedy the traffic problems caused by drug-dealing and "[w]hatever advantage was gained in drug enforcement was coincidental to the principal purpose of the traffic roadblocks." If this is correct, how much is left of the majority opinion in *Edmond*?

Suspicionless Checkpoints to Obtain Information About a Crime: Illinois v. Lidster

In Illinois v. Lidster, 540 U.S. 439 (2004), Justice Breyer wrote for the Court as it upheld a highway checkpoint where motorists were stopped, without suspicion, so that police could ask them about a recent hit-and-run accident. The roadblock was established about a week after the accident on the same highway where the accident occurred and at about the same time of night. Lidster was driving a minivan as he approached the checkpoint, his van swerved and nearly hit one of the officers, and eventually Lidster was arrested for and convicted of driving under the influence.

Justice Breyer reasoned that the checkpoint stop was different from *Edmund* because the officers were not stopping cars to determine whether occupants were committing crimes and the objective of the Illinois roadblock was not to further a "general interest in crime control," He concluded that information-seeking highway stops are less likely to provoke anxiety or to prove intrusive than other stops and "citizens will often react positively when police simply ask for their help as responsible citizens to give whatever information they may have to aid law enforcement." Justice Breyer found that the roadblock was reasonable given that "[t]he relevant public concern was grave" in light of the fact that the accident has resulted in a death, "[t]he stop advanced this grave public concern to a significant degree," and "[t]he police appropriately tailored their checkpoint stops to fit important criminal investigatory needs."

Justice Stevens, joined by Justices Souter and Ginsburg, concurred in part and dissented in part. He agreed that *Edmunds* was not controlling, but found that the reasonableness of the checkpoint was a close question that justified a remand to the state courts so that they could address that question.

5. DNA Testing

When, if ever, is suspicionless DNA testing of individuals reasonable? Can DNA testing—comparing a person's DNA against a database for identification—be justified as promoting "special needs" beyond ordinary criminal law enforcement? The Court considered these questions in the following case.

MARYLAND v. KING

Supreme Court of the United States, 2013.
133 S.Ct. 1958.

JUSTICE KENNEDY delivered the opinion of the Court.

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA.

In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. * * *

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. This Court granted certiorari and now reverses the judgment of the Maryland court.

I

When King was arrested on April 10, 2009, for menacing a group of people with a shotgun and charged in state court with both first- and second-degree assault, he was processed for detention in custody at the Wicomico County Central Booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to provisions of the Maryland DNA Collection Act (or Act).

* * *

The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored, but the utility of DNA identification in the criminal justice system is already undisputed. Since

the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, law enforcement, the defense bar, and the courts have acknowledged DNA testing's unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. * * *

The current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. The DNA material in chromosomes is composed of "coding" and "noncoding" regions. The coding regions are known as genes and contain the information necessary for a cell to make proteins. Non-protein-coding regions are not related directly to making proteins, and have been referred to as "junk" DNA. The adjective "junk" may mislead the layperson, for in fact this is the DNA region used with near certainty to identify a person. The term apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.

* * * The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary." * * * Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If all qualifying criminal charges are determined to be unsupported by probable cause the DNA sample [is] immediately destroyed. DNA samples are also destroyed if a criminal action begun against the individual does not result in a conviction, the conviction is finally reversed or vacated and no new trial is permitted, or the individual is granted an unconditional pardon.

The Act also limits the information added to a DNA database and how it may be used. Specifically, only DNA records that directly relate to the identification of individuals [may] be collected and stored. No purpose other than identification is permissible * * *. Tests for familial matches are also prohibited. The officers involved in taking and analyzing respondent's DNA sample complied with the Act in all respects.

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells. The procedure is quick and painless. * * *

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal

Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. Since its authorization in 1994, the CODIS system has grown to include all 50 States and a number of federal agencies. CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes. * * *. [T]he DNA identification is accompanied only by information denoting the laboratory and the analyst responsible for the submission. In short, CODIS sets uniform national standards for DNA matching and then facilitates connections between local law enforcement agencies who can share more specific information about matched * * * profiles.

All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. * * * At issue is a standard, expanding technology already in widespread use throughout the Nation.

* * * It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. * * *

A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek * * *. The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

* * *

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." Illinois v. McArthur, 531 U.S. 326, 330 (2001). * * * The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer." Treasury Employees v. Von Raab.

The instant case can be addressed with this background. The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be colored by their primary involvement in "the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). As noted by this Court

in a different but still instructive context involving blood testing, "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them.... Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Skinner*, supra, at 622. Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson*.

Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. To say that no warrant is required is merely to acknowledge that rather than employing a per se rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable. This application of traditional standards of reasonableness requires a court to weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy. * * *

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Also uncontested is the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested. * * *

The routine administrative procedure[s] at a police station house incident to booking and jailing the suspect derive from different origins and have different constitutional justifications than, say, the search of a place; for the search of a place not incident to an arrest depends on the fair probability that contraband or evidence of a crime will be found in a particular place. The interests are further different when an individual is formally processed into police custody. Then "the law is in the act of subjecting the body of the accused to its physical dominion." People v. Chiagles, 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923) (Cardozo, J.). When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177 (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. * * * It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. * * * An arrestee may be carrying a false ID or lie about his identity, and criminal history records can be inaccurate or incomplete.

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. It is a common occurrence that people detained for minor offenses can turn out to be the most devious and dangerous criminals. Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. * * * A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. * * * Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.

* * *

Third, looking forward to future stages of criminal prosecution, the Government has a substantial interest in ensuring that persons accused of crimes are available for trials. A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more

inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. For example, a defendant who had committed a prior sexual assault might be inclined to flee on a burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape. * * * Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. * * * DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. * * *

This interest is not speculative. In considering laws to require collecting DNA from arrestees, government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them. * * *

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. Regardless of when the initial bail decision is made, release is not appropriate until a further determination is made as to the person's identity in the sense not only of what his birth certificate states but also what other records and data disclose to give that identity more meaning in the whole context of who the person really is. And even when release is permitted, the background identity of the suspect is necessary for determining what conditions must be met before release is allowed. If release is authorized, it may take time for the conditions to be met, and so the time before actual release can be substantial. For example, in the federal system, defendants released conditionally are detained on average for 112 days; those released on unsecured bond for 37 days; on personal recognizance for 36 days; and on other financial conditions for 27 days. During this entire period, additional and supplemental data establishing more about the person's identity and background can provide critical information relevant to the conditions of release and whether to revisit an initial release determination. The facts of this case are illustrative. Though the record is not clear, if some thought were being given to releasing the respondent on bail on the gun charge, a release that would take weeks or months in any event, when the DNA report linked him to the prior rape, it would be relevant to the conditions of his release. * * * Even if an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past can and should lead to the revocation of his conditional release. * * *

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing . . . would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of . . . innocent people." J. Dwyer, P. Neufeld, & B. Scheck, Actual Innocence 245 (2000).

* * *

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. * * * Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of the administrative steps incident to arrest. * * *

DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or the layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, * * * and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

The respondent's primary objection to this analogy is that DNA identification is not as fast as fingerprinting, and so it should not be considered to be the 21st-century equivalent. But rapid analysis of fingerprints is itself of recent vintage. The FBI's vaunted Integrated Automated Fingerprint Identification System (IAFIS) was only launched on July 28, 1999. Prior to this time, the processing of fingerprint submissions was largely a manual, labor-intensive process, taking weeks or months to process a single submission. * * * The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Given the importance of DNA in the identification of police records pertaining to arrestees and the need to refine and confirm that identity for its important bearing on the decision to continue release on bail or to impose of new conditions, DNA serves an essential purpose despite the existence of delays such as the one that occurred in this case. Even so, the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical

advances. See, e.g., Attorney General DeWine Announces Significant Drop in DNA Turnaround Time (Jan. 4, 2013) (DNA processing time reduced from 125 days in 2010 to 20 days in 2012), online at http://ohioattorneygeneral.gov/Media/News-Releases/January-2013/Attorney-General-DeWine-Announces-Significant-Drop. And the FBI has already begun testing devices that will enable police to process the DNA of arrestees within 90 minutes. An assessment and understanding of the reasonableness of this minimally invasive search of a person detained for a serious crime should take account of these technical advances. * * *

In sum, there can be little reason to question the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution. * * * DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is no more than an extension of methods of identification long used in dealing with persons under arrest. In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

* * * By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. * * *

The expectations of privacy of an individual taken into police custody necessarily are of a diminished scope. * * *

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as "special needs " searches. Chandler v. Miller, 520 U.S. 305, 314 (1997). * * * Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen. The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.

The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: diminished expectations of privacy and minimal intrusions. * * * This is not to suggest that any search is acceptable solely

because a person is in custody. Some searches, such as invasive surgery, or a search of the arrestee's home, involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable, the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

Here, by contrast to the approved standard procedures incident to any arrest detailed above, a buccal swab involves an even more brief and still minimal intrusion. A gentle rub along the inside of the cheek does not break the skin, and it involves virtually no risk, trauma, or pain. * * * A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

* * * In addition the processing of respondent's DNA sample * * * did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional.

First, as already noted, the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee. * * * And even if non-coding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it "significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Vernonia School Dist. 47J*, 515 U.S., at 658. If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

Finally, the Act provides statutory protections that guard against further invasion of privacy. As noted above, the Act requires that only DNA records that directly relate to the identification of individuals shall be collected and stored. No purpose other than identification is permissible. * * * The Court need not speculate about the risks posed by a system that [does] not contain comparable security provisions. In light of the scientific and statutory safeguards, once respondent's DNA was lawfully collected the * * * analysis of respondent's DNA pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.

* * * When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment. * * *

JUSTICE SCALIA, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

* * *

Although there is a "closely guarded category of constitutionally permissible suspicionless searches," that has never included searches designed to serve "the normal need for law enforcement," Skinner v. Railway Labor Executives' Assn.. Even the common name for suspicionless searches—"special needs" searches—itself reflects that they must be justified, always, by concerns other than crime detection. We have approved random drug tests of railroad employees, yes—but only because the Government's need to "regulat[e] the conduct of railroad employees to ensure safety" is distinct from "normal law enforcement." *Skinner*, supra, at 620. So too we have approved suspicionless searches in public schools—but only because there the government acts in furtherance of its "responsibilities . . . as guardian and tutor of children entrusted to its care." Vernonia School Dist. 47J v. Acton.

So while the Court is correct to note that there are instances in which we have permitted searches without individualized suspicion, "[i]n none of these cases . . . did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Indianapolis v. Edmond. That limitation is crucial. It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form "reasonableness" inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court's

method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

The Court alludes at several points to the fact that King was an arrestee, and arrestees may be validly searched incident to their arrest. But the Court does not really rest on this principle, and for good reason: The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. See Arizona v. Gant. Neither is the object of the search at issue here.

* * *

* * * No matter the degree of invasiveness, suspicionless searches are never allowed if their principal end is ordinary crime-solving. * * *

Sensing (correctly) that it needs more, the Court elaborates at length the ways that the search here served the special purpose of "identifying" King. But that seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." * * * If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. * * * I will therefore assume that the Court means that the DNA search at issue here was useful to "identify" King in the normal sense of that word—in the sense that would identify the author of Introduction to the Principles of Morals and Legislation as Jeremy Bentham.

* * * The portion of the Court's opinion that explains the identification rationale is strangely silent on the actual workings of the DNA search at issue here. To know those facts is to be instantly disabused of the notion that what happened had anything to do with identifying King.

King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police searched him and seized the DNA evidence at issue here. What happened next? Reading the Court's opinion, particularly its insistence that the search was necessary to know "who [had] been arrested," one might guess that King's DNA was swiftly processed and his identity thereby confirmed—perhaps against some master database of known DNA profiles, as is done for fingerprints. After all, was not the suspicionless search here crucial to avoid "inordinate risks for facility staff" or to "existing detainee population"? Surely, then—surely—the State of Maryland got cracking on those grave risks immediately, by rushing to identify King with his DNA as soon as possible.

Nothing could be further from the truth. Maryland officials did not even begin the process of testing King's DNA that day. Or, actually, the next day. Or the day after that. And that was for a simple reason: Maryland law forbids them to do so. A "DNA sample collected from an individual charged with a crime . . . may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date." Md. Pub. Saf. Code Ann. § 2–504(d)(1). And King's first appearance in court was not until three days after his arrest. (I suspect, though, that they did not wait three days to ask his name or take his fingerprints.)

This places in a rather different light the Court's solemn declaration that the search here was necessary so that King could be identified at "every stage of the criminal process." Does the Court really believe that Maryland did not know whom it was arraigning? The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.

* * * The FBI's DNA database (known as CODIS) consists of two distinct collections. One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. I will refer to this as the "Convict and Arrestee Collection." The other collection consists of samples taken from crime scenes; I will refer to this as the "Unsolved Crimes Collection." The Convict and Arrestee Collection stores no names or other personal identifiers of the offenders, arrestees, or detainees. Rather, it contains only the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen. This is because the submitting state laboratories are expected already to know the identities of the convicts and arrestees from whom samples are taken. (And, of course, they do.)

Moreover, the CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection. That is sensible, if what one wants to do is solve those cold cases, but note what it requires: that the identity of the people whose DNA has been entered in the Convict and Arrestee Collection already be known. If one wanted to identify someone in custody using his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection * * *. But that is not what was done. And that is because this search had nothing to do with identification.

* * *

More devastating still for the Court's "identification" theory, the statute does enumerate two instances in which a DNA sample may be tested for the purpose of identification: "to help identify human remains" and "to help identify missing individuals." No mention of identifying

arrestees. Inclusio unius est exclusio alterius. And note again that Maryland forbids using DNA records "for any purposes other than those specified"—it is actually a crime to do so.

* * *

The Court also attempts to bolster its identification theory with a series of inapposite analogies.

Is not taking DNA samples the same, asks the Court, as taking a person's photograph? No—because that is not a Fourth Amendment search at all. It does not involve a physical intrusion onto the person, see Florida v. Jardines, and we have never held that merely taking a person's photograph invades any recognized "expectation of privacy." * * *

* * *

It is on the fingerprinting of arrestees, however, that the Court relies most heavily. The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question. Even assuming so, however, law enforcement's post-arrest use of fingerprints could not be more different from its post-arrest use of DNA. Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else).

* * *

Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's DNA was taken, and we should not disguise the fact. Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

* * * The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for "serious offense[s]." I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. If one believes that DNA will "identify" someone arrested for assault, he must believe that it will "identify" someone arrested for a traffic offense. * * * Make no mistake

about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.

* * *

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

I therefore dissent, and hope that today's incursion upon the Fourth Amendment * * * will some day be repudiated.

6. Inventory Searches

By now it should be apparent that the line between regulatory searches and law enforcement searches is often blurred. Another example of this overlap occurs with inventory searches. In most jurisdictions it is standard procedure for the police to inventory the contents of automobiles and other containers being held in their custody. An inventory search is not based on probable cause that evidence will be found, and *ostensibly* is unrelated to criminal investigation of any kind. As one court has put it, the police are allowed to conduct inventory searches without a warrant and without suspicion, in order "to protect the owner's property while it is in police custody, to protect the police against claims of lost or stolen property, and to protect the police and the public from potential danger." The traditional requirements of warrant and probable cause are excused because inventory searches serve a "caretaking" function and "are not designed to uncover evidence of criminal activity." United States v. Andrews, 22 F.3d 1328 (5th Cir.1994).

As with other "special needs" searches, the lack of any requirement of probable cause or reasonable suspicion raises the spectre of unregulated police discretion as to what and when to search. To control that discretion, the government must show that the officer was operating pursuant to standard inventory procedures promulgated by the police department. See United States v. Petty, 367 F.3d 1009 (8th Cir. 2004) ("Some degree of standardized criteria or established routine must regulate these police actions * * * to ensure that impoundments and inventory searches are not merely a ruse for general rummaging in order to discover incriminating evidence.").

Community Caretaking Function

The Supreme Court has analyzed warrantless, suspicionless inventory searches in several instances. In Cady v. Dombrowski, 413 U.S. 433 (1973), the Court approved the search of a car towed to a private garage after an accident that resulted in the hospitalization of the driver. The driver was a Chicago policeman, and the officer who conducted the search testified that he was looking for the driver's service revolver, which he believed Chicago policemen were required to carry at all times. In the course of the search, blood-stained garments were discovered in the trunk, which were later used to convict the defendant of murder. In a 5–4 decision, Justice Rehnquist found that the initial intrusion to search for the gun was reasonable as a "community caretaking function," to protect the public from the possibility that it would fall into the hands of vandals. Therefore, the seizure of evidence found in plain view was also justified.

Warrantless, Suspicionless Searches: South Dakota v. Opperman

Two years after *Cady,* the Court upheld the warrantless, suspicionless inventory search of a car impounded for a parking violation. Chief Justice Burger, writing for the Court in South Dakota v. Opperman, 428 U.S. 364 (1976), emphasized that the search was conducted pursuant to standard police procedures, which helped to guarantee that the intrusion "would be limited to the scope necessary to carry out the caretaking function." The majority found the search of Opperman's impounded car to be a reasonable means of protecting valuables, which could be seen in plain view on the dashboard. Opperman argued that it was unreasonable for the officers to break open the lock of his car and search the glove compartment, where they found marijuana that was used against him at trial. But the Court held that these actions were reasonable because they were authorized, and indeed mandated, by local police regulations.

As in other special needs cases, the *Opperman* Court balanced the state interest in making the search against the intrusiveness of the search to determine whether inventory searches were reasonable. The Court found that three legitimate state interests supported an inventory search: 1) protection of the police department from false property claims; 2) protection of the property interests of the owner; and 3) protection of the police and public from dangerous items. The Court concluded that these state interests, which could only be effectuated by a suspicionless search, outweighed the owner's privacy interests, especially given the diminished expectation of privacy in automobiles.

Justice Powell, in a concurring opinion, explained why the warrant requirement is inapposite when an inventory search is conducted

pursuant to departmental regulations: First, there are no special facts for a neutral magistrate to evaluate so as to determine whether probable cause exists, because inventory searches are non-criminal in nature. Second, there is no danger of discretionary searches or hindsight justifications when searches are conducted in accordance with standard procedures. Third, the danger of arbitrariness is not present where routine searches of all impounded cars are conducted.

Justice Marshall—in a dissent joined by Justices Brennan and Stewart, and in part by Justice White—argued that warrantless, suspicionless inventory searches could not be justified by any "special need." He found the safety rationale—i.e., that inventory searches protected the police and public from dangerous items—to be overbroad. Every automobile and container poses at least some hypothetical threat to safety. Justice Marshall concluded that an "undifferentiated possibility of harm" cannot serve as a basis for an inventory, and that the safety rationale was only implicated where specific circumstances indicate the possibility of a particular danger—such as in *Cady*, where the officers reasonably believed that the defendant had a gun in his car.

Next, Justice Marshall considered the assertion that inventories are necessary to protect the police against lost property claims. In this case, the concern was irrelevant because South Dakota law absolved police of responsibility as "gratuitous depositors" beyond inventorying objects in plain view and locking the car. Furthermore, an inventory does not discourage false claims that an item was stolen prior to the search, or was intentionally omitted from police records. Nor does it ensure that such police misconduct did not in fact occur.

Finally, Justice Marshall derided the assertion that impoundment and search of property is a reasonable means of protecting the owner's property interests. In his view, the property owner's interests are best known by the property owner himself; if the owner feels that impoundment and search are needed to protect his property, then he can simply consent to these intrusions.

Property Carried by an Arrestee: Illinois v. Lafayette

The Supreme Court relied on South Dakota v. Opperman in Illinois v. Lafayette, 462 U.S. 640 (1983), as it upheld the inventory search at the police station of a shoulder bag belonging to a man arrested for disturbing the peace. The search uncovered drugs. Chief Justice Burger reasoned that the government's interests in an inventory search at the stationhouse "may in some circumstances be even greater that those supporting a search incident to arrest" and that police conduct that might be embarrassingly intrusive on the street could be handled privately at the stationhouse. The Chief Justice asserted that the three interests

supporting an inventory search were fully applicable to a stationhouse search of an arrestee's possessions: police need to protect the property of arrested persons, to protect themselves from claims of theft or damage to property, and to remove dangerous instrumentalities from arrestees.

The lower court in *Lafayette* had found the inventory search unreasonable on the ground that preservation of the property could have been achieved in a less intrusive manner—such as by storing the bag rather than investigating its contents. Chief Justice Burger rejected this "less intrusive alternative" reasoning, stating as follows:

> The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative less intrusive means. * * * Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.

In a footnote, the Court stated that the inventory search of Lafayette's bag might have been invalid if he was not going to be incarcerated after being booked for disturbing the peace.[25] If the arrestee is going to be released immediately, then the interests supporting an inventory search would not appear to be implicated. Justice Marshall, joined by Justice Brennan, concurred in the judgment.

Limits on Police Discretion: Colorado v. Bertine

Opperman and *Lafayette* supported the Supreme Court's decision in Colorado v. Bertine, 479 U.S. 367 (1987), holding that police officers could inventory the contents of a van, including a closed backpack and a nylon bag and other containers within it. Chief Justice Rehnquist's opinion for the Court rejected an argument that the impoundment of the car was unjustified because the driver could have been offered the opportunity to make arrangements for the safekeeping of his property. The Court concluded that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."

The *Bertine* Court also rejected the defendant's claim that the inventory was impermissible because departmental regulations gave police officers discretion to decide whether to impound the van or to park and lock it in a public parking lot. The Chief Justice noted that the

---

[25] A number of courts have held that a preincarceration inventory search is improper if the arrestee, upon posting collateral, has a right to immediate release. See, e.g., United States v. Mills, 472 F.2d 1231 (D.C.Cir.1972); People v. Dixon, 392 Mich. 691, 222 N.W.2d 749 (1974).

regulations established several factors by which the officer was to determine whether to impound the vehicle or instead exercise a park and lock alternative. The regulations permitted impoundment only in two conditions: if leaving the car would present a real risk of damage or vandalism to the car; or if approval to leave the car could not be obtained from the owner. The majority held that these conditions were sufficiently concrete and understandable to reasonably limit the discretion of the officer—providing a satisfactory substitute to the proof requirements of probable cause or reasonable suspicion. The Court concluded that "nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity."

Bertine also challenged the opening of the containers found in his car, on the ground that the inventorying officer did not properly weigh the privacy interest in the container against the risk that it might serve as a repository for dangerous or valuable items. The majority again rejected a less intrusive means analysis for opening containers in an inventory search. In a footnote, the Court emphasized that "the police department procedures mandated the opening of closed containers and the listing of their contents." Thus, the officer's discretion as to what to open was limited by the inventory rules that were in place.

Justice Blackmun, joined by Justices Powell and O'Connor, concurred and wrote separately "to underscore the importance of having such inventories conducted only pursuant to standardized police procedures." Justice Marshall, joined by Justice Brennan, dissented. He urged that the officers did not act according to standards that sufficiently controlled their discretion and he repeated the arguments he made in *Opperman* that the government's interests in conducting an inventory did not outweigh the property owner's privacy interests.

Unlimited Police Discretion Invalidates the Inventory Search: Florida v. Wells

The Court revisited the subject of police discretion in conducting inventory searches in Florida v. Wells, 495 U.S. 1 (1990). The Court unanimously found that the opening of a locked suitcase could not be justified as an inventory search where the Florida Highway Patrol had *no policy whatever* concerning the opening of closed containers. Chief Justice Rehnquist, writing for the Court, found the search to be insufficiently regulated by standardized police procedures. However, the Chief Justice took issue with a statement by the Florida Supreme Court that "the police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There

can be no room for discretion." According to the Court in *Wells*, the Fourth Amendment does allow the officer *some* latitude to decide whether a container may be opened in an inventory search. This discretion can be exercised, pursuant to departmental regulations, "in light of the nature of the search and the characteristics of the container itself." The Chief Justice concluded:

> While policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the contents' exteriors. The allowance of the exercise of judgment based on concerns related to the purpose of an inventory search does not violate the Fourth Amendment.

This dictum prompted sharp responses in opinions by Justice Brennan (joined by Justice Marshall), Justice Blackmun, and Justice Stevens, all of whom concurred in the judgment. These Justices generally argued that to allow the individual officer any discretion to determine whether a container should be opened would create an unacceptable risk of abuse. Justice Brennan noted that the *Bertine* Court had allowed the officer some discretion as to whether to impound a car, but no discretion as to whether to open a container therein. He concluded that "attempting to cast doubt on the vitality of the holding in *Bertine* in this otherwise easy case is not justified." In response to Justice Brennan's characterization of the *Bertine* "holding", the Chief Justice stated that while the departmental rules at issue in *Bertine* called for an opening of all containers, the Court did not actually hold that such an all-or-nothing rule was required by the Fourth Amendment.

After *Wells,* would a policy allowing police officers to open containers "if they reasonably appear to contain valuables" be upheld? See United States v. Mundy, 621 F.3d 283 (3rd Cir. 2010): "Though the [police department's inventory policy] does not contain magic words specifically to closed containers, its reference to 'any personal property of value' sufficiently regulated the scope of a permissible inventory search, and therefore authorized the opening of the shoebox in Mundy's trunk to determine if such property was contained therein." See also United States v. Andrews, 22 F.3d 1328 (5th Cir.1994) (upholding a search of a notebook pursuant to departmental regulations that authorized officers to search property insofar as necessary "to protect the city from claims of lost property").

In the end, there may be no way to completely eliminate the exercise of discretion in an inventory seizure and search. Certainly a rule requiring the "impoundment of all cars" would not be practicable, given the various fact situations in which officers come upon cars that might be

subject to impoundment. While an all-or-nothing rule could be applied to opening containers, discretion would still have to be exercised to determine whether a certain item is or is not a container. See generally United States v. Judge, 864 F.2d 1144 (5th Cir.1989). For example, if the inventorying officer finds a fountain pen in a car, can he open up the pen under a policy requiring the opening of all containers? What if he finds a teddy bear? See also United States v. Petty, 367 F.3d 1009 (8th Cir. 2004) (impoundment and inventory regulations "may allow some latitude and exercise of judgment by a police officer when those decisions are based on concerns related to the purposes" of the impoundment or inventory; noting that it is "not feasible for a police department to develop a policy that provides clear-cut guidance" in every potential impoundment or inventory situation).

The Problem of Pretext

The emphasis in *Opperman* and *Bertine* on standardized inventory procedures reflects concern that, absent such guidelines, investigatory searches for evidence of crime may be conducted under the guise of inventories. As we have seen in other areas, however (most notably with roadblocks and searches incident to arrest), the fact that the officer is guided by bright line, all-or-nothing rules does not eliminate the possibility of pretextual searches. And as in other areas, the fact that the officer may have a pretextual motive is usually held irrelevant if the search itself is objectively reasonable. See, e.g., United States v. Hawkins, 279 F.3d 83 (1st Cir. 2002) ("Appellant also challenges the search saying that the inventory was clearly a 'ruse' used to search for drugs. Regardless of what appellant suggests, the law is clear. The subjective intent of the officers is not relevant so long as they conduct a search according to a standardized inventory policy."); United States v. Kanatzar, 370 F.3d 810 (8th Cir.2004) ("The presence of an investigative motive does not invalidate an otherwise valid inventory search.").

On the other hand, if the officer is acting without guidelines, as in *Wells*, or if the officer *disregards guidelines to obtain evidence*, then the search cannot be justified as an inventory search. An example of the latter is where the officer opens only a few containers in an impounded automobile, or fails to file an inventory list where such a filing is required. See United States v. Parr, 716 F.2d 796 (11th Cir.1983) (search cannot be justified as an inventory search where items were selectively investigated). As the court put it in United States v. Rowland, 341 F.3d 774 (8th Cir. 2003), finding an illegal search where officers inventoried the evidence of crime but not other items of value in the car:

> In sum, law enforcement had standardized procedures in place but failed to follow them here. Such failure, coupled with the fact the

> officers disregarded items without evidentiary value * * * suggests they did not search the vehicle in order to safeguard the vehicle's contents from loss, or to protect law enforcement personnel from harm, or even to guard the department and county against a possible lawsuit. Rather, it appears law enforcement sifted through the vehicle's contents searching only for and recording only incriminating evidence; something law enforcement may not do.

See also United States v. Proctor, 489 F.3d 1348 (D.C.Cir. 2007) ("Because the officers failed to follow the MPD standard procedure, the impoundment of Proctor's vehicle was unreasonable and thus violated the Fourth Amendment.").

Less Onerous Alternatives

The problem of pretextual inventory searches could be regulated by requiring police officers to use the least onerous alternative in effectuating the state interests involved. For example, impoundment of a car could be prohibited if someone who was not being arrested is on the scene and could simply drive it away—the "drive away" alternative would protect the police from false claims, protect the owner's interest, and protect against safety risks, without necessitating an intrusive seizure. Similarly, a search of the car and containers in the car could be prohibited if the officer could simply seal the car to prevent entry. It would seem that in some circumstances, a container can be sealed or locked, thus protecting the owner's valuables and protecting the police from false claims, without the intrusion of a search. However, these arguments are based on a less intrusive means analysis, which the Supreme Court has rejected in *Lafayette* and *Bertine.* According to those cases, the issue is not whether a less intrusive alternative exists that would equally effectuate state interests. Rather, the issue is whether the alternative chosen is a reasonable means of accommodating the (high) interests of the state and the (low) privacy interests of citizens. So while police departments are free to use these less onerous alternatives, they are not required to do so under the Fourth Amendment. See United States v. Betterton, 417 F.3d 826 (8th Cir. 2005) ("Nothing in the Fourth Amendment requires a police department to allow an arrested person to arrange for another person to pick up his car to avoid impoundment and inventory.").

Why does the Supreme Court reject the less intrusive alternative arguments in the inventory cases? Professor Maclin points out that the Court has required the State to employ less intrusive means when other constitutional rights, such as First Amendment rights, are involved. He proffers the following explanation for this apparent disparity in constitutional standards.

> The Court is uninterested in placing the Fourth Amendment in the category of preferred constitutional rights, including the rights of free speech, freedom of religion, and freedom from racial discrimination, despite its specific placement in the Bill of Rights.
>
> * * *
>
> Why is the Fourth Amendment considered a second-class right? My guess is that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society. This dual perception may explain the Court's reluctance to subject police conduct to vigorous judicial oversight.

Maclin, The Central Meaning of the Fourth Amendment, 35 Wm. & Mary L.Rev. 197, 237 (1993). Can you see any reason to distinguish between, for example, First and Fourth Amendment protections? Is the difference that the Fourth Amendment specifically emphasizes reasonableness, while the First Amendment is written in more absolute terms?

Searches and Seizures That Serve No Inventory Interest

An impoundment or search that effectuates the state interests supporting an inventory search—even though those interests could be met less intrusively—must be distinguished from an impoundment or search that effectuates *none* of those state interests. It is reasonable, under *Bertine*, to impound a vehicle even where alternative arrangements could be made to protect the car. It is also reasonable, under *Bertine* and *Lafayette*, to open a container even though it could otherwise be secured. It is not, however, reasonable to impound a vehicle that is parked in a locked garage attached to the arrestee's home; such a seizure is not necessary to effectuate the interests that support an impoundment in the first place. Likewise, it is not reasonable to vacuum a car's interior to "inventory" carpet fibers: there is no safety risk, no chance of a claim for lost property, and no need to protect the owner from the chance that his carpet fibers will be stolen. See United States v. Showalter, 858 F.2d 149 (3d Cir.1988), where the government sought to justify the search of an entire *residence* under the inventory exception. The court stated that "none of the factors which have been used to justify the warrantless inventory search of an automobile are present * * * when generally applied to the home." See also United States v. Best, 135 F.3d 1223 (8th Cir.1998), where the officer, in the course of an "inventory" search, pried open the door panel of a car and discovered drugs. The court held the search invalid, because it "did not serve the purpose of protecting the car and its contents." The court noted that "Best would not have a legitimate claim for protection of property hidden in the door panel" of his car, and

therefore the officer "did not have a legitimate interest in seeking such property."

7. Border Searches

Courts are not always persuasive in their inventory search opinions, but they try to state a rationale for not requiring a warrant. This is in sharp contrast with the cases establishing the border search exception to the warrant and probable cause requirements. These cases make little effort to justify the exception on policy grounds. The most persuasive rationale is similar to that used in *Skinner* and *Von Raab*: border searches serve a special need beyond traditional criminal law enforcement. The special need is the interest in protecting American borders, "in order to regulate the collection of duties and to prevent the introduction of contraband into this country." United States v. Johnson, 991 F.2d 1287 (7th Cir.1993). As the Court stated in United States v. Montoya de Hernandez, 473 U.S. 531 (1985):

> At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.

Because the border search serves special needs, it is evaluated under the reasonableness clause of the Fourth Amendment. And given the heavy state interest just stated, as well as the diminished expectation of privacy attendant to a border crossing, border searches are ordinarily reasonable even without a warrant or probable cause, and often without any suspicion at all. See United States v. Robles, 45 F.3d 1 (1st Cir.1995) ("routine border searches, conducted for the purposes of collecting duties and intercepting contraband destined for the interior of the United States, do not require reasonable suspicion, probable cause, or a warrant").

Warrantless, Suspicionless Search of International Mail: United States v. Ramsey

In United States v. Ramsey, 431 U.S. 606 (1977), Customs officials opened eight envelopes sent to the United States from Thailand, as part of an investigation of a heroin-by-mail enterprise in the Washington, D.C. area. Ramsey argued that the envelopes could not be opened without a warrant and probable cause, but the Supreme Court disagreed. Justice Rehnquist found the search to be reasonable under the border search doctrine. He analyzed the constitutionality of border searches as follows:

> That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining

persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border should, by now, require no extended demonstration. The Congress which proposed the Bill of Rights, including the Fourth Amendment, to the state legislatures on September 25, 1789, 1 Stat. 97, had, some two months prior to that proposal, enacted the first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29. Section 24 of this statute granted customs officials "full power and authority" to enter and search "any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed * * *." The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest. * * *

* * *

Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

The defendant in *Ramsey* argued that the border search doctrine should not apply to international *mail*, because it is not carried across the border by a traveler. But Justice Rehnquist found nothing special about mail when it crosses the border into the United States.

The border-search exception is grounded in the recognized right of the sovereign to control, subject to substantive limitations imposed by the Constitution, who and what may enter the country. It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical. It was conceded at oral argument that customs officials could search, without probable cause and without a warrant, envelopes carried by an entering traveler, whether in his luggage or on his person. Surely no different constitutional standard should apply simply because the envelopes were mailed, not carried. The critical fact is that the envelopes cross the border and enter this country, not that they are brought in by one mode of transportation rather than another. It is their entry into this country from without it that makes a resulting search "reasonable."

Justice Stevens, joined by Justices Brennan and Marshall, dissented in *Ramsey*, arguing that Congress did not confer authority to open letters without probable cause. Justice Powell wrote a concurring opinion.

"Routine" Border Searches

The court in United States v. Charleus, 871 F.2d 265 (2d Cir.1989), states that "routine border searches of the personal belongings and effects of entrants may be conducted without regard to probable cause or reasonable suspicion." Such searches are deemed reasonable because of the important state interest involved in regulating the border, the diminished expectation of privacy attendant to crossing the border, and the relatively limited intrusiveness of a "routine" border search. Does the lesser expectation of privacy in luggage carried into the country justify warrantless border searches, or does the existence of such searches reduce one's expectation of privacy?

While suspicionless border searches are generally reasonable, it is possible that "the rule as to nonroutine border searches is, however, different." United States v. Robles, 45 F.3d 1 (1st Cir.1995). Because they are more intrusive, "non-routine" border searches must be supported by some level of individualized suspicion.

In the following case, the Supreme Court criticizes the use of the labels "routine" and "non-routine"—at least as applied to searches of vehicles—and finds a relatively unusual search to be reasonable even in the absence of suspicion.

UNITED STATES v. FLORES-MONTANO

Supreme Court of the United States, 2004.
541 U.S. 149.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Customs officials seized 37 kilograms—a little more than 81 pounds—of marijuana from respondent Manuel Flores-Montano's gas tank at the international border. The Court of Appeals for the Ninth Circuit * * * held that the Fourth Amendment forbade the fuel tank search absent reasonable suspicion. We hold that the search in question did not require reasonable suspicion.

Respondent, driving a 1987 Ford Taurus station wagon, attempted to enter the United States at the Otay Mesa Port of Entry in southern California. A customs inspector conducted an inspection of the station wagon, and requested respondent to leave the vehicle. The vehicle was then taken to a secondary inspection station.

At the secondary station, a second customs inspector inspected the gas tank by tapping it, and noted that the tank sounded solid.

Subsequently, the inspector requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. After the gas tank was removed, the inspector hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. The process took 15 to 25 minutes.

* * *

The Government advised the District Court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion * * *.

* * * [T]he Court of Appeals * * * asked whether the removal and dismantling of the defendant's fuel tank is a "routine" border search for which no suspicion whatsoever is required. The Court of Appeals stated that "in order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion," and the "critical factor" in determining whether a search is "routine" is the "degree of intrusiveness."

The Court of Appeals seized on language from our opinion in United States v. Montoya de Hernandez, 473 U.S. 531 (1985), in which we used the word "routine" as a descriptive term in discussing border searches. ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant"). The Court of Appeals took the term "routine," fashioned a new balancing test, and extended it to searches of vehicles. But the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search of a vehicle, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles.

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." United States v. Ramsey. * * * It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.

That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 1/2 fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry. Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%. In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days.

Respondent asserts two main arguments with respect to his Fourth Amendment interests. First, he urges that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy. But on many occasions, we have noted that the expectation of privacy is less at the border than it is in the interior. We have long recognized that automobiles seeking entry into this country may be searched. It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment.

Second, respondent argues that the Fourth Amendment "protects property as well as privacy," and that the disassembly and reassembly of his gas tank is a significant deprivation of his property interest because it may damage the vehicle. He does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property.[a] According to the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (*i.e.*, no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident.

Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. A gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. If damage to a vehicle were to occur, the motorist might be entitled to recovery. While the interference with a motorist's possessory interest is not insignificant when the Government removes, disassembles, and

---

[a] Respondent's reliance on cases involving exploratory drilling searches is misplaced. See United States v. Rivas, 157 F.3d 364 (CA5 1998) (drilling into body of trailer required reasonable suspicion); United States v. Robles, 45 F.3d 1 (CA1 1995) (drilling into machine part required reasonable suspicion); United States v. Carreon, 872 F.2d 1436 (CA10 1989) (drilling into camper required reasonable suspicion). We have no reason at this time to pass on the reasonableness of drilling, but simply note the obvious factual difference that this case involves the procedure of removal, disassembly, and reassembly of a fuel tank, rather than potentially destructive drilling. We again leave open the question "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner it is carried out." United States v. Ramsey.

reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border.[b]

For the reasons stated, we conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. While it may be true that some searches of property are so destructive as to require a different result, this was not one of them. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring.

I join the Court's opinion in full. I also note that Customs keeps track of the border searches its agents conduct, including the reasons for the searches. This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.

QUESTIONS AFTER FLORES-MONTANO

The Court dropped a footnote in *Flores-Montano* indicating that it was leaving open whether drilling into a vehicle would be reasonable without suspicion of any crime or violation. Lower courts after *Flores-Montano* have taken that footnote as an invitation to uphold suspicionless drilling and other types of destruction of property at the border. For example, United States v. Chanbery, 424 F.3d 1051 (9th Cir. 2005), the court upheld a suspicionless border search that included drilling a hole in the bed of a pickup truck. Relying on *Flores-Montano,* the court declared that "a single small diameter hole in a truck bed does not reduce the functionality, operation or safety of the vehicle." The defendant cited cases from other circuits holding that drilling requires reasonable suspicion, but the court noted that all of those cases were decided before *Flores-Montano*, and all of them relied on "the distinction between 'routine' and 'non-routine' searches, a distinction that was specifically limited to searches of the person by the Supreme Court." See also United States v. Cortez-Rocha, 383 F.3d 1093 (9th Cir. 2004) (border search of defendant's vehicle, which included cutting open the defendant's spare tire, did not require reasonable suspicion: "the search of the spare tire,

[b] Respondent also argued that he has some sort of Fourth Amendment right not to be subject to delay at the international border and that the need for the use of specialized labor, as well as the hour actual delay here and the potential for even greater delay for reassembly are an invasion of that right. Respondent points to no cases indicating the Fourth Amendment shields entrants from inconvenience or delay at the international border.

The procedure in this case took about an hour (including the wait for the mechanic). At oral argument, the Government advised us that, depending on the type of car, a search involving the disassembly and reassembly of a gas tank may take one to two hours. We think it clear that delays of one to two hours at international borders are to be expected.

which neither damages the vehicle nor decreases the safety of operation of the vehicle, is not so destructive as to be unreasonable").

In *Flores-Montano*, the government "advised the District Court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion." This was so even though the defendant avoided eye contact during questioning at the border, his hands were shaking when he produced identification, the agent tapped on the gas tank and noticed that it sounded solid, and a narcotics detection dog alerted on the vehicle. Despite having an excellent case of reasonable suspicion on the facts, the government argued for the broader point that dismantling a gas tank is reasonable at the border, in all cases, even if a car is plucked at random or at the officer's whim. This appears to be a regular tactic that the government has been taking with border searches, i.e., arguing that actions like drilling and dismantling can be done without suspicion, rather than arguing that there is in fact reasonable suspicion in the particular case. This litigation position was criticized by Judge Fletcher in United States v. Chaudhry, 424 F.3d 1051 (9th Cir. 2005), a case in which she concurred in the court's holding that drilling a hole in a flat bed of a pickup truck was permissible without any suspicion. Judge Fletcher expressed her concern about the government's litigation strategy as follows:

> I write separately to express my distaste for the government's game-playing in this case and in two others we heard on the same calendar. In each case there was reasonable and articulable suspicion of drug smuggling. But the government wanted confirmation that no suspicion was required for extensive, intrusive searches at the border. This would have been an ancillary benefit for the government—it would not have to prove the reliability of its drug sniffing dogs.
>
> As a practical matter, border agents are too busy to do extensive searches (removing gas tanks and door panels, boring holes in truck beds) unless they have suspicion. Apparently no suspicionless search case has come along to allow the issue—how destructive and extensive a suspicionless search may be—to be presented in its pure form. So the government seized upon cases where there have been extensive searches based on clearly reasonable, articulable suspicion. In these cases, the government refuses to present evidence to support the suspicion. It prefers to test the limits of its right to search beyond what it can see (by drilling holes, removing gas tanks, etc.) without any suspicion whatsoever.
>
> * * *
>
> I see two problems with such an approach to litigation. First, such appeals are essentially a request for an advisory opinion, as the dispute over whether or not a particular search may be conducted in the absence of any suspicion is an entirely fictional construct. * * * The only possible purposes are the government's desire to push the envelope to its limits: to find out just how much destruction it can do without any suspicion,

and to avoid proving it uses reliable dogs. Second, because there is ample suspicion in each case, it is difficult for judges to consider the issue cleanly on an unencumbered record. Evidence of probable criminal activity, especially evidence of narcotics detector dog alerts, cannot help but color judges' views of the facts. We inevitably think "harmless error." I must admit that I take comfort in knowing that the border agents in these cases did not rip apart the defendants' cars on a whim. However, were I to decide a case where there is truly no suspicion, and where five or ten exploratory holes are drilled in the exterior walls of a vehicle, I might reach a different result.

Border Searches of Ship Cabins

In United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010), the defendant was a crew member of a foreign cargo ship that entered the port of Miami. Customs and Border protection officials conducted a search, primarily, for prohibited agricultural materials, including seeds. They inspected the ship from bow to stern—this included a thorough inspection of the cabin of the ship's cook—Alfaro-Moncada. An officer searched the defendant's desk in his cabin and found DVD's, the covers of which showed young girls engaging in sexual acts. The defendant was tried and convicted of child pornography and argued that the search amounted to a search of his *home*, and therefore required reasonable suspicion. But the court disagreed, and noted that the interests supporting a suspicionless border search were fully implicated in this case:

> A home with a fixed location cannot be used as a means to transport into this country contraband or other weapons of mass destruction that threaten national security. A crew member's cabin, like the rest of the ship on which it is located, can and does pose that threat.
>
> * * *
>
> Stopping agricultural pest and diseases from entering this country is an essential function of homeland security; when they have come across our borders, extensive damage has resulted. [Citing reports of infestation of the Asian longhorned beetle and the emerald ash borer, which led to the destruction of millions of trees.]

Do you think the Customs/Border agent was looking for seeds and bugs in Alfaro-Mancado's desk? Does it make any difference if that answer to that question is no?

Border Searches and Seizures of Persons

The Court addressed the question of the appropriate standard of proof for highly intrusive border intrusions in United States v. Montoya de Hernandez, 473 U.S. 531 (1985). Justice Rehnquist, writing for a six-person majority, stated that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, *reasonably suspect* that the traveler is smuggling contraband in her alimentary canal." (emphasis added).

Montoya de Hernandez went through customs in Los Angeles after arriving on a plane from Colombia. Her eight recent trips to either Miami or Los Angeles caused agents to question her about the purpose for her trip. She carried $5,000 cash, mostly $50 bills, with no billfold and stated that she came to purchase goods for her husband's store in Colombia. Although she had no appointments with sellers and no hotel reservation, she stated that she planned to ride around the city visiting retail stores and that she planned to stay at a Holiday Inn. She could not recall how her airline ticket was purchased. In her valise inspectors found four changes of "cold weather" clothing.

These facts, the Court held, were sufficient to warrant seasoned inspectors in arriving at a reasonable suspicion that Montoya de Hernandez was a "balloon swallower" attempting to smuggle drugs into the country. A strip search by a female inspector revealed a fullness in the suspect's abdomen. The inspector noticed that the suspect was wearing two pair of elastic underpants with a paper towel lining the crotch area. Upon receiving this information, the inspector in charge informed the suspect of his suspicion. The inspector gave her the option of returning to Colombia on the next available flight, agreeing to an x-ray or remaining in detention until she produced a monitored bowel movement. She chose the first option, but inspectors were unable to arrange a flight. Sixteen hours later, the suspect had not defecated or urinated and had refused food or drink. It appeared that she was struggling to avoid use of the toilet. Inspectors sought and obtained a warrant authorizing a rectal examination and x-ray, provided that the physician consider the suspect's claim of pregnancy. A pregnancy test was negative, and a rectal examination produced a balloon containing a foreign substance. Investigators arrested the suspect. She later passed 88 cocaine-filled balloons through her system.

The Supreme Court upheld both the initial inspection and the detention, finding that the delay was attributable to the suspect's "heroic" efforts "to resist the call of nature" and that the detention was not unreasonably long even though it "undoubtedly exceed[ed] any other detention we have approved under reasonable suspicion." Justice

Rehnquist emphasized not only the suspect-created delay, but also the heavy state interest and diminished expectation of privacy attendant to a border crossing. He noted that "alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops." Justice Stevens concurred in the judgment on the ground that the prolonged detention was attributable to the suspect's choice not to consent to an x-ray. Justice Brennan, joined by Justice Marshall, described the facts as a "disgusting and saddening episode" involving a detention based upon a profile that justified at most reasonable suspicion, and he dissented. He argued that "[i]ndefinite involuntary *incommunicado* detentions 'for investigation' are the hallmark of a police state, not a free society."

Standard of Proof Between Probable Cause and Reasonable Suspicion?

The lower court in *Montoya* had found that the intrusion was so severe that it had to be justified by a "clear indication" of criminal activity. This was a standard of proof somewhere between reasonable suspicion and probable cause. In *Montoya,* the majority emphatically rejected this approach, and stated that as in *Terry,* there is no relevant standard of proof between reasonable suspicion and probable cause. Justice Rehnquist concluded as follows:

> We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to reasonable suspicion and probable cause; such subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.
>
> The reasonable suspicion standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause.

After *Montoya,* there are apparently only two types of intrusions at the border—a "routine" border intrusion that can be done without suspicion, and a "non-routine" border intrusion that requires reasonable suspicion. It could be argued that some intrusions at the border could be so severe as to require probable cause, but given the facts of *Montoya* and the state interest supporting border searches, can you envision such an intrusion? Perhaps compelled surgery? See United States v. Adekunle, 2 F.3d 559 (5th Cir.1993) (reasonable suspicion sufficient for 100 hour incommunicado detention, forced use of laxatives, and monitored bowel movement); United States v. Odofin, 929 F.2d 56 (2d Cir.1991) (24 day detention before bowel movement; reasonable suspicion sufficient).

Depending on their intrusiveness, searches of *persons* at the border can fall on either side of the line the courts have established between "routine" and "non-routine" border searches—the latter requiring reasonable suspicion, the former requiring no suspicion at all. For example, in United States v. Sanders, 663 F.2d 1 (2d Cir.1981), customs officials forced the defendant to take off his artificial leg and inspected it, finding drugs. The court likened the police activity to a body cavity search, well-recognized as more intrusive than the routine border search. See also United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010) ("Even at the border, * * * reasonable suspicion is required for highly intrusive searches of a person's body such as a strip search or an x-ray examination."). In contrast, in United States v. Charleus, 871 F.2d 265 (2d Cir.1989), a customs inspector patted down the defendant, felt a hard lump under his clothing, and lifted the back of his shirt, whereupon he found packages of narcotics taped to the defendant's body. The court analyzed the intrusion as follows:

> The [intrusion] arguably straddles the line between the two categories of border searches—searching more than personal belongings or effects such as a purse, wallet, or even outer jacket was involved; but the search was not nearly as intrusive as a body cavity or full strip search. Since the potential indignity resulting from a pat on the back followed by a lifting of one's shirt simply fails to compare with the much greater level of intrusion associated with a body cavity or full strip search, we decline to hold that reasonable suspicion was here required.

See also United States v. Kelly, 302 F.3d 291 (5th Cir. 2002) (canine sniff of a person, including contact with the dog's nose, was a routine border search: "Certainly, a canine sniff, even one involving some bodily contact, is no more intrusive than a frisk or a pat-down, both of which clearly qualify as routine border searches.").

Border Searches of Laptops, Video Cameras, Reading Material, etc.

If you are carrying a laptop across the border into the United States, can an officer—without having any suspicion—turn on the laptop and peruse all the material on the harddrive or SSD? The court in United States v. Ickes, 393 F.3d 501 (4th Cir. 2005), upheld such an inspection as a routine border search. Ickes's van was stopped at a border checkpoint. Officers first turned on Ickes's video camera and saw that he had taken a video of a young ball boy at a tennis match. They then conducted a thorough inspection of his laptop harddrive and computer disks that were in his car. Officers found child pornography and Ickes moved to suppress the evidence. Ickes raised both a Fourth and a First amendment objection

to the search. The court quickly disposed of the Fourth Amendment claim, holding that the search was no more intrusive than any other search of a person's effects at the border: such thorough inspections are allowed without suspicion, and there was nothing approaching a strip search or body cavity search that could be labeled "non-routine." As to the First Amendment argument, the court declared as follows:

> [T]he ramifications of accepting Ickes's First Amendment argument would be quite staggering. * * * Particularly in today's world, national security interests may require uncovering terrorist communications, which are inherently "expressive." Following Ickes's logic would create a sanctuary at the border for all expressive material—even for terrorist plans. This would undermine the compelling reasons that lie at the very heart of the border search doctrine. Ickes's argument, at bottom, proves too much.
>
> * * *
>
> Ickes claims that our ruling is sweeping. He warns that "any person carrying a laptop computer . . . on an international flight would be subject to a search of the files on the computer hard drive." This prediction seems far-fetched. Customs agents have neither the time nor the resources to search the contents of every computer.

For other cases allowing thorough border searches of expressive material without any suspicion, see United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008) (search of laptop without suspicion was reasonable; laptop is nothing more than a container and courts "have long held that searches of closed containers and their contents can be conducted at the border without particularized suspicion"); United States v. Seljan, 547 F.3d 993 (9th Cir. 2008) (suspicionless border search of personal correspondence—revealing sexual misconduct with young children—found reasonable).

In *Seljan, supra,* Judge Kozinski, in dissent, provided a passionate argument against a rule allowing police unfettered discretion to peruse reading and viewing material in a border search. He argued that the majority, in allowing such a practice, failed to give due weight to the language and history of the Fourth Amendment:

> The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, *papers,* and effects. . . ." The reference to papers is not an accident; it's not a scrivener's error. It reflects the Founders' deep concern with safeguarding the privacy of thoughts and ideas—what we might call freedom of conscience—from invasion by the government. Because my colleagues in the majority don't see this right as very important, they authorize the government to read every scrap of paper that crosses our borders, whether in a pocket or purse, a package, suitcase or envelope. * * *

> [T]he Founders were as concerned with invasions of the mind as with those of the body, the home or personal property—which is why they gave papers equal rank in the Fourth Amendment litany. The sum and substance of today's opinion is that we remove papers as an independent sphere of constitutional protection, treating them simply as a species of effects. Because our commission as federal judges does not authorize us to blue-pencil words written by the Founding Fathers, I respectfully dissent.

The majority in *Seljan* relied heavily on *Ramsey, supra,* where the Court upheld the suspicionless search of mail crossing the border. But Judge Kozinski declared that *Ramsey* was readily distinguishable, because *Ramsey* involved mail that included heroin—it "did not involve *reading* anything within the envelopes" and the *Ramsey* Court treated mailed envelopes as effects "because they were simply containers being used for smuggled items."

Judge Kozinski noted that the bedrock cases giving rise to the Fourth Amendment—the libel case involving John Wilkes and the seizure and search of papers in Entick v. Carrington—involved expressive material, and concluded as follows:

> The majority's reluctance to step between Mr. Seljan and his well-merited punishment is understandable. Seljan's long career of "sexually educating" children is heinous; it's difficult to regret that he will spend the rest of his life in prison. But this result comes at a high price: allowing serious invasions into the privacy of millions of Americans, innocent as well as guilty. * * * Every envelope containing birthday cards or trade secrets, every e-mail, every diary, every laptop that crosses the border can be opened and its contents read by government agents, without a warrant or even founded suspicion. Worse yet, by treating these seizures as a trivial annoyance rather than a major intrusion into our freedom of thought, my colleagues open the door for police across the United States to read whatever private papers fall into their hands. This is the power the English government claimed in the Wilkes affair; the power that so outraged the colonists; the power the Fourth Amendment was built to shield us against. We sell this birthright very cheaply today.

Is Judge Kozinski overreacting? How likely is it that Homeland Security will pore over all the reading material of every person crossing the border. They could never hire enough agents to do that, could they? Could they decide to copy all reading material and use Internet cloud storage to be able to access it should they desire to do so?

For more on border seizures and searches of laptops, cellphones, etc., see www.wired.com/threatlevel/2013/02/electronics-border-seizures:

The Department of Homeland Security's civil rights watchdog has concluded that travelers along the nation's borders may have their electronics seized and the contents of those devices examined for any reason whatsoever—all in the name of national security.

The DHS, which secures the nation's border, in 2009 announced that it would conduct a "Civil Liberties Impact Assessment" of its suspicionless search-and-seizure policy pertaining to electronic devices "within 120 days." More than three years later, the DHS office of Civil Rights and Civil Liberties published a two-page executive summary of its findings.

"We also conclude that imposing a requirement that officers have reasonable suspicion in order to conduct a border search of an electronic device would be operationally harmful without concomitant civil rights/civil liberties benefits," the executive summary said.

The President George W. Bush administration first announced the suspicionless, electronics search rules in 2008. The President Barack Obama administration followed up with virtually the same rules a year later. Between 2008 and 2010, 6,500 persons had their electronic devices searched along the U.S. border, according to DHS data.

* * *

Meantime, a lawsuit the ACLU brought on the issue concerns a New York man whose laptop was seized along the Canadian border in 2010 and returned 11 days later after his attorney complained.

At an Amtrak inspection point, Pascal Abidor showed his U.S. passport to a federal agent. He was ordered to move to the cafe car, where they removed his laptop from his luggage and "ordered Mr. Abidor to enter his password," according to the lawsuit.

Agents asked him about pictures they found on his laptop, which included Hamas and Hezbollah rallies. He explained that he was earning a doctoral degree at a Canadian university on the topic of the modern history of Shiites in Lebanon.

He was handcuffed and then jailed for three hours while the authorities looked through his computer while numerous agents questioned him, according to the suit, which is pending in New York federal court.

Searches Away from the Border

The right to search at the actual border has been extended to its functional equivalent as well. For example, if a plane flies from Mexico City non-stop to Denver, a search by customs officials at the Denver

airport is considered a border search. The same standard applies to searches of ships, where the port of call is not at the border itself. United States v. Tilton, 534 F.2d 1363 (9th Cir.1976). In Torres v. Puerto Rico, 442 U.S. 465 (1979), the Court unanimously agreed that a trip from the mainland to Puerto Rico did not result in the crossing of an *international* border and that the border search exception to the warrant requirement did not apply.

A more troubling problem has arisen in connection with searches of vehicles inside the border, pursuant to § 287(a) of the Immigration and Nationality Act [8 U.S.C.A. § 1357(a)], which allows searches for aliens "within a reasonable distance from any external boundary of the United States." A reasonable distance has been defined as 100 air miles from any external border, 8 CFR § 287.1. The Court in United States v. Martinez-Fuerte, 428 U.S. 543, 552–53 (1976), described the kinds of searches that were implemented pursuant to this legislation:

> The Border Patrol conducts three kinds of inland traffic-checking operations in an effort to minimize illegal immigration. Permanent checkpoints, such as those at San Clemente and Sarita, are maintained at or near intersections of important roads leading away from the border. They operate on a coordinated basis designed to avoid circumvention by smugglers and others who transport the illegal aliens. Temporary checkpoints, which operate like permanent ones, occasionally are established in other strategic locations. Finally, roving patrols are maintained to supplement the checkpoint system.

Beginning with Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Supreme Court decided a series of cases challenging the constitutionality of these law enforcement efforts in border areas. In *Almeida-Sanchez* the defendant was stopped by a roving Border Patrol on an east-west road in California about 25 air miles north of the Mexican border. The officers had no warrant and no suspicion for stopping the car. The officers searched the defendant's vehicle for illegal aliens, discovering instead a large quantity of marijuana. The Court held the stop and search unconstitutional. In a 5–4 decision, Justice Stewart wrote for the majority that a roving patrol away from the border was regulated by the same standards as any other police activity—meaning that suspicionless seizures and searches were not permitted. Justice White's dissent found the search to be a reasonable response to the unique problems of enforcing immigration laws in border areas. See also United States v. Brignoni-Ponce, 422 U.S. 873 (1975), holding that roving border patrols are subject to the same standards as other law enforcement stops under *Terry*.

The use of traffic checkpoints removed from the border also came under scrutiny. In United States v. Ortiz, 422 U.S. 873 (1975), warrantless *searches* at *internal* checkpoints were held unconstitutional unless based on probable cause. The Court found that, at least insofar as searches were concerned, the risk of official abuse of discretion was just as great at a checkpoint as it was at a roving patrol; officers at checkpoints decided which cars to search, and only 3% of the vehicles that were stopped were also searched.

The following year, the Court approved warrantless *stops* of vehicles at *permanent checkpoints* for limited questioning of the occupants. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). No probable cause or reasonable suspicion was required to justify the stops. The Court reasoned that suspicionless checkpoint stops are necessary tools of law enforcement, and that the public interest in making these stops outweighed the constitutionally protected interests of private citizens. In addition, Justice Powell, writing for the Court, stated that motorists could be selectively referred to secondary inspection areas for further questioning, again without any articulable suspicion. He argued that the additional intrusion—although admittedly a seizure—was limited and inoffensive and that use of the questioning techniques tended to minimize the intrusion on the general motoring public, thus protecting other Fourth Amendment interests. However, if the secondary inspection was unduly offensive or intrusive, then individualized suspicion would be required. See also United States v. Machuca-Barrera, 261 F.3d 425 (5th Cir. 2001) (stop at immigration checkpoint can last no longer than necessary to fulfil its immigration-related purpose).

I. CONSENT SEARCHES

1. Voluntary Consent

Voluntariness Distinguished from Waiver: Schneckloth v. Bustamonte

A search based upon voluntary consent is reasonable even in the absence of a warrant or any articulable suspicion. The Supreme Court addressed the requirements for valid consent in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). A California police officer at 2:40 a.m. stopped an automobile with a headlight and a license plate light burned out. Six men were in the car. The driver had no license, only one passenger produced his license, and he explained that the car was his brother's. The officer asked the men to step out of the car, they complied, and after two additional officers arrived, the officer asked the person who produced the license if he could search the car. The man replied, "Sure, go ahead," and opened the trunk for the officer. The search produced three

stolen checks. The court of appeals held that consent was not valid because the consenting party was never told that he had the right to refuse to give consent. The Supreme Court disagreed.

Justice Stewart's majority opinion cited voluntariness concepts developed in confession cases and concluded that

> the question 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 the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.

The defendant argued that warnings of the right to refuse to permit a search—comparable to the *Miranda* warnings, which we shall examine in connection with police interrogation—should be required before consent can be sought. The majority responded that it would be impractical to give such warnings under the "informal and unstructured conditions" in which consent requests are usually made.

Justice Stewart distinguished the traditional concept of waiver of "the safeguards of a fair criminal trial" from consent to search. He concluded that a defendant was to be given "the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial," and that "[a]ny trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result." But, he found, that "[t]he protections of the Fourth Amendment are of a wholly different order." Justice Stewart concluded that the proper test in consent search cases is not whether there was a waiver of the defendant's Fourth Amendment rights, but whether the consent to search was voluntary under the totality of circumstances. He concluded that the Fourth Amendment does not require that citizens be discouraged from cooperating with the police—which would occur if they were required to be informed of their right to refuse.

The Court concluded that voluntariness of consent must be determined by the totality of the circumstances. The suspect's knowledge of his right to refuse consent is therefore relevant in determining the voluntariness of the consent. But absence of a consent warning is not dispositive.

As applied to the facts of the case, Justice Stewart had no trouble in concluding that the suspect's consent was voluntary—the suspect was not under arrest; the officer used no force and made no threats; and the suspect expressed no unwillingness to consent.

Justice Brennan dissented, arguing that "[i]t 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." Justice Marshall also dissented. He argued that consent searches are permissible because we permit our citizens to choose not to exercise their constitutional rights, and that "consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police." His solution was to have the government bear the burden of showing knowledge, which burden could be satisfied by a warning before asking for consent.

Reaffirming Schneckloth: United States v. Drayton

The Court reaffirmed its totality of the circumstances analysis in United States v. Drayton, 536 U.S. 194 (2002), in which the Court upheld searches of bags and persons made during a bus sweep. The Court found that while the officer did not inform the suspects of their right to refuse consent, "he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable." The *Drayton* Court concluded as follows:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

The Court's opinion in *Drayton* is fully set forth in the section on stops and frisks, supra. See also United States v. Collins, 683 F.3d 697 (6th Cir. 2012) (borrower of car validly consented to search—"when requesting an individual's consent to search, police do not have to inform the individual that others [in this case the owner of the car] could object to the search.").

The Consequences of Refusing Consent

Is refusal to consent to a search suspicious? Can an officer conclude that a person who refuses to permit a search has something to hide? In United States v. Prescott, 581 F.2d 1343 (9th Cir.1978), the court held that a person cannot be penalized for exercising the right to refuse to permit a search, and that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." The majority said that its reasoning was necessary "to protect the exercise of a constitutional right." Surprisingly, there was a dissenting opinion that argued that no harm would come if a citizen's decision to invoke Fourth Amendment rights were admissible in evidence against the citizen. See also United States v. Torres, 65 F.3d 1241 (4th Cir.1995) ("Officers cannot use a traveler's refusal to consent to the

search of his bags as support for the requisite reasonable, articulable suspicion.").

The Impact of Custody

In *Schneckloth,* consent was obtained from a person who was not in police custody, a fact emphasized by the Court in its conclusion that its decision was "a narrow one." But in United States v. Watson, 423 U.S. 411 (1976), the Court found that the absence of consent warnings or of proof that Watson knew he could withhold consent was not controlling where the defendant "had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station." The majority added that "to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth.*" *Watson* made clear that *Schneckloth* was not as narrow as Justice Stewart had proclaimed. Justice Marshall, joined by Justice Brennan, adhered to his opinion in *Schneckloth,* but added that "even short of this position there are valid reasons for application of such a rule to consents procured from suspects held in custody."

Not surprisingly, *Watson* has been relied upon to uphold consents obtained in all types of custodial situations; while the person's custodial status is relevant to whether the consent was voluntary, it is only one of the totality of circumstances. See, e.g., United States v. Hidalgo, 7 F.3d 1566 (11th Cir.1993) (consent voluntary even though the defendant "was arrested by SWAT team members who broke into his home in the early morning, woke him, and forced him to the ground at gun point"); United States v. Duran, 957 F.2d 499 (7th Cir.1992) (consent voluntary even though the suspect was under arrest and in the police station).

Totality of the Circumstances

After *Schneckloth* the totality of the circumstances must be examined to determine whether a person has voluntarily consented to a search. In Bumper v. North Carolina, 391 U.S. 543 (1968), the Court placed the burden of proving that consent "was, in fact, freely and voluntarily given" on the government, and declared that "[t]his burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

The Supreme Court applied *Schneckloth* and found a valid consent in United States v. Mendenhall, 446 U.S. 544 (1980). Officers encountered Mendenhall in an airport, suspected she was a drug courier, and asked her to accompany them to a private room. She agreed. After a series of polite questions, Mendenhall ultimately agreed to a strip search and a search of her purse. Narcotics were found in the purse and on her person. Although a majority of the Court did not agree on whether to treat

Mendenhall as "seized" when federal agents first approached her, a majority did agree that she voluntarily consented to accompany the agents to their airport office and to have her purse and person searched. In deciding that Mendenhall voluntarily accompanied the agents to their office, the Court observed that she was simply asked to go and was not threatened or physically forced. In deciding that the searches in the office were consensual, the Court emphasized that Mendenhall was twice told that she was free to decline consent. Justice White's dissent for four members of the Court argued that the government failed to meet its burden of proving that Mendenhall consented to accompany the officers to their office. "[T]he Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority. This is a notion that we have squarely rejected."

In United States v. Gonzalez-Basulto, 898 F.2d 1011 (5th Cir.1990), the court set forth a non-exclusive list of six factors relevant to whether consent is voluntarily obtained.

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no evidence will be found.

Obviously, none of these factors are dispositive. For example, *Watson* found a consent voluntary even though the defendant was under arrest, and *Schneckloth* found voluntary consent even though the defendant was unaware of his right to refuse. However, a weak showing by the government on several of the factors substantially increases the likelihood that consent will be found involuntary.

The facts and resolution of *Gonzalez-Basulto*, supra, are typical of consent cases after *Schneckloth*. Border patrol agents at a permanent checkpoint suspected that Gonzalez-Basulto was carrying drugs in a refrigerated tractor-trailer rig. He was referred to a secondary inspection area to verify his claim that he was an American citizen. Gonzalez produced immigration documentation, and looked nervously about at the drug sniffing dogs present at the checkpoint. The agent asked whether Gonzalez would mind opening the trailer for an inspection. Gonzalez replied "no problem" and unlocked and opened the trailer, which contained boxes of oranges and lemons. A drug-sniffing dog was hoisted into the trailer, and gave a positive alert. The agents opened many boxes, and finally found cocaine in boxes near the front of the trailer. The court found that Gonzalez voluntarily consented to the search.

> The agents did not brandish weapons or threaten Gonzalez in any way. Gonzalez was not placed under arrest until the search

> uncovered the cocaine. Gonzalez cooperated with the agent who requested permission to search by responding "no problem" to the request and by unlocking and opening the trailer doors. While the agent admitted that he did not inform Gonzalez of his right to refuse to consent, the agent emphasized that he did not put any kind of pressure on Gonzalez to get his consent. He merely asked for permission. Gonzalez was not well-educated but he exhibited a sufficient degree of understanding to indicate his "no problem" response was intelligent. Gonzalez may well have believed that no drugs would be found because the cocaine was hidden in boxes toward the front of the trailer and there was little crawl space in the trailer.

Compare United States v. Isiofia, 370 F.3d 226 (2d Cir. 2004) (consent not voluntary where the defendant was never informed of his right to refuse consent, the agents demanded consent, yelled at the defendant and used abusive language, and told him that he would be jailed and deported and never see his family again unless he consented to the search).

Consider the sixth factor discussed in *Gonzalez-Basulto,* i.e. the defendant's belief that no evidence would be found. In United States v. Mendenhall, *supra,* the Court categorically rejected the argument that Mendenhall could not have voluntarily consented to a strip search because it would disclose the drugs that she carried. The Court stated that, while the suspect may later regret having given consent, "the question is not whether she acted in her ultimate self-interest, but whether she acted voluntarily." Wouldn't the contrary view—that a person could not give voluntary consent if the search would be likely to uncover incriminating evidence—all but do away with consent searches?

Threats of Action if Consent Is Refused

Suppose an officer says, "I would like you to consent, but if you don't, I'll just come back a little later with a warrant." Does this threat render a subsequent consent involuntary? The court considered this question in United States v. Duran, 957 F.2d 499 (7th Cir.1992), in which Karen Duran consented to the search of an outbuilding after officers told her that they would obtain a warrant if she didn't consent. The court stated:

> This may have induced Karen to grant her consent, but it was not coercive under the fourth amendment. Although empty threats to obtain a warrant may at times render a subsequent consent involuntary, see United States v. Talkington, 843 F.2d 1041 (7th Cir.1988) (consent invalid when police lied in telling suspect that they were in the process of getting a search warrant); Dotson v. Somers, 175 Conn. 614, 402 A.2d 790 (1978) (consent invalid where police had insufficient grounds upon which to base a warrant

application), the threat in this case was firmly grounded. Karen's admission that [her husband, the defendant] dealt marijuana would have provided the police probable cause had they sought a search warrant, so their threat to do so in the event she refused consent was entirely proper.

On the relevance of police threats of action, and the rationality of giving consent, consider United States v. Welch, 683 F.3d 1304 (9th Cir. 2012). Officers were conducting a lawful protective sweep and came upon Welch in his bedroom. The officers had guns drawn. They asked for consent to search the room and Welch said "no." One officer then said, "Fine, but we're going to have to get a search warrant." Welch said nothing. The officer then said, "it could take awhile." Welch then said "okay you can search." The search uncovered a gun and ammunition and Welch was charged with felon-firearm-possession. He argued that he had not voluntarily consented, but the court disagreed.

> The explicit threat here is that Welch might have to stand around with nothing to do for some substantial period of time, much as we all do whenever we are stuck in a line. It would be a delicate will indeed that might be overborne by the threat of a period of idleness and wasted time. Yet that threat, "it would take a while," is what changed Welch's "no" to a "yes."
>
> The district judge provided a persuasive explanation of why Welch changed his mind. Welch, the court found, "reasonably believed that the officers would eventually be able to obtain a search warrant" and that, because he would have to wait on the balcony while they did, he would not be able to go into the apartment, retrieve the pistol and ammunition, and somehow dispose of them before the police came back with a warrant. So "it made sense for [Welch] to agree to the search rather than wait for the warrant to be obtained and, because of where the items were hidden, hope for the best." That was a rational gamble, but one that Welch lost. Welch's consent was not coerced, just constrained, by having to place his bet on one of two poor alternatives. Maybe if he let them in, the police would want to get the search done quickly and fail to find his contraband. Or maybe if he put them to the trouble of getting a search warrant, they would search more thoroughly because he had inconvenienced them.

Must a Person Who Is Stopped Be Told That He Is Free to Leave?: Ohio v. Robinette

In Ohio v. Robinette, 519 U.S. 33 (1996), Robinette was lawfully stopped for speeding and given a warning. After the officer returned his license, he asked Robinette: "One question before you get gone: Are you

carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Robinette answered in the negative, and when the officer asked to search the car, Robinette consented. The officer found drugs in the car.

The state court held that Robinette's consent could not be voluntary because the officer never informed him that the stop had ended and he was free to go. The Court, in an opinion by Chief Justice Rehnquist for seven Justices, found no such bright-line requirement in the Fourth Amendment. The Chief Justice reasoned as follows:

> We have previously rejected a per se rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search. In Schneckloth v. Bustamonte, it was argued that such a consent could not be valid unless the defendant knew that he had a right to refuse the request. We rejected this argument: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." And just as it "would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.

Justice Ginsburg concurred in the judgment in *Robinette*, emphasizing that while a "tell-then-ask" rule made good sense, imposing it as a constitutional requirement was inconsistent with the totality of circumstances approach mandated by *Schneckloth*.

Justice Stevens dissented. He argued that, by asking whether Robinette had contraband, the officer was continuing the detention, even though the initial reason for the detention had ended. Justice Stevens concluded from this that the continued interrogation, in the absence of reasonable suspicion, constituted an illegal seizure, which tainted Robinette's consent.

Did the Person Consent?

In some cases, the question is not whether the defendant consented voluntarily, but whether he consented at all. For example, in United States v. Price, 54 F.3d 342 (7th Cir.1995), Officer Brown stopped Pierce's car, became suspicious, and asked whether there were any drugs in the car. Pierce replied in the negative. Officer Brown then asked Pierce, "Do you mind if I take a look?" and Pierce quickly replied "Sure." Brown searched the car, and Pierce looked on without objection. Narcotics were discovered. At the suppression hearing, Pierce testified that when he said

"Sure" what he meant was "Sure, I *mind*." The court of appeals responded to this argument as follows:

> Perhaps in the abstract one could say that given the phrasing of Brown's question, Pierce's response to it is ambiguous and thus capable of being interpreted as either "Go ahead" or "No way." But * * * [t]he only conclusion to be drawn from the totality of the evidence is that Pierce's immediate response "Sure" meant, "Sure, go ahead." The crucial fact is Pierce's failure to protest upon learning that Brown understood his response as a consent to the search. Had Pierce not agreed to the search, now was the time to make that clear. Yet when confronted with Brown's understanding of his response, Pierce offered no objection at all; instead, he submitted to a pat-down search and took a seat in Brown's patrol car in order to get out of the rain. Given these circumstances it was not clear error for the district court to find that Pierce's response "Sure" meant that he agreed to the search.

Assume that you are in Pierce's situation and that you really mean "Sure, I mind," not "Sure, go ahead." What would your reaction be if Officer Brown ignores you and goes ahead with the search anyway? Would telling him to stop have a positive effect, do you think? See also United States v. Bautista, 362 F.3d 584 (9th Cir. 2004) (no consent where the occupant of a motel room opened the door after the police demanded entrance, and stepped back as officers proceeded into the room); United States v. Williams, 521 F.3d 902 (8th Cir. 2008) ("The precise question is not whether [the defendant] consented subjectively, but whether his conduct would have caused a reasonable person to believe that he consented.").

2. Third Party Consent

Can a third party consent to the search of an area in which a suspect has an expectation of privacy? Frazier v. Cupp, 394 U.S. 731 (1969), upheld the search of a defendant's duffle bag when his cousin, a joint user of the bag, voluntarily consented. The Court rejected the argument that because the cousin had authority to use only one compartment of the bag, he could not consent to a search of the remainder, stating that it would not "engage in such metaphysical subtleties," and that the defendant, who allowed his cousin to use the bag, must "have assumed the risk" he would consent to let others see inside.

Actual Authority: United States v. Matlock

The leading third-party consent case is United States v. Matlock, 415 U.S. 164 (1974). Matlock was arrested in the front yard of a house. Mrs. Graff admitted the police to the house and told them she shared the house with Matlock. She consented to a search. The Court found the search to

be reasonable because Mrs. Graff had actual authority to consent to the search. The Court stated the rationale for permitting third-party consent searches in the following analysis:

> The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, 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 co-inhabitants 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.

See also United States v. Kimoana, 383 F.3d 1215 (10th Cir. 2004) (individual who had stayed overnight in a motel room, who left his possessions there, and who had a room key, had actual authority to consent to a search of the room, even though he was not the registered guest who paid for the room).

Apparent Authority: Illinois v. Rodriguez

The Court in Illinois v. Rodriguez, 497 U.S. 177 (1990), considered whether a search is valid when based on the consent of a third party who has *apparent* but not *actual* authority. The third party in *Rodriguez* was Rodriguez's woman friend, who had, unknown to the officers, moved out of his apartment a month before the search and retained a key without permission. When speaking to the officers who were seeking consent she referred to the premises as "our apartment" and opened the door with a key and let them in.

Justice Scalia, writing for a six-person majority, agreed with the lower courts that the friend did not have actual authority to consent to a search of the apartment, in that she had no joint access or control of the premises after moving out. According to the majority, however, the entry was valid if the officers had reasonable belief that the friend had authority to consent. The Court rejected the defendant's argument that permitting a search on the basis of apparent but not actual authority would amount to an unauthorized waiver of the defendant's Fourth Amendment rights. Justice Scalia relied on *Schneckloth* and distinguished between a waiver of constitutional rights and the voluntary consent to search. He explained that while a waiver of a constitutional right must be personal, the validity of a consent search is determined by whether the search is reasonable:

> We would assuredly not permit * * * evidence seized in violation of the Fourth Amendment to be introduced on the basis of a trial court's mere reasonable belief—derived from statements by unauthorized persons—that the defendant has waived his objection.

> But one must make a distinction between, on the one hand, trial rights that derive from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. * * *
>
> What Rodriguez is assured by the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents. What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no search will occur that is "unreasonable." * * *

Justice Scalia concluded that the question of authority to consent should be governed by the same standard of reasonableness—and allowance for reasonable mistakes—as had been applied in other areas of Fourth Amendment jurisprudence, such as probable cause, the execution of a warrant, and the existence of exigent circumstances. The Court remanded for a determination of whether the officers could have reasonably believed that Rodriguez's friend had actual authority to consent to a search of his apartment. Justice Marshall, joined by Justices Brennan and Stevens, dissented.

Mistakes of Law

In Stoner v. California, 376 U.S. 483 (1964), the government argued that the officers relied on the apparent authority of the hotel desk clerk to consent to a search of Stoner's room. The Court rejected that argument, stating that "the rights protected by the Fourth Amendment are not to be eroded by unrealistic doctrines of apparent authority." Is the result and language in *Stoner* inconsistent with *Rodriguez*? Or can it be explained by the reasonableness standards that are applicable to third party consent searches? Is *Stoner* really an apparent authority case? See, e.g., United States v. Brown, 961 F.2d 1039 (2d Cir.1992) (stating that *Rodriguez* does not validate "a search premised upon an erroneous view of the law" and that "an investigator's erroneous belief that landladies are generally authorized to consent to a search of a tenant's premises could not provide the authorization necessary for a warrantless search").

The Duty to Investigate Third Party Authority to Consent

Does *Rodriguez* mean that the police can presume third party consent upon the simple assertion of the third party that she has common authority? If a babysitter answers the door, and asserts that she has actually been granted authority over the entire premises, can police search the entire house upon the babysitter's consent? In United States v. Dearing, 9 F.3d 1428 (9th Cir.1993), the court held that a live-in babysitter lacked apparent authority to consent to a search of his

employer's bedroom. The court declared that "the police are not allowed to proceed on the theory that ignorance is bliss," and concluded that the officer should have inquired into the extent of the babysitter's authorized access into his employer's bedroom. See also United States v. Kimoana, 383 F.3d 1215 (10th Cir. 2004) (government's burden of proving valid third party consent "cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry").

Third Party Consent Where the Defendant Is Present and Objecting: Georgia v. Randolph

In Georgia v. Randolph, 547 U.S. 103 (2006), Justice Souter wrote for the Court as it held that even though one occupant consents, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

Randolph and his wife had separated, she moved away with their son, and returned to the home to get some belongings; thereafter she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She stated there was evidence of drugs in the house. Eventually officers went to the house and both Mr. and Mrs. Randolph answered the door. An officer asked for consent to search. Mr. Randolph unequivocally refused, but Mrs. Randolph readily gave consent. The police entered and found drugs.

Justice Souter wrote that "[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases, * * * is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." Looking to widely shared social expectations he reasoned as follows:

> [I]t is fair to say that 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. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.
>
> The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Unless the people living together fall within some recognized

> hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior. * * * In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

Justice Souter explicitly stated that "this case has no bearing on the capacity of police to protect domestic victims" and "[t]he undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case * * *." At the end of his opinion, he noted the State did not argue exigent circumstances or that Janet Randolph gave any indication of a need for protection inside the house.

Justice Souter then considered the limits of a rule prohibiting entry on third party consent when the defendant is present and objecting:

> Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. * * * Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time-consuming in the field and in the courtroom, with no apparent systemic justification.

Chief Justice Roberts, joined by Justice Scalia, dissented. He argued as follows:

> A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once

privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.

* * *

Just as the source of the majority's rule is not privacy, so too the interest it protects cannot reasonably be described as such. That interest is not protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought. We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines.

The Chief Justice expressed the view that the decision would have serious consequences in domestic abuse situations because "the majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects." He opined that the majority's reliance on exigent circumstances "is a strange way to justify a rule, and the fact that alternative justifications for entry might arise does not show that entry pursuant to consent is unreasonable."

Justice Scalia and Justice Thomas also dissented. Justice Stevens and Breyer wrote concurring opinions. Justice Alito did not participate.

NOTE ON RANDOLPH

After *Randolph,* what does it mean to be "present" and "objecting" at the time the third party consents to a search? On the question of "presence" the Supreme Court held, in Fernandez v. California, 134 S.Ct. 1126 (2014), that the defendant's wife's consent to search the premises was valid even though the defendant had objected to the search when the officers initially approached his apartment. At the time of that approach, officers saw that Fernandez's wife appeared to be battered and bleeding. They arrested Fernandez, then returned to the apartment and obtained consent from his wife. Justice Alito, writing for six members of the Court, declared that the Court in *Randolph* "went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present" at the time the consent search is conducted. The Court held that the officers were justified in removing Fernandez and that the *Randolph* rule could not apply where officers are "objectively reasonable" in removing the objector from the premises. The Court also rejected the defendant's argument that the

objection he made while he *was* present was enough to bar third party consent at a later point when he was not. Justice Alito reasoned that the objection could not last forever, and to limit its duration to a "reasonable" time would create a host of practical problems and would be inconsistent with the bright line rule established in *Randolph*. Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented in *Fernandez*.

As to whether a defendant is *objecting* at the time third-party consent is given, see, e.g., United States v. Uscanga-Ramirez, 475 F.3d 1024 (8th Cir. 2007) (defendant denied that there was a gun in his house and said his girlfriend was lying about it, but he never explicitly objected when the girlfriend granted consent to search, therefore the gun that was found was properly admitted); United States v. Hicks, 539 F.3d 566 (7th Cir. 2008) (defendant who objected to his arrest and removal from the premises did not explicitly object to a search of the premises, so third-party consent was valid).

As to whether a defendant is *present* at the time third-party consent is granted, see, e.g., United States v. Alama, 486 F.3d 1062 (8th Cir. 2007) (where defendant refused to come to the door in order to avoid arrest, he was not present and objecting when third-party search was granted); United States v. Lopez, 547 F.3d 397 (2nd Cir. 2008) (officers arrested the defendant on the first floor of his house, then escorted his girlfriend to the second floor bedroom to get the defendant's clothes, and at that point sought consent from her to search the bedroom; third-party consent was valid because the defendant was not present and there was no indication that the marshals removed Lopez for the purpose of avoiding his potential objection: "the ease with which law enforcement officers might seek the defendant's permission to search when a co-occupant has already consented is irrelevant").

3. Scope of Consent

Even if a person voluntarily gives consent, there may be a question about whether the consent extended to the areas actually searched by the officer. A search beyond the scope of the consent granted cannot be justified as a consent search. See United States v. Neely, 564 F.3d 346 (4th Cir. 2009) (defendant's consent to search his trunk did not extend to a search of the passenger compartment of the car). The question, of course, is whether a given search is beyond the scope of a given consent.

Scope Defined by the Object of the Search: Florida v. Jimeno

In Florida v. Jimeno, 500 U.S. 248 (1991), Chief Justice Rehnquist, writing for a majority of seven justices, relied on *Rodriguez* and *Schneckloth* to conclude that the scope of a consent is determined by a standard of objective reasonableness. The Court held that an officer could reasonably conclude that when a suspect gave general consent to a search of his car, he also consented to a search of a paper bag lying on the floor of the car. The officer had informed Jimeno that he was looking for narcotics

in the car and obtained consent to search. Jimeno did not place any explicit limitation on the scope of the search. The Chief Justice reasoned that the general consent to search the car included consent to search containers in the car that might contain drugs. He stated that "the scope of a search is generally defined by its expressed object" and that "a reasonable person might be expected to know that narcotics are carried in some form of container." The Chief Justice distinguished the instant case from one in which an officer, given consent to search the trunk of a car, pried open a locked briefcase found inside the trunk. He explained that "it is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with a paper bag."

The *Jimeno* majority rejected the defendant's argument that police officers should be required to request separate permission to search each container found in a car. The Chief Justice saw "no basis for adding this sort of superstructure to the Fourth Amendment's basic tenet of reasonableness." He noted that a container-by-container requirement would result in fewer consents being given—which would be contrary to the community's interest in encouraging citizens to cooperate with the authorities.

Justice Marshall, joined by Justice Stevens, dissented. Justice Marshall noted that, at best, general consent is ambiguous, and police can avoid ambiguity by asking specifically at the outset for permission to search the contents of a car, or by asking for additional permission to search a container when it is found within a car. Justice Marshall concluded by attacking the majority's expressed interest in encouraging consent searches:

> The majority's real concern is that if the police were required to ask for additional consent to search a closed container * * * an individual who did not mean to authorize such additional searching would have an opportunity to say no. In essence, then, the majority is claiming that the community has a real interest not in encouraging citizens to *consent* to investigatory efforts of their law enforcement agents, but rather in encouraging individuals to be *duped* by them. That is not the community that the Fourth Amendment contemplates.

Ambiguity Construed Against the Citizen

After *Jimeno*, it is up to the citizen rather than the officer to clarify any ambiguity concerning the scope of consent. See United States v. Berke, 930 F.2d 1219 (7th Cir.1991) (consent to officer's "looking" into bag allows a thorough search of the bag; defendant did not ask for clarification of what the officers meant when they said they wanted to

"look"); United States v. Luken, 560 F.3d 741 (8th Cir. 2009) (forensic analysis of hard drive on defendant's computer did not exceed the scope of consent; before defendant gave consent, the officer explained that they would be able to recover deleted files and images, and defendant did not place any explicit limitations on the search).

Imagine that you are in Jimeno's position and the officer asks if he can search your car. Assume further that you want to limit the scope of this search. Because it is up to you to clarify any ambiguity, how would you go about doing so? Would you be concerned that by limiting the scope of the search, you will direct the officer's attention to the very area that you want to exclude from the search? Does it make sense for Jimeno to say, "yes, you can search the car, but not that bag in the back seat"?

While ambiguity is construed against the citizen, there are certainly situations in which the officers' search will be beyond what could be reasonably contemplated by the consent. For example, in United States v. Turner, 169 F.3d 84 (1st Cir.1999), Turner's next door neighbor was attacked with a knife, and blood was found around Turner's window. Officers thought the assailant might be hiding in Turner's house and asked for consent to search. They also had thoughts that Turner might be the assailant. They asked to search for any signs that the suspect might have been inside Turner's apartment, or might have left evidence of his presence there. Turner consented. An officer saw a picture on Turner's computer screen that resembled the victim. This got him curious, and so he sat down and started searching through the computer's hard drive. He discovered files containing child pornography, and Turner was prosecuted for that offense. But the court held that the search exceeded the scope of consent, and therefore that the files were illegally obtained:

> We think that an objectively reasonable person assessing in context the exchange between Turner and these detectives would have understood that the police intended to search only in places where an intruder hastily might have disposed of any physical evidence of the Thomas assault immediately after it occurred; for example, in places where a fleeing suspect might have tossed a knife or bloody clothing. Whereas, in sharp contrast, it obviously would have been impossible to abandon physical evidence of this sort in a personal computer hard drive, and bizarre to suppose—nor has the government suggested—that the suspected intruder stopped to enter incriminating evidence into the Turner computer.

It is also likely that a search will be beyond the scope of the consent if it involves *destructive activity*—as in an example given by the Court in *Jimeno*, involving breaking open a locked briefcase. See United States v. Strickland, 902 F.2d 937 (11th Cir.1990) (consent to search a car does not extend to officer's slashing open a spare tire); United States v. Osage, 235

F.3d 518 (10th Cir. 2000) (consent to search a bag does not permit the opening of a sealed can labeled "Tamales in Gravy" found in the bag: "before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed."). Compare United States v. Jackson, 381 F.3d 984 (10th Cir. 2004) (consent to search for narcotics allowed the officer to pry open the top of a baby powder container: "removing the lid of the baby powder container did not exceed the scope of Jackson's consent because it did not destroy or render the container useless").

4. Withdrawing Consent

Because there is a right to refuse consent initially, and a right to control the scope of consent, it follows that there is also a right to revoke a consent once given. Of course, consent cannot be revoked retroactively after the officer has found incriminating information. United States v. Dyer, 784 F.2d 812 (7th Cir.1986) (revocation must be made before the search is completed). Also, the revocation of consent must be *clear and explicit.* See United States v. Gray, 369 F.3d 1024 (8th Cir. 2004) (expression of impatience with how long the consent search is taking is not sufficient to terminate consent: "Withdrawal of consent need not be effectuated through particular magic words, but an intent to withdraw consent must be made by unequivocal act or statement.").

Suppose that an officer obtains voluntary consent to search a house and then, when he is about to enter a closet, the defendant revokes consent and forbids entry to the closet. Can the officer consider the defendant's actions as proof that there is something incriminating in the closet? As one court put it: "The constitutional right to withdraw one's consent would be of little value if the very fact of choosing to exercise that right could serve as any part of the basis for finding the reasonable suspicion that makes consent unnecessary." United States v. Carter, 985 F.2d 1095 (D.C.Cir.1993).

This principle is fact-sensitive, however. For example, in *Carter,* where the court set forth the principle that revocation of consent cannot be considered suspicious, the court actually upheld a search that was made after consent was revoked. The court found the principle it stated "immaterial" where the following sequence of events occurred: 1) Officers suspected Carter of drug trafficking based on various profile factors and suspicious answers to questions during the encounter; 2) Carter permitted the officer to look through his tote bag; 3) the officer pulled out a paper bag from the tote bag; 4) Carter snatched the paper bag from the officer and volunteered to show the officer the food that he claimed was in the paper bag; 5) Carter put his hand inside the paper bag, felt around,

and finally withdrew his hand—which was empty; and 6) Carter then rolled up the paper bag and stood looking at the officer.

The *Carter* court held that the officer could reasonably take Carter's conduct with respect to the paper bag into account, "as part of the totality of the circumstances, regardless whether it occurred before or, as here, after Carter had given and then withdrawn his consent to a search." This was because Carter's "peculiar" way of retracting consent could legitimately be considered suspicious, independent of the withdrawal of consent itself.

Judge Wald, in dissent, complained that under the majority's approach, Carter "was entitled to just say no to any further search of the bag, [but] he had to do so in a way that would not raise the detective's suspicion that he had something to hide; not an easy feat under the circumstances." She concluded as follows:

> Permitting the police to rely on the atmospherics of the refusal or withdrawal of consent to supply the reasonable suspicion necessary to objectively justify an otherwise unlawful search strips the legal right of withdrawal of all practical value. * * * If the right to withdraw consent for a "consensual" encounter is to have any meaning on the streets, as well as in the jurisprudence, it must encompass the manner as well as the fact of its exercise.

For a different perspective on "suspicious" withdrawal of consent, see United States v. Wilson, 953 F.2d 116 (4th Cir.1991) (angry refusal to allow search of coat, after consenting to search of luggage and person, should not have counted as a factor in the analysis of reasonable suspicion; except in extraordinary circumstances, officers must have evidence independent of the withdrawal of consent and the manner in which it is executed).

5. Credibility Determinations

Consent cases often come down to a credibility determination between the officer's and the defendant's accounts of what happened. Typically, the officers testify that they acted politely, asked the defendant to consent, informed him of his right to refuse, and the defendant readily consented. In contrast, defendants testify that the officers either never even sought consent, or the defendant never consented, or that the officers did obtain consent but only after using threatening and coercive tactics. In the typical consent case, there is little evidence other than the testimony of the opposing sides that is or can be produced on the consent question. It is fair to state, at least by viewing the reported opinions, that courts routinely find officers to be more credible than defendants. See United States v. Dean, 550 F.3d 626 (7th Cir. 2008) ("Altogether, it was perfectly rational for the district court to have believed that Dean's desire

to avoid another conviction provided a greater motive for him to fabricate a story than any motive that could be attributed to the officers.").

In New York City, the Mollen Commission reviewed the activities of the New York City Police Department and concluded that police officers often commit perjury on the witness stand. The Commission found that perjury is "prevalent enough in the department that it has its own nickname: 'testilying.' " Sexton, New York Police Often Lie Under Oath, Report Says, New York Times, April 22, 1994, p.1, col. 1. See also Slobogin, Testilying and What To Do About It, 67 Colo. L.Rev. 1037 (1996) (citing surveys of defense attorneys, prosecutors and judges, who estimated that police perjury at Fourth Amendment suppression hearings occurs in as much as fifty percent of the cases).

Professor Lassiter, in Eliminating Consent from the Lexicon of Traffic Stop Interrogations, 27 Cap. L.Rev. 79 (1998), argues that "testilying" goes hand in hand with racial profiling. That is, officers single out minorities for traffic and other stops, and then lie at the suppression hearing about things like consent. He considers whether a rule should be promulgated that a suspect cannot consent to a search without a lawyer present, but dismisses that solution as "impractical" when applied to consents obtained on the street. He states that in light of the twin problems of racial profiling and testilying, the possibility that citizens truly and voluntarily consent to a search that uncovers evidence is so remote that the *entire concept of voluntary consent should be rejected*.

Can you think of any other solutions to the problem of testilying? What about subjecting officers to polygraph tests before they testify that the defendant voluntarily consented to a search that uncovered incriminating evidence? See also McClurg, Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying, 32 U.C. Davis L.Rev. 389 (1999) (suggesting changes in police training and mentoring to reduce testilying).

VI. ELECTRONIC SURVEILLANCE, UNDERCOVER ACTIVITY, AND THE OUTER REACHES OF THE FOURTH AMENDMENT

The Supreme Court has struggled in its attempts to consider the Fourth Amendment's applicability to various types of surreptitious investigative activity.

A. CONSTITUTIONAL LIMITATIONS ON ELECTRONIC SURVEILLANCE

Physical Trespass Required: Olmstead v. United States

In 1928, Chief Justice Taft's majority opinion in Olmstead v. United States, 277 U.S. 438, declared that the interception of voice communications over telephone lines without entry into Olmstead's premises was not within the coverage of the Amendment. "The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants." Justices Brandeis and Holmes wrote separate dissenting opinions. Justice Brandeis observed that "[t]he makers of our Constitution * * * conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." He argued that "every unjustifiable intrusion upon the privacy of the individual, by whatever means employed, must be deemed a violation of the Fourth Amendment." And he warned, in now familiar words, that "[o]ur government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Continuing the Trespass Analysis: Goldman v. United States and on Lee v. United States

In Goldman v. United States, 316 U.S. 129 (1942), the Court found that the use of a detectaphone placed against an office wall to hear conversations next door did not violate the Fourth Amendment because there was no trespass. A decade later the Court held by a 5–4 majority in On Lee v. United States, 343 U.S. 747 (1952), that the Fourth Amendment was not implicated when the government wired an undercover agent for sound by means of a microphone that transmitted sounds to another officer outside the laundry in which the undercover agent was conversing with On Lee. There was no trespass. In a separate opinion, Justice Frankfurter said that the dissenting view in *Goldman* was correct: *Olmstead* and its trespass analysis should be overruled. Justice Douglas's dissent expressed dissatisfaction that he had voted with the majority in *Goldman*.

Trespass Not Required: Silverman v. United States and Katz v. United States

Nine years later came the first Supreme Court condemnation of eavesdropping under the Fourth Amendment. Justice Stewart's

unanimous opinion in Silverman v. United States, 365 U.S. 505 (1961), found a constitutional violation in the placement of a spike, a foot long with a microphone attached, under a baseboard into a party wall, so that it made contact with the heating duct that ran through the entire house and served as a sounding board. The Court said that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an intrusion into a constitutionally protected area." Finally, in Katz v. United States, 389 U.S. 347 (1967), the Court stated that the Fourth Amendment would apply to electronic surveillance whenever it violated a person's justifiable expectation of privacy. *Katz* is set forth, and discussed in detail, in the section on the threshold requirements for Fourth Amendment protection, *supra.*

It is important to note that *Katz* found that a trespass was not *necessary* for Fourth Amendment protection. It might have appeared, upon a reading of *Katz* and the cases that followed it for more than 40 years, that the whole concept of connecting physical trespass to Fourth Amendment protection had been scrapped. But in the landmark case of United States v. Jones, 132 S.Ct. 945 (2012), the Court held that the *Katz* "reasonable expectation of privacy" test did not *reject* the old cases finding that the Fourth Amendment protected against trespassory investigations. Rather, *Katz* held that the Fourth Amendment does not protect *only* against trespassory investigations. In other words, the reasonable expectation of privacy test is a *supplement* to and not a substitute for the common-law premise that trespassory investigations constitute searches regulated by the Fourth Amendment. *Jones* is set forth earlier in this Chapter in the section on searches.

B. UNDERCOVER AGENTS

Surreptitious Recording: Lopez v. United States

Lopez v. United States, 373 U.S. 427 (1963), involved an IRS agent who, having received an unsolicited bribe and having reported it to his superiors, concealed a wire recorder on his person, as directed by his superiors, when he met Lopez. Justice Harlan's majority opinion found no Fourth Amendment violation. "[T]he device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." The opinion concluded that "the risk that petitioner took in offering a bribe * * * fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

Undercover Agents in the Home: Lewis v. United States

Chief Justice Warren wrote for the Court in Lewis v. United States, 385 U.S. 206 (1966), and shed additional light on the Fourth Amendment's application to undercover government investigative activities. An undercover narcotics agent had telephoned Lewis's home asking about the possibility of purchasing marijuana. Arrangements were made and a sale was consummated. Subsequently, another sale took place in Lewis's home. Only Justice Douglas dissented from the Warren view that, because Lewis invited the agent into his home "for the specific purpose of executing a felonious sale of narcotics," the fact that Lewis believed he was dealing with a fellow lawbreaker did not require constitutional protection for the belief. The Chief Justice rejected the defendant's argument that the privacy interests in a home required heightened protection:

> [W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.

Limits on the Scope of Undercover Activity: Gouled v. United States

In upholding the undercover activity in *Lewis*, the Court took pains to distinguish Gouled v. United States, 255 U.S. 298 (1921). In *Gouled,* a business associate of the defendant, acting under orders from federal officers, obtained entry into the defendant's office by pretending that he was paying a social visit, when in fact he rummaged through papers in the office while Gouled was temporarily absent. The Court in *Gouled* invalidated the search. The *Lewis* Court explained that the search in *Gouled* was invalidated because the undercover informant's search went well beyond the scope of Gouled's invitation into the home.

Misplaced Confidence: Hoffa v. United States

A similar result to that in *Lewis* was reached in Hoffa v. United States, 385 U.S. 293 (1966). Union leader James Hoffa was convicted for attempting to bribe jurors in a previous trial. Much of the government's case depended on the testimony of a local union official who, after being released from jail with federal and state charges pending against him, spent a great deal of time in the Hoffa camp at the time of the bribe attempts. Justice Stewart's majority opinion assumed that the witness

had been an undercover agent from the first visit to Hoffa, but found that "no interest legitimately protected by the Fourth Amendment" was involved in the case. Justice Stewart wrote that "[w]hat the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area * * *." He concluded that the undercover agent invaded no protected area because he was invited into Hoffa's hotel room. Under these circumstances, Hoffa was not relying on the security of the hotel room, but upon his "misplaced confidence" that the union official would not reveal his statements. Such a risk, according to Justice Stewart, is "the kind of risk we necessarily assume whenever we speak."

Analysis of Eavesdropping and Undercover Informant Cases

The Court struggled in the early wiretapping and eavesdropping cases just to identify the right issues. Faced with new techniques of evidence gathering, the Court first found no Fourth Amendment violation unless a trespass occurred. Then, it found that any trespassory investigation was enough to require a finding that the Fourth Amendment was violated. *Katz* ultimately supplemented the trespass test with a reasonable expectation of privacy test. But the *Katz* test does not change the results in *Lewis, Gouled* or *Hoffa,* because the Court in those cases held that a person has no reasonable expectation of privacy from undercover activity *when he assumes the risk that his friends or associates would disclose his guilty secrets*. See also United States v. Davis, 326 F.3d 361 (2d Cir. 2003) (no Fourth Amendment violation where defendant invited an undercover informant into his home for a drug transaction, and the informant secretly videotaped the proceedings; the court noted that it was not deciding "the constitutionality of video surveillance conducted by an invited visitor equipped with a hidden camera with the power to depict items and details unobservable by the human eye").

Why does a person assume the risk that a friend will record an incriminating conversation, but not the risk that the government will use a wiretap and record an incriminating conversation?

C. STATUTORY REGULATION OF DOMESTIC ELECTRONIC SURVEILLANCE

Procedural Protections Required: Berger v. New York

Berger v. New York, 388 U.S. 41 (1967), seemed to evince a different judicial attitude toward electronic eavesdropping. The case arose out of a state investigation of alleged bribery of officials responsible for liquor licenses. An eavesdropping order was obtained pursuant to a New York statute, under which a justice could enter an order upon a finding of a

"reasonable ground to believe that evidence of crime" might be obtained. The statute required that the order particularly describe "the person or persons whose communications, conversations or discussions are to be overheard or recorded." The orders at issue in *Berger* permitted the installation of recording devices in an attorney's office and another person's office for 60 days. After two weeks, a conspiracy was uncovered and Berger was indicted as part of it. Relevant portions of the recordings were admitted into evidence.

Justice Clark's majority opinion found serious fault with the New York statute. Justice Clark viewed the statute as a "blanket grant" of permission to eavesdrop, "without adequate supervision or protective procedures." Among the procedural flaws, Justice Clark noted that: 1) there was a conspicuous absence of any requirement that a particular crime be named; 2) there was no requirement of a particular description of the conversations sought; 3) the length of time eavesdropping was permitted was too extensive; 4) extensions of the time period were granted on an insufficient showing that such extensions were "in the public interest"; 5) there was no provision for terminating the conversation once the evidence sought was found; and 6) the statute lacked notice and return procedures. The opinion concluded as follows: "Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe that it does."

The Federal Statutory Response: Title III and Its Amendments

One year after *Berger*, Congress enacted a new scheme of regulating wiretapping and electronic eavesdropping as part of the Omnibus Crime Control and Safe Streets Act of 1968. This legislation—which does not regulate eavesdropping conducted with the consent of one of the parties—is commonly known as "Title III." Title III was modified by Title I of the 1986 Electronic Communications Privacy Act, to account for technological advances and to correct perceived gaps in the statute. Other amendments were made by the Stored Communications Act. Title III was further amended by the USA PATRIOT ACT, passed almost immediately after the 9/11 terrorist attacks, and then again by the Homeland Security Act of 2002 (which makes it easier for agencies to share information obtained through interceptions permitted by Title III); and subsequent minor changes have been added from time to time.

The basic provisions of Title III as amended (18 U.S.C. §§ 2510–2522) are as follows:

1. ***Coverage:*** The statute covers any "wire, oral or electronic communication" It regulates any "intercept" which is defined as "the

aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."

2. ***Prohibition and Exclusion:*** Section 2511 prohibits the unauthorized willful interception, use, or disclosure of wire, oral, or electronic communications covered by the Act; but it does not apply to interception conducted with the consent of one of the parties.[26] Section 2515 states that no information obtained in violation of Title III, and no evidence derived therefrom, may be admitted in any proceeding.

3. ***Authorization:*** Title III provides that a court order may be obtained authorizing or approving the interception of wire or oral communications when such interception may provide or has provided evidence of—a long list of specified crimes. Title III was amended by the USA PATRIOT ACT to add to the list of crimes those related to computer fraud and abuse, use of chemical weapons, and terrorism.

4. ***Procedural Requirements for Application:*** To obtain an order authorizing interception of a wire, oral, or electronic communication, an officer must make a written filing under oath or affirmation to a judge of competent jurisdiction and must include, among other things:

> "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including details as to the particular offense that has been, is being, or is about to be committed";
>
> unless the application is for a "roving" wiretap, "a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted";
>
> "a particular description of the type of communications sought to be intercepted";
>
> "the identity of the person, if known, committing the offense and whose communications are to be intercepted";
>
> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous";

---

[26] Inadvertent interceptions do not violate the Act. See Adams v. Sumner, 39 F.3d 933 (9th Cir. 1994) (switchboard operator at hotel inadvertently hears an incriminating conversation; no error to admit at trial). See also United States v. Wuliger, 981 F.2d 1497 (6th Cir. 1992) (attorney who uses intercepted conversations to cross-examine a witness cannot be convicted under the Act unless he knows or has reason to know that the communications were intercepted in violation of the Act).

"a statement of the period of time for which the interception is required to be maintained"; and

a full and complete statement of any prior applications made with judges to intercept communications with any of the targets.

5. ***Order Issued by the Court:*** Upon a proper submission, the court "may enter an ex parte order * * * authorizing or approving interception of wire, oral or electronic communications" if the court finds that:

there is probable cause to believe that an individual is committing, has committed, or is about to commit an enumerated offense;

there is probable cause to believe that particular communications concerning that offense will be obtained through the interception;

"normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous";[27] and

there is probable cause to believe that the place where the communications are coming from are being used, or are about to be used, in connection with the commission of the specified offense.

6. ***Particularity Requirements:*** A court order authorizing interception of communications must provide the following particularized information:

"the identity of the person, if known, whose communications are to be intercepted";[28]

"the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted";

"a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates";

"the identity of the agency authorized to intercept the communications, and of the person authorizing the application"; and

---

[27] The statute's reference to other available investigative methods is known as the "necessity" requirement. But it is not an "exhaustion" requirement. As the Court stated in United States v. Giordano, 416 U.S. 505 (1974), the statute was intended to ensure not that wiretaps are used only as a last resort, "but that they were not to be routinely employed as the initial step in a criminal investigation." Thus, the statute does not require that alternative investigative procedures have been tried and failed, "but only that the success of other methods of investigation appear unlikely." United States v. Rivera, 527 F.3d 891 (9th Cir.2008) (necessity requirement met where it was clear that officers did not use the wiretap as the initial step in the investigation but instead used numerous techniques, and considered using several others, over the course of a 19-month investigation, before applying for the wiretap).

[28] In United States v. Kahn, 415 U.S. 143 (1974), the Court held that where the government knew of the existence of a person but did not know she was using the phone for illegal purposes, she was not a person whose identity must be disclosed under this section.

"the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."

7. ***Time Limits:*** An order permitting interception of communications under Title III must be limited in duration. It cannot authorize interception "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." Extensions of an order may be granted, but only upon application for an extension establishing necessity. The period of extension can be no longer than the judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days.

8. ***Minimization:*** Every order under Title III must contain a provision that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." This "minimization" requirement means that officers must stop monitoring a conversation as soon as it becomes apparent that it is not about the criminal activity that justified the court's order.[29]

9. ***Exigent Circumstances:*** Officers with probable cause can intercept communications without a court order, for a period no more than 48 hours, if an emergency situation exists that involves "immediate danger of death or serious physical injury to any person, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime."

10. ***Inventory:*** Within a reasonable time and in no case more than 90 days of the issuance of a court order, the party whose communications were intercepted must receive an inventory which must include among other things notice of the fact and date of the entry of the order, and the fact that communications were intercepted. The court may in its discretion make available for inspection "such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice." On an ex parte showing of good cause the court may order that the delivery of the inventory be postponed.[30]

---

[29] In Scott v. United States, 436 U.S. 128 (1978), the Court held it irrelevant that officers had no subjective intent to comply with the minimization requirement. What is controlling, said the Court, is whether the agents actually intercepted conversations that were not otherwise subject to interception under the Act.

[30] In United States v. Donovan, 429 U.S. 413 (1977), the Court held that when the government inadvertently excluded persons from its list of those intercepted and thus deprived them of the inventory notice, suppression of evidence was not warranted because the requirements did not play a "substantive role" in the statutory scheme. The Court in United States v. Ojeda Rios, 495 U.S. 257 (1990), held that a failure to comply with the Title III requirement that tapes be immediately sealed would not result in suppression if the government's error was the result of a good faith, objectively reasonable misinterpretation of the statute.

11. ***Remedies:*** Any "aggrieved person" may move to suppress the contents of any intercepted "wire or oral communication, or evidence derived therefrom," on the grounds that—

the communication was unlawfully intercepted;

the order of authorization or approval under which it was intercepted is insufficient on its face; or

the interception was not made in conformity with the order of authorization or approval.

12. ***Roving Wiretaps***: Title III now allows for "roving" wiretaps, i.e., interception of communications that are not tied to a particular location. An order for a roving wiretap can be issued upon a detailed showing that a stationary wiretap will not be a sufficient means for intercepting the targeted communications. See United States v. Oliva, 686 F.3d 1106 (9th Cir. 2012) (orders allowing surveillance of cellphones authorized the government to transform the cellphones into roving electronic bugs through the use of sophisticated technology; government needed to specifically request that authority in order to have it provided).

For an attack on Title III as being insufficiently protective, see Schwartz, The Legitimization of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich.L.Rev. 455 (1969). The Supreme Court's handling of important questions under the statute is criticized in Goldsmith, The Supreme Court and Title III; Rewriting the Law of Electronic Surveillance, 74 J.Crim.L. & Crim. 1 (1983).

For an article analyzing the changes wrought to Title III by the PATRIOT ACT, including the authorization of "roving wiretaps", see Orin Kerr, Internet Surveillance After the USA PATRIOT ACT: The Big Brother That Isn't, 97 Nw.U. L.Rev. 607 (2003).

D. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

Title III exempts interceptions of communications involving foreign intelligence, as Congress determined that matters of national security could not be accommodated by the strictures of Title III: it provides that "nothing contained [herein], shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system."

Interception of communications pertinent to foreign intelligence are governed by the Foreign Intelligence Surveillance Act of 1978, 50

U.S.C.A. § 1801 et seq. FISA differs from Title III in several important respects:

1) The government does not need to show traditional probable cause that a crime has been or will be committed. All that must be shown is that "the target of the electronic surveillance is a foreign power or agent of a foreign power." This includes a so-called "Lone Wolf' who is not directly affiliated but who engages in "international terrorism." See, e.g., United States v. Wen, 471 F.3d 777 (7th Cir. 2006) (probable cause to believe that a foreign agent was communicating with his controllers outside the United States was sufficient to support a FISA warrant; if, while conducting this surveillance, agents discover evidence of a domestic crime, they may use it to prosecute for that offense).

2) Requests for an order are made to one of eleven federal district judges specially selected by the Chief Justice of the Supreme Court. In order to secure an order, the application must set forth the identity or description of the target, and a statement of facts or circumstances relied upon to justify the officer's belief that the target is a foreign power or agent of a foreign power and that each facility or location to be subjected to surveillance is being used or is about to be used by the target.

3) Notice and inventory requirements are much less stringent. In fact, a target need *never* be notified of FISA surveillance if the Attorney General determines that there is a national security interest in continuing to maintain the secrecy of the search.

4) If there is a motion to suppress, the government may withhold the application it submitted to the FISA court, as well as the court order, on grounds of national security.

5) The "exigent circumstances" exception allows interceptions without a court order for up to 72 hours for an individual and for up to a year for foreign governmental entities.

6) Court review of a FISA application is extremely limited: "[I]n the absence of a prima facie showing of a fraudulent statement by the certifying officer, procedural regularity is the only determination to be made if a non-United States person is the target." United States v. Campa, 529 F.3d 980 (11th Cir. 2008). If a United States person is a target, the review is only over whether "some of the certifications are clearly erroneous." Defendants have argued that FISA is invalid because it does not assure adequate judicial review. But these arguments have been rejected. See United States v. Stewart, 590 F.3d 93 (2nd Cir. 2009) (upholding FISA surveillance of a lawyer representing a defendant charged with conspiracy to bomb the World Trade Center).

Up until 9/11/2001, FISA was used exclusively to conduct foreign counterintelligence investigations. But Section 218 of the PATRIOT ACT amended FISA to authorize electronic surveillance even in investigations whose primary purpose is criminal prosecution. See United States v. Ning Wen, 477 F.3d 896 (7th Cir. 2007) (FISA now applies to interceptions that have international intelligence as a "significant purpose"); United States v. Stewart, 590 F.3d 93 (2nd Cir. 2009) (reviewing and rejecting defendant's argument that the primary purpose for wiretapping her under FISA was to pursue a criminal investigation). "Since the passage of the PATRIOT ACT, the government has instituted a significant number of criminal prosecutions involving evidence gathered through FISA surveillance. In 2004, the federal government requested and obtained 1,754 FISA orders to conduct searches and surveillance, more than seven times the number of FISA orders issued in the year 2000." Siegler, The PATRIOT ACT's Erosion of Constitutional Rights, 32 Litigation 18 (2006). For a case finding that the FISA "significant purpose" test is reasonable under the Fourth Amendment, see United States v. Duka, 671 F.3d 329 (3rd Cir. 2011).

Despite the very mild limitations on surveillance imposed by FISA, the Bush Administration argued that it needed more flexibility in monitoring suspected terrorist activity. Congress responded by enacting the FISA Amendments Act of 2008. The Amendment left much of FISA intact, but it established a new and independent source of intelligence collection authority, beyond that granted in traditional FISA. Section 702 of FISA, 50 U.S.C. § 1881a, which was enacted as part of the FISA Amendments Act, supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISA court's authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power. And, unlike traditional FISA, § 1881a does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur. All that is required in a showing to the court is that the surveillance is of "persons reasonably believed to be located outside the United States" and that the targeting concerns "foreign intelligence information." Surveillance under § 1881a may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad Additionally, acquisitions under § 1881a must comport with the Fourth Amendment. § 1881a(b)(5). Moreover, surveillance under § 1881a is subject to congressional oversight and several types of Executive Branch review.

Section 1881a mandates that the Government obtain the Foreign Intelligence Surveillance Court's approval of "targeting" procedures, "minimization" procedures, and a governmental certification regarding proposed surveillance. Among other things, the Government's certification must attest that (1) procedures are in place "that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the [FISC] that are reasonably designed" to ensure that an acquisition is "limited to targeting persons reasonably believed to be located outside" the United States; (2) minimization procedures adequately restrict the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons, as appropriate; (3) guidelines have been adopted to ensure compliance with targeting limits and the Fourth Amendment; and (4) the procedures and guidelines referred to above comport with the Fourth Amendment.

Data Mining Under—and Around—FISA

In 2013, information was leaked that the National Security Agency obtained FISA orders to engage in data mining of phone calls, emails and internet activity of millions of Americans. The orders purportedly did not allow interception of content, but did allow collection of metadata—i.e., the length of a call, the number called, the recipient of an email, the fact of access to an internet page, etc. The following is a report by the *Huffington Post* on the FISA-authorized data mining:

> A massive email surveillance program run by the National Security Agency is not directed at Americans and is legally permissible and highly useful for anti-terror operation, a senior administration official said in a statement Thursday night.
>
> The statement, provided on condition of anonymity, came hours after news outlets revealed the existence of the PRISM program, which provides the NSA with access to records of America's largest Internet companies. The statement is an implicit confirmation of the program's existence. It also is the first defense of the massive surveillance effort that, until Thursday evening, the public did not know existed.
>
> The Guardian and Washington Post articles refer to collection of communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act. This law does not allow the targeting of any U.S. citizen or of any person located within the United States.
>
> The program is subject to oversight by the Foreign Intelligence Surveillance Court, the Executive Branch, and Congress. It involves extensive procedures, specifically approved by the court, to ensure that only non-U.S. persons outside the U.S. are targeted, and that

minimize the acquisition, retention and dissemination of incidentally acquired information about U.S. persons.

This program was recently reauthorized by Congress after extensive hearings and debate.

Information collected under this program is among the most important and valuable intelligence information we collect, and is used to protect our nation from a wide variety of threats.

The Government may only use Section 702 to acquire foreign intelligence information, which is specifically, and narrowly, defined in the Foreign Intelligence Surveillance Act. This requirement applies across the board, regardless of the nationality of the target.

Coming on the heels of revelations that the NSA had obtained phone call data from several of the biggest providers (as well as, reportedly, credit card information) it remains to be seen if the White House explanation will suffice. Top senators were quick to defend the NSA's phone surveillance program on Thursday. But others expressed concern, if not dismay, that it violated privacy rights.

This was before news of PRISM. It seems likely that lawmakers who reauthorized the Foreign Intelligence Surveillance Act will say that they anticipated that it would never be used to collect search histories, email contents or live chat transcripts.

From the Washington Post, June 18, 2013

Google challenges U.S. gag order, citing First Amendment

Google asked the secretive Foreign Intelligence Surveillance Court on Tuesday to ease long-standing gag orders over data requests the court makes, arguing that the company has a constitutional right to speak about information it is forced to give the government.

The legal filing, which invokes the First Amendment's guarantee of free speech, is the latest move by the California-based tech giant to protect its reputation in the aftermath of news reports about broad National Security Agency surveillance of Internet traffic.

Revelations about the program, called PRISM, have opened fissures between U.S. officials and the involved companies, which have scrambled to reassure their users without violating strict rules against disclosing information that the government has classified as top secret.

A high-profile legal showdown might help Google's efforts to portray itself as aggressively resisting government surveillance, and a victory could bolster the company's campaign to portray

government surveillance requests as targeted narrowly and affecting only a small number of users.

* * *

In its petition, Google sought permission to publish information about how many government data requests the surveillance court approves and how many user accounts are affected. Google long has made regular reports with regard to other data demands from the U.S. government and other governments worldwide, but it has been forced to exclude requests from the surveillance court, which oversees an array of official monitoring efforts that target foreigners.

* * *

Surveillance court requests typically are known only to small numbers of a company's employees. Discussing the requests openly, either within or beyond the walls of the company, can violate federal law.

Yet even if Google is permitted to say how many requests the surveillance court has made, the information may not shed much light on PRISM. The program does not require individual warrants from the surveillance court each time a search is made.

Even overall numbers of surveillance court requests would offer insight "only at a very high level of abstraction," said Stephen Vladeck, an American University law professor. "I don't think we'll learn anything other than how pervasive this practice has been. . . . It will only be a piece of a much larger puzzle."

The court, based in downtown Washington and composed of 11 federal judges appointed by Chief Justice John G. Roberts Jr., rarely rejects government requests for information. Of 1,789 requests it received in 2012, it approved all but one, which was withdrawn.

In 2008, the court rejected a challenge from a technology company that argued that a government request for information on foreign users was too broad to be constitutional. The court redacted the name of the company and other details when it published the ruling. Few of its decisions are ever made public. Appeals are handled by a secretive review court and can reach the Supreme Court.

The sharply limited public window into the legal infrastructure of surveillance review has made it difficult for outsiders to evaluate its decisions or the value of the secrecy it maintains.

* * *

All of the technology companies involved in PRISM, including Facebook, Apple, Microsoft, Google and Yahoo, have struggled to respond to the revelations about NSA surveillance.

Most of the companies have issued carefully crafted denials, saying that they do not permit wholesale data collection while acknowledging that they comply with legal government information requests. In Tuesday's legal filing, Google called the Post and Guardian reports about PRISM "misleading."

Those articles cited an NSA Power-Point presentation that said the agency connected directly to the servers of Facebook, Google, Microsoft and other tech industry giants—an assertion immediately denied by the companies. * * *

From Reuters, August 21, 2013:

The National Security Agency's surveillance network has the capacity to reach around 75 percent of all U.S. Internet communications in the hunt for foreign intelligence, the Wall Street Journal reported on Tuesday.

Citing current and former NSA officials, the newspaper said the 75 percent coverage is more of Americans' Internet communications than officials have publicly disclosed.

The Journal said the agency keeps the content of some emails sent between U.S. citizens and also filters domestic phone calls made over the Internet.

The NSA's filtering, carried out with telecom companies, looks for communications that either originate or end abroad, or are entirely foreign but happen to be passing through the United States, the paper said.

But officials told the Journal the system's broad reach makes it more likely that purely domestic communications will be incidentally intercepted and collected in the hunt for foreign ones.

In response to a request for comment, NSA said its intelligence mission "is centered on defeating foreign adversaries who aim to harm the country. We defend the United States from such threats while fiercely working to protect the privacy rights of U.S. persons."

The Journal said that these surveillance programs show the NSA can track almost anything that happens online, so long as it is covered by a broad court order, the Journal said.

Edward Snowden, a former NSA contractor, first disclosed details of secret U.S. programs to monitor Americans' telephone and Internet traffic earlier this summer.

In 2013, the FISA court renewed its authorization of the NSA plan to search the metadata of every American's phone calls. The court declared that the plan was constitutional under Smith v. Maryland, supra, the pen register case, which held that because the phone company had access to the numbers called by a person, the government could have such access in equal measure. The court acknowledged that under United States v. Jones, supra, the long-term surveillance of a person's location could be a search, but the court declared that the Supreme Court's *Jones* decision was grounded in trespass, and the NSA committed no trespass by monitoring calls. Moreover, NSA was not involved in location-tracking, as were the police in *Jones*. The Court declared that "[t]he Supreme Court may someday revisit the third-party disclosure principle in the context of 21st century technology, but that day has not arrived."

Is there a difference between aggregated location tracking and aggregated call tracking? Don't both types of aggregation risk disclosure of intimate details of a person's life? Is it relevant that FISA courts render rulings after hearing only the government's side?

It should be noted that the FISA court found that the NSA had violated the limits on the order allowing collection of phone call metadata—i.e., the NSA had looked at the contents of some calls. The FISA judge who discovered the violations reprimanded the NSA for violating the order prohibiting inspection of the content of calls in the absence of reasonable suspicion to believe that the calls were linked to terrorism. In fact only 10% of the calls monitored for content satisfied the reasonable suspicion standard. See NSA Violated Rules on Use of Phone Logs, Intelligence Court Found in 2009, New York Times, Sept. 11, 2013, p. A14.

Since the FISA court's decision on the data collection program, two district courts have reviewed the program, as of the date of this publication. One court upheld the program, relying on Smith v. Maryland, thus equating metadata collection to pen registers. The other court held that *Smith* dealt with quaint technology and was too thin a reed on which to rest the massive data collection that the NSA had undertaken.

Public outcry over the NSA data collection program led President Obama to make some changes by executive order and to suggest others through legislation. The most important change is that prior FISA court approval is now necessary before an analyst can gain access to calling records (except in emergencies). Also, a board of advocates has been appointed to argue the civil liberties side when FISA courts are ruling on cases that present novel and important policy issues. But the changes do not question the constitutionality of the data collection program and do not impose any limitation on NSA's collection of telephone call and

internet data. See Obama Outlines Calibrated Curbs on Phone Spying, New York Times, Jan. 18, 2014, p.1.

For more on the use of FISA procedures after 9/11, see Maclin, The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the *Keith* case. 41 U.C. Davis L. Rev. 1259 (2008).

VII. REMEDIES FOR FOURTH AMENDMENT VIOLATIONS

A. THE BACKGROUND OF THE EXCLUSIONARY RULE

The exclusionary rule, in its broadest conception, provides that evidence obtained in violation of the Fourth Amendment must be excluded from trial. But the exclusionary rule was not born contemporaneously with the Fourth Amendment. The Bill of Rights is not explicit as to remedies. For over a century after the adoption of the Fourth Amendment, virtually the only remedies available to victims of illegal searches were suits in trespass for damages, or in replevin for return of the goods seized. The trespass alternative was usually impractical, and replevin had no chance of success if the goods seized were contraband, or the fruits or instrumentalities of crime, because these items were considered forfeited to the state regardless of the legality of the seizure.

Exclusionary Rule for the Federal Courts: Weeks v. United States

The Court in Weeks v. United States, 232 U.S. 383 (1914), held that evidence obtained in violation of the Fourth Amendment must be excluded from evidence in federal courts. Justice Day wrote for a unanimous Court that if evidence obtained in violation of the Fourth Amendment could be used against a criminal defendant, then "the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value." The Court noted that the officers who obtained the evidence illegally were "doubtless prompted by the desire to bring further proof to the aid of the Government." It concluded that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution intended for the protection of the people against such unauthorized action."

Weeks was limited to cases where the illegal search was conducted by federal officers and the evidence was sought to be admitted in a federal

criminal proceeding. It was essentially an exercise of the Court's supervisory power over the federal courts.

Two themes articulated in *Weeks,* and finding recurrent expression in later cases dealing with the rationale for excluding evidence, were that the exclusionary rule is the only effective means of protecting Fourth Amendment rights, and that the interest in judicial integrity requires that the courts not sanction illegal searches by admitting the fruits of illegality into evidence. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), these considerations were held to prohibit the copying of illegally seized documents, and their use as the basis for a subpoena of the originals, which had been returned pursuant to a motion by the defendant. The Court stressed that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is [not merely that] evidence so acquired shall not be used before the Court but that it shall not be used at all."

B. THE EXCLUSIONARY RULE AND THE STATES

Weeks, which was grounded in the Court's supervisory power over federal courts, explicitly rejected the notion that the exclusionary rule should apply to violations by state or local police. Because the exclusionary rule after *Weeks* did not affect the conduct of state officials, federal officials would often allow state officers to obtain evidence illegally and then serve it to the federal officers on a "silver platter." The silver platter method of avoiding Fourth Amendment protections was used until 1960 when Elkins v. United States, 364 U.S. 206, abolished it. Then the Court took the next step and applied the exclusionary rule to the states. Mapp v. Ohio, 367 U.S. 643 (1961).

The rationale underlying these developments in Fourth Amendment remedies can best be understood by contrasting two major opinions of that period: Wolf v. Colorado and Mapp v. Ohio. As you study the two opinions, consider not only the debate over the efficacy of the exclusionary rule, but also the sensitive issues of federal-state relations.

WOLF V. COLORADO

Supreme Court of the United States, 1949.
338 U.S. 25.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

* * *

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The

knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

In Weeks v. United States, this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling * * * was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.

[Justice Frankfurter summarized state case law on the issue of admissibility of evidence, contrasting pre-and post-*Weeks* decisions. In 1949, 31 states had rejected the *Weeks* doctrine and 16 states were in agreement with it.]

The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge

scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. * * *

We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. * * *

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE joins, dissenting.

* * *

The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

* * *

[JUSTICE RUTLEDGE's separate dissent is omitted, as is JUSTICE DOUGLAS' dissent. JUSTICE BLACK's concurring opinion, stating that the exclusionary rule "is not a command of the Fourth Amendment" also is omitted.]

NOTE ON WOLF AND THE ROAD TO MAPP

Although the Court was divided 6–3 in *Wolf,* the division was over the applicability of the exclusionary rule to the States. The Justices unanimously agreed that the prohibition against unreasonable searches and seizures was a fundamental right applied to the States through the Due Process Clause of the Fourteenth Amendment. They disagreed on whether the exclusionary rule was a constitutionally required remedy.

In the next decade, the issue received the Court's attention twice more. In Rochin v. California, 342 U.S. 165 (1952), the shocking method used by the State to obtain incriminating evidence—pumping the defendant's stomach—was held to so offend "a sense of justice" as to require exclusion at a state trial. Two years later, in Irvine v. California, 347 U.S. 128 (1954), *Wolf* was

reaffirmed, 5–4, and evidence was admitted where the search of a home, although illegal, did not involve a physical assault on the suspect's person.

In 1961, the Supreme Court once again considered the question in Mapp v. Ohio. *Mapp* appeared to be exclusively a First Amendment case (whether Miss Mapp had the right to possess obscene material in her home); the exclusionary rule issue was neither briefed nor argued. Yet, *Wolf* was overruled 5–3. The change is partly explained by the fact that six members of the *Wolf* Court were no longer on the Bench.

MAPP V. OHIO

Supreme Court of the United States, 1961.
367 U.S. 643.

MR. JUSTICE CLARK delivered the opinion of the Court.

* * *

Some five years after *Wolf,* in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [*Weeks*] rule." Irvine v. California. * * *

* * * Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

* * * Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. * * * [T]he admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. * * *

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as basic to a free society. This Court has not hesitated to enforce as strictly against the States as it does against the

Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. * * * Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? * * *

* * *

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. at 21. In some cases this will undoubtedly be the result. But * * * there is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. * * *

The ignoble shortcut to conviction left open to the States tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. * * *

* * *

[JUSTICE BLACK concurred in a separate opinion, arguing that the Constitutional basis for the majority rule was the Fourth Amendment in conjunction with the Fifth Amendment's ban against compelled self-incrimination. The concurrences of Justices Douglas and Stewart have been omitted. Justice Stewart did not reach the Fourth Amendment question, preferring to decide the case on First Amendment grounds.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and JUSTICE WHITTAKER join, dissenting.

* * *

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing.

* * *

[T]he majority now finds an incongruity in *Wolf's* discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is for me the strength of that decision.

* * *

NOTE ON MAPP

What is the basis for the majority's conclusion that the exclusionary rule is required by the Constitution? Obviously, the texts of the Fourth and Fourteenth Amendments lend no support to the proposition. The origins of the rule likewise throw no historical weight behind its acceptance. In the final analysis, isn't the majority implicitly deciding that the exclusion of evidence is the only effective sanction, and that the right to be free from unreasonable searches is "a dead letter" without a sanction? If other alternatives had proved effective in deterring violations, would the Court have found exclusion to be a constitutional requirement?

Would a showing that exclusion of evidence has no deterrent effect whatsoever have required a different result? Professor Dripps, in Living with *Leon*, 95 Yale L.J. 906 (1986), argues that if no sanction attaches to a Fourth Amendment violation, the Amendment does not qualify as a *law*, thus betraying "the fundamental principle of constitutionalism, which is after all that the Constitution states the law." He argues that "even if the sanction does not deter, the refusal to apply it or anything else expresses the judgment that the underlying norm is of little importance."

As we will see in *Leon, infra*, the Court has held that despite its decision in *Mapp*, the exclusionary rule *is not constitutionally required for all Fourth Amendment violations*, in part because the violation of a Fourth Amendment right occurs at the time of the original police intrusion. The argument is that later exclusion from the trial has nothing to do with the already completed violation, and that introduction of the evidence at trial is not a separate violation of privacy. For an argument that the Fourth Amendment violation is not complete at the time of the intrusion, and that the exclusionary rule is constitutionally required, see Heffernan, On Justifying Fourth Amendment Exclusion, 1989 Wis.L.Rev. 1193.

C. ARGUMENTS FOR AND AGAINST THE EXCLUSIONARY RULE

Many judges are not enamoured of the exclusionary rule. For example, Judge Bowman had this to say about the exclusionary rule in United States v. Jefferson, 906 F.2d 346 (8th Cir.1990), a case in which the entire court agreed that evidence obtained during a stop without reasonable suspicion had to be excluded due to the exclusionary rule:

> This case vividly illustrates the perversity of the exclusionary rule. Here, an officer's educated hunch led to the discovery of evidence (nine kilograms of cocaine) of substantial criminal activity. This discovery occurred as a result of information the officer developed by asking questions and examining documents in the course of his routine check of a parked car and its occupants at a highway rest stop. The ordinary law-abiding citizen, I believe, would think the officer should be commended for his fine work, and the cocaine dealers punished. Instead, because we hold (as I agree, under the existing case law, we must) that a "seizure" within the meaning of the Fourth Amendment occurred before the officer had formed an objectively reasonable basis for suspecting the defendants of criminal activity, the exclusionary rule requires that the evidence be suppressed. The defendants thus exit unpunished, free to continue dealing illegal drugs to the pathetic addicts and contemptible scofflaws who comprise the national market for these substances. As for the officer, far from his being commended, it is judicially recorded that he blundered, and the point once again is driven home that legalistic observance of even the most technical of the judge-created rules of search and seizure—rules which, like the Fourth Amendment itself, seek to protect law-abiding citizens from intrusive conduct by officers of the state—is more important than intelligent, courageous, and vigorous initiative to expose criminal activity and bring those responsible for it to the bar of justice.
>
> It has been reported that since 1961, when [*Mapp* was decided], "the murder rate has doubled, rape has quadrupled and robbery has quintupled." *Wall St.J.*, May 7, 1990, at A14, Col. 1. While it would be foolish to blame the exclusionary rule for all of this alarming increase in violent crime, I believe it is equally foolish to pretend that the exclusionary rule, and the *zeitgeist* it has created, is to blame for none of it.

Judge Bowman's comments prompted Chief Judge Lay to respond as follows:

> If police are not deterred from illegal intrusions of privacy by excluding whatever evidence is seized, the Fourth Amendment will have no meaning or force. Surely an appreciation for the history and

purpose of our basic freedoms will never allow emotional fear to justify an environment where there is no check on the abuse of police power.

The Fourth Amendment protects the good guy as well as the bad. It would mean very little to anyone if it did not. The argument that since 1961 murders have doubled, rapes quadrupled, and robbery quintupled in part because of the exclusionary rule is a statement more fitting for headlines of the National Enquirer. It is irrational hyperbole totally unsupported in fact or in law.

Supporters of the exclusionary rule generally make four points in its favor: 1. The rule preserves judicial integrity, by insulating the courts from tainted evidence; 2. The rule prevents the government from profiting from its own wrong; 3. The rule is not costly, because it only excludes what should never have been obtained in the first place; and 4. The rule is necessary to deter police misconduct. See, e.g., Barnett, Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutiv Principles of Justice, 32 Emory L.J. 937 (1983).

Professor Amar, in Fourth Amendment First Principles, 10 Harv.L.Rev. 757 (1994), attacks each of the justifications listed by Judge Lay. As to the judicial integrity rationale, Amar responds: "we must remember that integrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict. Thus, the courts best affirm their integrity not by closing their eyes to truthful evidence, but by opening their doors to any civil suit brought against wayward government officials, even one brought by a convict."

Professor Amar continues his critique of the exclusionary rule as follows:

Consider next the nice-sounding idea that government should not profit from its own wrongdoing. Our society, however, also cherishes the notion that cheaters—or murderers or rapists, for that matter—should not prosper. When the murderer's bloody knife is introduced, it is not only the government that profits; the people also profit when those who truly do commit crimes against person and property are duly convicted on the basis of reliable evidence. * * *

The classic response is that setting criminals free is a cost of the Fourth Amendment itself, and not of the much-maligned exclusionary rule. If the government had simply obeyed the Fourth Amendment it would never have found the bloody knife. Thus, excluding the knife simply restores the status quo ante and confers no benefit on the murderer. The classic response is too quick.

In many situations, it is far from clear that the illegality of a search is indeed a but-for cause of the later introduction of an item

found in the search. Suppose the police could easily get a warrant, but fail to do so because they think the case at hand falls into a judicially recognized exception to the warrant requirement. A court later disagrees—and so, under current doctrine, the search was unconstitutional. But if the court goes on to exclude the bloody knife, it does indeed confer a huge benefit on the murderer. The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the knife into evidence.

* * *

But even if a defendant could conclusively establish but-for causation, the bloody knife should still come in as evidence. Not all but-for consequences of an illegal search are legally cognizable. * * * [I]f an illegal search turns up a ton of marijuana, the government need not return the contraband even if the government's possession of the marijuana is clearly a but-for consequence of its illegal search. Indeed, the government may sell the marijuana (say, for legitimate medical uses) and use the proceeds to finance the continued war on drugs. In a very real way, the government *has* profited from its own wrong.

Finally, Professor Amar critiques the deterrence rationale of the exclusionary rule, and decries the fact that deterrence comes by way of benefit to criminal defendants.

Deterrence is concerned with the government, it is concerned with systematic impact. It treats the criminal defendant merely as a surrogate for the larger public interest in restraining the government. The criminal defendant is a kind of private attorney general.

But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens. Indeed, he is often despised by the public, the class he implicitly is supposed to represent. He will litigate on the worst set of facts, heedless that the result will be a bad precedent for the Fourth Amendment generally. He cares only about the case at hand—his case—and has no long view. He is not a sophisticated repeat player. He rarely hires the best lawyer. He cares only about exclusion—and can get only exclusion—even if other remedies (damages or injunctions) would better prevent future violations. * * * He is, in short, an awkward champion of the Fourth Amendment.

He is also overcompensated. * * * In a criminal case, if we insist on using criminal defendants as private attorneys general, why not give a defendant who successfully establishes a Fourth Amendment violation only a ten percent sentence discount—surely a tangible incentive—and substitute for the remaining ninety percent some

other structural remedy, injunctive or damages, that will flow to the direct benefit of law-abiding citizens? * * *

Put differently, if deterrence is the key, the idea is to make the government pay, in some way, for its past misdeeds, in order to discourage future ones. But why should that payment flow to the guilty? Under the exclusionary rule, the more guilty you are, the more you benefit. * * * In sum, when it comes to private attorneys general, the exclusionary rule's deterrence rationale looks in the wrong place—to paradigmatically guilty criminal defendants rather than to prototypically law-abiding civil plaintiffs.

Professor Slobogin, in Why Liberals Should Chuck the Exclusionary Rule, 1999 Univ. Ill. L.Rev. 363, argues that the exclusionary rule should be replaced by an effective remedy of monetary damages.

[I]f optimal deterrence of illegal searches and seizures is the goal, the exclusionary rule is a poor solution. Changing or suppressing behavior is a complex and difficult task. It is especially difficult when, as is true with many types of illegal searches and seizures, the behavior is implicitly or explicitly endorsed by peers, superiors, and large segment of the general public. Without a strong disincentive t engage in such conduct, it will continue. Thus, a regime that directly sanctions officers and their departments is preferable to the [exclusionary] rule. Although there are many versions of such a regime, it should have several core components: (1) a liquidated damages/penalty for all unconstitutional actions, preferably based on the average officer's salary; (2) personal liability, at the liquidated damages sum, of officers who knowingly or recklessly violate the Fourth Amendment; (3) entity liability, at the liquidated damages sum, for all other violations; (4) state-paid legal assistance for those with Fourth Amendment claims; and (5) a judicial decisionmaker.

That such a regime is a better deterrent than the exclusionary rule does not establish that it should be adopted, of course. The exclusionary rule clearly does have some deterrent effect. If it proves to be considerably less costly than a damages regime, perhaps it should remain the sanction of choice. It is unlikely that the rule is significantly "cheaper," however, whether one looks at financial or other types of costs. * * * A conservative estimate is that approximately 10,000 felons and 55,000 misdemeanants evade punishment each year because of successful Fourth Amendment suppression motions. Other costs of the rule are more subtle. These include the threat to the Fourth Amendment posed by judges and prosecutors concerned with freeing criminals, the psychic and systemic costs of routine perjury by police officers, the distracting impact of suppression hearings on the quality of defense

representation on other issues, and the damage to courts and government generally because of public outrage at the huge benefit criminals receive when the cases against them are dismissed or damaged by exclusion.

* * *

[A] favorite liberal argument on behalf of the rule has been * * * that any alternative that truly works will result in at least as many lost convictions as the rule. A first response to this argument is that if we can avoid flaunting the costs of the Fourth Amendment and still achieve its goals, so much the better. More importantly, the assumption that an effective alternative prevents us from catching any criminal the exclusionary rule prevents us from convicting is wrong. The point of an effective deterrent is not only to discourage unconstitutional actions but to encourage constitutional ones. With an effective deterrent in place, police who lack probable cause will not necessarily give up; the more reasonable assumption is that they will simply get more cause. That is precisely the behavior a damages regime would systematically induce and what the exclusionary rule fails to encourage in any concerted way.

For more arguments about the value of the exclusionary rule and lternative remedies, see Stuntz The Virtues and Vices of the xclusionary Rule, 20 Harv.J.L and Pub.Pol. 443 (1997); Perrin et al., If s Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and xtensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule, 83 Iowa L.Rev. 369 (1998).

For a debate over the exclusionary rule by two titans of the law, see Calabresi and Kamisar, Debate on the Search and Seizure Exclusionary Rule, 26 Harv. J. L. & Pub. Pol. 4 (2003). Judge Calabresi proposes an alternative to the exclusionary rule: that defendants could object to illegally obtained evidence, but only at *sentencing*, and if the motion is successful the defendant would receive a sentence reduction. In addition, Judge Calabresi would impose direct administrative sanctions on police officers for illegal searches and seizures. Professor Kamisar expresses doubt that administrative sanctions on wrongdoing police officers will be imposed in practice.

D. ALTERNATIVES TO EXCLUSION

The most common argument in support of the exclusionary rule is the alleged absence of alternative means of enforcing Fourth Amendment protections. The efficacy of the alternatives are, however, as hotly debated as the rule itself. In this section, other possible remedies will be evaluated, both in terms of deterrent value and workability.

It should be noted at the outset that most of these remedies could be used as *supplements* to, rather than replacements for, suppression of evidence.

1. Civil Damages Recovery

At present several forms of damage actions are available to the victim of an illegal search or seizure. Common law tort actions include false arrest, false imprisonment and trespass. More importantly, a federal civil rights action under 42 U.S.C.A. § 1983 is available when state officers, acting under color of law, violate a constitutional right. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court created a federal common law counterpart to § 1983 for violations by *federal* officials.

The two major problems involved in civil actions against police for violation of constitutional rights are first, winning, and second, collecting on the judgment. Obstacles such as governmental immunity exist in many states. Magistrates who issue invalid warrants are immune from suit. Pierson v. Ray, 386 U.S. 547, 553–55 (1967). Police officers exercising discretion are entitled to qualified immunity, so that even if they violate the Fourth Amendment, the citizen does not recover unless the law was clearly established at the time of the conduct.[31] How much Fourth Amendment law can be considered clearly established? (See *Safford, supra,* in the section on *Terry*, in which a strip search of a student was found illegal under the Fourth Amendment, but the official was found not liable because the law against such an action was not clearly established at the time of the search).

Besides the daunting prospect of overcoming qualified immunity, the "moral aspects of the case" make recovery in a jury trial difficult. Many victims of illegal police practices are not very sympathetic plaintiffs. In a false arrest action, for example, proof of the plaintiff's prior convictions often can be used to impeach his credibility or to show that probable cause existed for the arrest. "Respectable" persons have the greatest chance of recovering, because they will not be tainted by their past, but the "respectable" person is probably least likely to be subject to arbitrary arrest and harassment, and thus least likely to require a tort remedy.

If a plaintiff succeeds in proving liability, the next obstacle is proving—and collecting—damages adequate to make the suit worth the effort. In a trespass action, where damages are limited to actual property

[31] In Malley v. Briggs, 475 U.S. 335 (1986), the Court states that the question to be asked on qualified immunity with respect to an illegal search is "whether a reasonably well-trained officer * * * would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." The opinion observes that "[i]t is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it," but that "ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should."

loss, the award is usually small except in the most extreme search cases. Nominal damages provide no incentive for an aggrieved citizen to sue, and thus prevent private persons from effectively enforcing the public policy against police illegality. A § 1983 action, which provides for attorney fees for the prevailing party, avoids some of the drawbacks of common law tort remedies. However, proof of the requisite intent and measuring the value of constitutional rights impose additional problems.

If the plaintiff receives a substantial damage award, the final problem is collecting on the judgment. Where sovereign immunity prevents actions against the government, a plaintiff is left to attempt recovery from the offending officers, who are often unable to pay. In § 1983 actions, the governmental unit employing the officer is not liable simply because one of its officers has violated the plaintiff's Fourth Amendment rights. In order to hold the government entity liable, the plaintiff must show that his injury resulted from the entity's custom or policy; otherwise the plaintiff is left to recover against the individual officer. Monell v. Department of Social Services, 436 U.S. 658 (1978) (applying the custom or policy requirement for municipal liability in § 1983 actions).

Supreme Court View on Civil Damage Recovery as an Alternative to the Exclusionary Rule: Hudson v. Michigan

Despite all these limitations on civil damages recovery for a Fourth Amendment violation, the Supreme Court in Hudson v. Michigan, 547 U.S. 586 (2006), seemed to find § 1983 actions to be a viable alternative to the exclusionary rule. The Court in *Hudson* held that a violation of the knock-and-announce requirement does not justify exclusion of evidence found in the home.[32] The defendant argued that without the exclusionary rule, such violations would not be deterred. Justice Scalia, writing for the majority, responded to that argument, and more broadly to the argument that the exclusionary rule was necessary to deter other Fourth Amendment violations, in the following passage:

> We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago. Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; Monroe v. Pape, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of

32 *Hudson* is set forth in detail in the section on the fruit of causation and attenuation, *infra*.

municipalities, Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978). Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

Hudson complains that "it would be very hard to find a lawyer to take a case such as this", but 42 U.S.C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." M. Avery, D. Rudovsky, & K. Blum, Police Misconduct: Law and Litigation, p. v (3d ed. 2005). The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.

Is the Court saying that the exclusionary rule is no longer necessary t deter any Fourth Amendment violation, because of the modern strengtl and viability of § 1983 actions? What about the limitations on §1983 liability that Justice Scalia did not discuss in *Hudson*—such as defenses of qualified immunity, and the absence of respondeat superior liability? What about the fact that many victims of Fourth Amendment violations are people with whom a jury will have little sympathy?

Fortified Civil Damages Remedy

It should be noted that after *Hudson*, any talk of a fortified damages remedy may be hypothetical, because the Court seems to think that existing damages remedies provide a sufficiently effective alternative to exclusion. Nonetheless, Professor Amar, in Fourth Amendment First Principles, 107 Harv.L.Rev.757 (1994), recommends five steps that would strengthen the deterrent effects of the existing civil damages remedy for Fourth Amendment violations. He contends that if these steps are employed, the damages remedy will provide effective deterrence against illegal police activity; the exclusionary rule can then be abolished.

Professor Amar's suggestions are as follows: First, the government should be made liable for illegal police behavior—that is, the current bar on respondeat superior liability should be abrogated. Not only would this provide a financially responsible defendant, but it would apply the deterrent at the level where policy is made. Second, damage multipliers and punitive damages should be made available—with some of the excess

recovery going to a "Fourth Amendment Fund to educate Americans about the Amendment and comfort victims of crime and police brutality." Third, claims for small damage amounts should be entitled to reasonable attorney's fees and the possibility of class action consolidation. Fourth, the procedural limitations on injunctive relief for Fourth Amendment violations should be liberalized. Fifth, administrative channels should be established so that claims can be processed quickly and efficiently without the need for a court action.

Would this fortified damages remedy be more effective than the exclusionary rule? Does it make more sense than the exclusionary rule because it potentially provides compensation to innocent people, whereas the exclusionary rule can by definition be invoked only by guilty people?

Some have argued that one of the costs of the exclusionary rule is that it results in judicial cutbacks on the Fourth Amendment's substantive protections—the argument is that courts, when they see the consequences of exclusion of evidence (letting the guilty go free), tend to hold that there is no Fourth Amendment violation in the first place. Would the courts be more prone to find Fourth Amendment violations if the only consequence was a monetary remedy, as opposed to allowing a guilty person to go free?

Proposals in Congress for Alternatives to the Exclusionary Rule

Members of Congress have from time to time proposed legislation that would abrogate the exclusionary rule and replace it with a fortified tort remedy. As of yet, no such proposal has been enacted. A typical example is a proposal providing that the United States would be liable for damages resulting from an illegal search or seizure of an investigative or law enforcement officer. Punitive damages are capped at $10,000; awards to anyone convicted of an offense in which the illegally obtained evidence was used would be limited to damages for actual physical injury and property damage; and attorney's fees and costs would be awarded to claimants who prevail.

The Committee on Federal Legislation of the Association of the Bar of the City of New York had this to say about tort recovery alternatives to the exclusionary rule:

> [E]ven if a tort remedy could be fashioned that would result in meaningful monetary recovery for the victims of Fourth Amendment violations, we would object to it as a replacement for (rather than a supplement to) the exclusionary rule. The tort remedy is based upon the premise that Fourth Amendment rights can and should be left to the marketplace—that the government can make an economic decision to violate a person's Fourth Amendment rights, so long as it

is willing to pay its way out of it. We do not believe that Fourth Amendment rights are susceptible to such a market analysis. * * *

* * * We find it troubling that the government could establish a budget line for Fourth Amendment violations as part of its war on crime. It cannot be the case that a Fourth Amendment violation is truly remedied simply because the government cuts a check.

Proposed Changes to the Exclusionary Rule, 50 The Record of the Association of the Bar of the City of New York 385 (1995).

Does Congress even have the power under the Constitution to abrogate the exclusionary rule and replace it with another remedy?

2. Criminal Prosecutions of Offending Officers

Criminal prosecution of offending officers is sometimes suggested as the only real deterrent to police misconduct. A federal statute has been in existence since 1921 that makes federal officers who participate in illegal searches guilty of a misdemeanor and subject to substantial fines. 18 U.S.C.A. § 2236. To our knowledge, however, no officer has ever been convicted under the statute. Many states have similar statutes that also remain dormant. A fair number of criminal actions have been brought under state and federal law for actions of police officers that have resulted in death or serious injury of persons who are arrested. The cases involving the beatings of Rodney King (an African-American construction worker who was beaten by Los Angeles police officers following a high-speed car chase in 1991) and Abner Louima (arrested in a nightclub in 1997 and sexually assaulted by police officers in a stationhouse bathroom) are two notorious examples. But again, few criminal prosecutions are brought against police officers who simply make illegal searches.

Why has there been such a dearth of prosecutions? The most likely answer is that prosecutors are reluctant to press charges against the police, except in the most extreme cases involving physical injury, because they rely heavily on cooperation with the department. In addition, juries are reluctant to convict policemen of crime, unless the circumstances are egregious.

More fundamentally, it can be argued that the threat of a direct criminal sanction on the officer who conducts an illegal search is an *over-deterrent*. It may lead to an officer "second-guessing" himself in fast-developing situations, and deciding, for example, not to enter a premises, when to enter might be needed to protect a member of the public. Isn't the systemic deterrence provided by the exclusionary rule more appropriate in these circumstances?

3. Police Rulemaking and Other Administrative Solutions

A third alternative remedy for Fourth Amendment violations is police regulation, education, training and discipline. In Hudson v. Michigan, supra, the Court extolled the virtues of internal police regulations and training programs to comply with the Fourth Amendment—which programs generally did not exist at the time of *Mapp*—as an alternative to the exclusionary rule for deterring police misconduct.

> Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. * * * [W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers." S. Walker, Taming the System: The Control of Discretion in Criminal Justice 1950–1990, p. 51 (1993). Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to create an effective regime for internal discipline. [Citing treatises and manuals used by police.] Failure to teach and enforce constitutional requirements exposes municipalities to financial liability. See Canton v. Harris, 489 U.S. 378, 388 (1989). Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect. There is also evidence that the increasing use of various forms of citizen review can enhance police accountability.

While police education, training and discipline on Fourth Amendment issues has surely increased dramatically since *Mapp*, couldn't it be argued that all of these innovations occurred *because* the exclusionary rule finally made the Fourth Amendment relevant, as a practical matter, to police departments? Why was there no significant training on Fourth Amendment standards in the state before *Mapp*? If the exclusionary rule were abolished, would there be the same incentive to train officers in Fourth Amendment law and discipline them when they violate it?

4. Sentence Reductions

Some of the commentary discussed above suggest that instead of excluding illegally obtained evidence from the trial, a more fair and balanced result would allow or require the sentencing court to reduce a defendants sentence if illegally obtained evidence was used against him at trial. It is argued that the sentencing alternative would limit the costs to society and avoid a windfall for the defendant.

Would the threat of a reduction of sentence deter illegal searches and seizures? Would officers and police departments take account of a sentencing discount in determining whether to conduct a search or seizure? Or would these actors be focused on convicting the guilty?

E. LIMITATIONS ON EXCLUSION

There are a number of important situations in which evidence has been illegally obtained, and yet it will not be excluded. This section considers those limitations on the exclusionary rule.

1. "Good Faith"—Reasonable Reliance on the Decisions of Magistrates and Others

In the following case, the Court adopted a "good faith" exception for searches conducted pursuant to a warrant that is later found to be invalid. As you read the case, keep in mind that the Court is not promulgating an "absolute" exception. Rather, there are "exceptions to the exception," where a good faith argument will be rejected and the evidence excluded. Also note that the Court clearly holds that the Constitution does not require exclusion of evidence as a remedy for Fourth Amendment violation. Does this mean that *Mapp* is overruled? so, are the States permitted to abolish the exclusionary rule entirely an admit all illegally obtained evidence, as they were before *Mapp*?

UNITED STATES V. LEON

Supreme Court of the United States, 1984.
468 U.S. 897.

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.
* * *

[On the basis of information from an informant and other investigation, Officer Rombach obtained a facially valid search warrant. The ensuing searches produced large quantities of drugs and related evidence that the government proffered against several alleged coconspirators. The district court found that the warrant was issued without probable cause. The court of appeals affirmed the order of suppression, finding that the affidavit was insufficient to establish probable cause under the then-applicable *Spinelli* test. One court of appeals judge dissented from this ruling.]

The Government's petition for certiorari expressly declined to seek review of the lower courts' determinations that the search warrant was unsupported by probable cause and presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." * * *

We have concluded that, in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions. Accordingly, we reverse the judgment of the Court of Appeals.

* * *

Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment, or that the rule is required by the conjunction of the Fourth and Fifth Amendments. These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time, and the Fourth Amendment has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.

* * * The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "works no new Fourth Amendment wrong." The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case-in-chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. * * * An objectionable collateral consequence of this interference

with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. * * *

Close attention to those remedial objectives has characterized our recent decisions concerning the scope of the Fourth Amendment exclusionary rule.

[Justice White notes that the Court had by this time: confined the rule to criminal trials; required "standing" on the part of defendants who seek suppression; permitted use of illegally seized evidence to impeach the defendant; and allowed evidence to be admitted where its link to a violation is attenuated.]

As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule. But the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us. * * *

Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime," we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination.

* * *

* * * To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate. * * * Judges and magistrates are not adjuncts to the law enforcement

team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. * * * Imposition of the exclusionary sanction is not necessary to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or "magistrate shopping" and thus promotes the ends of the Fourth Amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.[a]

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. * * * But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. * * *[b]

This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish

---

[a] Our discussion of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant. * * *

[b] We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment. The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits.

probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient. * * * Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

* * * We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion. We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. * * * [T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer[c] will have no reasonable grounds for believing that the warrant was properly issued.

Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in Lo-Ji Sales, Inc. v. New York [where the magistrate issued the warrant and then participated in the search]; in such circumstances, no reasonably well-trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. * * *

Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the

[c] References to "officer" throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.

constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. * * *

If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers' good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith. * * *

When the principles we have enunciated today are applied to the facts of this case, it is apparent that the judgment of the Court of Appeals cannot stand. * * *

* * *

Officer Rombach's application for a warrant clearly was supported by much more than a "bare bones" affidavit. The affidavit related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate.

JUSTICE BLACKMUN, concurring.

* * * I believe that the rule announced today advances the legitimate interests of the criminal justice system without sacrificing the individual rights protected by the Fourth Amendment. I write separately, however, to underscore what I regard as the unavoidably provisional nature of today's decisions.

* * *

* * * By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.

* * *

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.[d]

* * *

[A]s critics of the exclusionary rule never tire of repeating, the Fourth Amendment makes no express provision for the exclusion of evidence secured in violation of its commands. A short answer to this claim, of course, is that many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decisionmaking. * * *

A more direct answer may be supplied by recognizing that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; * * *. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

* * * Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment. * * *

[I]f the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual's Fourth Amendment rights may be undermined as completely by one as by the other.

* * *

[T]he Court has frequently bewailed the "cost" of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. * * * Thus, some criminals will go free *not,* in Justice (then Judge) Cardozo's misleading epigram, "because the constable has blundered," but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals.

---

[d] The dissent addresses both *Leon* and the companion case, *Sheppard* discussed infra.

* * *

* * * The key to the Court's conclusion * * * is its belief that the prospective deterrent effect of the exclusionary rule operates only in those situations in which police officers, when deciding whether to go forward with some particular search, have reason to know that their planned conduct will violate the requirements of the Fourth Amendment. * * *

* * * But what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment. Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally. * * *

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

* * *

Although the Court brushes these concerns aside, a host of grave consequences can be expected to result from its decision to carve this new exception out of the exclusionary rule. A chief consequence of today's decision will be to convey a clear and unambiguous message to magistrates that their decisions to issue warrants are now insulated from subsequent judicial review. * * *

Moreover, the good faith exception will encourage police to provide only the bare minimum of information in future warrant applications. The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not "entirely unreasonable," all police conduct pursuant to that warrant will be protected from further judicial review. * * *

[E]ven if one were to believe, as the Court apparently does, that police are hobbled by inflexible and hypertechnical warrant procedures, today's decision cannot be justified. This is because, given the relaxed standard for assessing probable cause established just last Term in

Illinois v. Gates, the Court's newly fashioned good faith exception, when applied in the warrant context, will rarely, if ever, offer any greater flexibility for police than the *Gates* standard already supplies. * * * Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the test announced today. Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mindboggling concept of objectively reasonable reliance upon an objectively unreasonable warrant.

* * * [T]he full impact of the Court's regrettable decision will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights.

* * *

JUSTICE STEVENS, concurring in the judgment in [*Sheppard*], and dissenting in [*Leon*].[e]

* * *

The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was "reasonable" for the police to conduct them. In my opinion an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time.

* * *

Today's decisions do grave damage to [the exclusionary rule's] deterrent function. Under the majority's new rule, even when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait. No longer must they hesitate and seek additional evidence in doubtful cases. * * *

* * * Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding. In my judgment, the Constitution requires more. * * * Nor should we so easily concede the existence of a

[e] Justice Stevens expressed the view that there was no constitutional violation in *Sheppard*.

constitutional violation for which there is no remedy. To do so is to convert a Bill of *Rights* into an unenforced honor code that the police may follow in their discretion. The Constitution requires more; it requires a *remedy*. If the Court's new rule is to be followed, the Bill of Rights should be renamed.

NOTE ON MASSACHUSETTS V. SHEPPARD

Massachusetts v. Sheppard, 468 U.S. 981 (1984), is the companion case to *Leon*. In the course of a murder investigation in Roxbury, Officer O'Malley obtained probable cause to arrest Sheppard and to search his residence. Officer O'Malley's affidavit described in detail the property to be seized in the search of Sheppard's house, e.g., the victim's clothing. Detective O'Malley showed the affidavit to the district attorney, the district attorney's first assistant, and a sergeant, who all concluded that it set forth probable cause for the search and the arrest, and that a warrant based on the affidavit would particularly describe the things to be seized. The *Sheppard* Court described what happened next:

> Because it was Sunday, the local court was closed, and the police had a difficult time finding a warrant application form. Detective O'Malley finally found a warrant form previously in use in the Dorchester District. The form was entitled "Search Warrant—Controlled Substance G.L. c. 276 §§ 1 through 3A." Realizing that some changes had to be made before the form could be used to authorize the search requested in the affidavit, Detective O'Malley deleted the subtitle "controlled substance" with a typewriter. He also substituted "Roxbury" for the printed "Dorchester" and typed Sheppard's name and address into blank spaces provided for that information. However, the reference to "controlled substance" was not deleted in the portion of the form that constituted the warrant application and that, when signed, would constitute the warrant itself.
>
> Detective O'Malley then took the affidavit and the warrant form to the residence of a judge who had consented to consider the warrant application. The judge examined the affidavit and stated that he would authorize the search as requested. Detective O'Malley offered the warrant form and stated that he knew the form as presented dealt with controlled substances. He showed the judge where he had crossed out the subtitles. After unsuccessfully searching for a more suitable form, the judge informed O'Malley that he would make the necessary changes so as to provide a proper search warrant. The judge then took the form, made some changes on it, and dated and signed the warrant. However, he did not change the substantive portion of the warrant, which continued to authorize a search for controlled substances; nor did he alter the form so as to incorporate the affidavit. The judge returned the affidavit and the warrant to O'Malley, informing him that the warrant was sufficient authority in form and content to carry out the search as

requested. * * * The scope of the ensuing search was limited to the items listed in the affidavit, and several incriminating pieces of evidence were discovered. Sheppard was then charged with first degree murder.

The *Sheppard* Court stated that "[t]here is no dispute that the officers believed that the warrant authorized the search that they conducted." The Court found that there was an objectively reasonable basis for the officers' mistaken belief. If an error of constitutional dimension was made, the Court found that it was the judge who made it, and the Court therefore declined to suppress the evidence. The Court concluded that the officers "took every step that could reasonably be expected of them," and that O'Malley was not required "to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." The Court refused to decide whether the warrant was in fact invalid for lack of particularity. It stated that this was "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity." Justice Stevens argued in his opinion concurring in the judgment that there was no error of constitutional dimension and therefore no need to suppress evidence.

For cases following *Sheppard*, see United States v. Kelley, 140 F.3d 596 (5th Cir.1998) (officers could reasonably rely on the warrant even though it was defective because the magistrate hadn't signed it: "The rare occasion when a magistrate accidentally fails to sign a warrant cannot be eliminated by suppressing the evidence" and "it is unlikely that police will wilfully and recklessly attempt to evade getting a warrant signed"); United States v. Russell, 970 F.2d 421 (5th Cir.1992) (warrant fails to include an attachment of the items to be seized, but the officer specifically described the items in an affidavit; judge committed the "clerical error" of failing to incorporate the affidavit in the warrant).

Reasonable Reliance on Unreasonable Warrants

The *Leon* Court rejects a good faith test that would depend on the subjective state of mind of the officer. Instead, the Court establishes a concept of "reasonable" reliance on an invalid warrant. Justices Stevens and Brennan contend that it is impossible to rely reasonably on an unreasonable warrant. But reasonable minds can and often do differ as to what is reasonable. For example, in a typical negligence trial both sides can make reasonable arguments about whether the defendant acted unreasonably—if there was no such thing as a reasonable argument about whether the defendant acted reasonably, then no negligence case would ever get to a jury. And in terms of warrants, one person might think that a warrant is valid while two others might think it defective; certainly there could be a reasonable disagreement when it comes to Fourth Amendment standards that are often ambiguous and fact-dependent.

What the *Leon* Court appears to mean is that in cases where some or most people would think that a warrant is invalid—for lack of probable cause, or particularity, or other procedural details—the good faith exception will apply so long as reasonable minds can differ on the point. Where no reasonable argument can be made that the warrant is valid, then the good faith exception will not apply because no reasonable officer could rely on the magistrate's determination. It is at that point an error by the *officer* to rely on the warrant—and officers can be deterred by the exclusionary rule.

Thus, the good faith exception is similar to the standard used for reviewing jury verdicts in civil cases—the standard is not whether the jury was correct or whether the reviewing court would have decided the case another way, but rather whether no reasonable person could have decided the way the jury did. So long as there is room for argument, then, the good faith exception will apply.

Another useful analogy comes from the qualified immunity cases decided under the civil rights statute, 42 U.S.C. § 1983. Even if the plaintiff's constitutional rights are violated, an official is not liable unless he violated clearly established law; if the law was not clearly established at the time of the officer's action, then there is room for argument as to whether the officer's conduct was lawful. The Supreme Court has equated the standards of qualified immunity with the objective reasonableness standard of the good faith exception to the exclusionary rule. See Anderson v. Creighton, 483 U.S. 635 (1987) (rejecting the argument that an officer may not reasonably act unreasonably).

Because an officer can reasonably act unreasonably, there are three types of errors after *Leon:*

(1) reasonable mistakes that are not a violation of the Fourth Amendment at all, such as a mistake of fact;

(2) unreasonable mistakes that in fact violate the Fourth Amendment, but at the time of the conduct reasonable minds could have differed about whether the officer was acting lawfully; and

(3) unreasonable mistakes where the officer violated clearly established law, so that no reasonable argument could be made that the action was lawful.

Illinois v. Rodriguez, (discussed in the materials on third party consent)—where the officers made a reasonable mistake about the authority of a third party to consent to a search—falls into the first category; *Leon* falls into the second; and reliance on a warrant issued on the basis of a barebones affidavit falls into the third.

Leon, Gates and Warrants Clearly Lacking in Probable Cause

In Justice Brennan's view, the good faith standard and the *Gates* standard for probable cause overlap completely, so that if a warrant is lacking in probable cause under the permissible test of *Gates* it must be so deficient, so clearly lacking in probable cause, that it could not possibly be reasonably relied upon. This view has not been adopted by the courts after *Leon*, however. There are a number of cases in which courts have found the good faith exception applicable because reasonable minds could differ about whether the *Gates* standards were satisfied. These cases indicate that there is some grey area between the *Gates* standard and a warrant that clearly lacks probable cause. See, e.g., United States v. Gibson, 928 F.2d 250 (8th Cir.1991) (*Gates* standard not satisfied because police only corroborated a few "innocent details," but good faith exception applies because reasonable minds could differ on whether *Gates* standard is satisfied on such minimal corroboration); United States v. Brunette, 256 F.3d 14 (1st Cir. 2001) (it was error for the magistrate to issue a warrant to search for internet child pornography where the magistrate relied solely on the officer's conclusion that the pictures posted by the defendant were pornographic; however, "although we hold that the omission of images or a description of them was a serious defect in the warrant application, the uncertain state of the law at the time made reliance on the warrant objectively reasonable."); United States v. Paull, 551 F.3d 516 (6th Cir. 2009) (while information about the defendant's possession of child pornography was very dated, the warrant did not "clearly lack" probable cause because of this stale information; the officer had experience in child pornography investigations that caused her to believe the evidence was still on the premises: "even where an officer's experience provides too little evidence to establish probable cause, it suffices to make the affidavit not bare bones by providing a reasonable connection between the defendant and the alleged crime.").

There are also a fair number of cases in which probable cause is found lacking under *Gates*, and the court further finds that the officer was *not* objectively reasonable in relying on the warrant. See, e.g., United States v. Doyle, 650 F.3d 460 (4th Cir. 2011) (warrant to search for child pornography clearly lacked probable cause where "[t]he bulk of the information supplied in the affidavit concerned allegations of sexual assault"; the court found that "evidence of child molestation alone does not support probable cause to search for child pornography"); United States v. John, 654 F.3d 412 (3rd Cir. 2011) (warrant to search the defendant's home for child pornography clearly lacked probable cause where it was based solely on the fact that the defendant had molested his students on school property and kept evidence of those crimes at his home); United States v. Baxter, 889 F.2d 731 (6th Cir.1989) (affidavit describing tip from anonymous informant, with corroboration only of

defendant's address and prior conviction on drug charges, is a barebones affidavit, and officer was not objectively reasonable in relying on the warrant); United States v. Helton, 314 F.3d 812 (6th Cir. 2003) ("A reasonable officer knows that evidence of three calls a month to known drug dealers from a house, a description of that house, and an allegation that a drug dealer stores drug proceeds with his brother and his brother's girlfriend (neither of whom live at or are known to visit that house) falls well short of establishing probable cause that the house contains evidence of a crime.").

The case of United States v. Carpenter, 360 F.3d 591 (6th Cir. 2004), is instructive on the difference between facts that are reasonably close to probable cause and facts where probable cause is clearly lacking. Officers obtained a warrant to search the defendant's residence based on an affidavit stating that marijuana was growing in a field "near" the residence and "there is a road connecting the above described residence to the marijuana plants." The court held that the warrant issued on the basis of this affidavit lacked probable cause, "because it did not provide the required nexus between the residence and the illegal activity." However, the evidence found in the residence was not excluded because the affidavit did not clearly lack a showing of probable cause as to location. The court stated that "the affidavit was not completely devoid of any nexus between the residence and the marijuana that the police observed." Rather, it noted both that the marijuana was growing near the residence and that there was a road connecting the residence and the marijuana plants. The court found a "useful contrast" in the facts of United States v. Hove, 848 F.2d 137 (9th Cir. 1988), where a warrant was found clearly lacking in probable cause because the officer "obtained a warrant to search a particular residence after submitting to the issuing magistrate an affidavit that failed to provide *any* nexus between the residence and illegal activity".

Good Faith and Qualified Immunity: Messerschmidt v. Miller

In Messerschmidt v. Millender, 132 S.Ct. 1235 (2012), the Supreme Court reversed the Ninth Circuit's denial of qualified immunity to two officers who executed a search warrant for firearms and gang-related material based solely on a violent altercation between the defendant and his girlfriend. The Court, in an opinion by Chief Justice Roberts, noted (as it had in previous cases) that the standard for qualified immunity in cases alleging Fourth Amendment violations was the same as provided in the good-faith exception under *Leon:*

> Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the

> officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." Nonetheless * * * the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." The "shield of immunity" otherwise conferred by the warrant will be lost, for example, where the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon.*

Because the officers in this case had obtained a warrant, the major question in the case was whether that warrant was so lacking in probable cause as to a gang-related offense that it could not have been reasonably relied upon. Chief Justice Roberts found a number of plausible reasons for allowing a search for gang-related material, among them that gang-related evidence would tie the defendant to the premises and show his control over the property. He also noted that reasonable officers could have concluded that what was going on in the house was more than a domestic dispute: "A reasonable officer could certainly view Bowen's attack as motivated not by the souring of his romantic relationship with Kelly but instead by a desire to prevent her from disclosing details of his gang activity to the police." The Chief Justice concluded as follows:

> The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. * * * Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered "plainly incompetent" for concluding otherwise.

Justice Breyer wrote a short concurring opinion. Justice Kagan wrote an opinion concurring in part and dissenting in part. Justice Sotomayor, joined by Justice Ginsburg, dissented, accusing the Court of sanctioning a "general warrant" based on the faulty premise that "four wrongs apparently make a right."

Leon and Warrants Lacking Particularity

Applying the *Leon* framework to particularity questions, it would appear that the good faith exception would apply to a search pursuant to an overbroad or unparticularized warrant, so long as reasonable minds could differ about whether the warrant is in fact overbroad. On the other hand, if all reasonable people would agree that the warrant is deficient, then the officer cannot reasonably rely upon it.

United States v. Dahlman, 13 F.3d 1391 (10th Cir.1993), is an example of *Leon*-applicability. Officers searching for narcotics obtained a warrant to search two "lots" in a subdivision. As conducted, the search encompassed a camping trailer and a cabin on one of the lots, as well as the lots themselves. The court found that the warrant was defective as applied to the cabin: "a warrant authorizing the search of a lot of land without a more precise definition of the scope of the search is inconsistent with the particularity requirement of the Fourth Amendment, and does not suffice to authorize a search of a residence located on the land." Still, the court held that the evidence obtained in the cabin was admissible under the good faith exception. It noted that two other circuits had held similar warrants to be sufficiently particular, and therefore that reasonable minds could differ about whether the warrant was in fact overbroad. See also United States v. Otero, 563 F.3d 1127 (10th Cir. 2009) (warrant to search computer was overbroad because it authorized the seizure of "any and all information" stored on the computer, and the subject matter limitations were placed in a different part of the affidavit; but the good faith exception applied because "one could see how a reasonable officer might have thought that the limitations in the first portion of Attachment B would be read to also apply to the second portion").

In contrast, some cases have found a warrant to be so overbroad that it could not reasonably be relied upon. In United States v. Fuccillo, 808 F.2d 173 (1st Cir.1987), officers searched a clothing warehouse and retail clothing store, with search warrants authorizing the seizure of "women's clothing" believed to be stolen. They seized virtually all the clothing found at each of the premises (including men's clothing). The court ruled that the warrants were insufficiently particular, because the officers "could have obtained specific information for presentment to the magistrate and placement in the warrant which would have enabled the agents [executing the warrants] to differentiate contraband cartons of women's clothing from legitimate ones." In fact the officers had a detailed list of the stolen clothing, but they failed to include it in the warrant application. The court further held that the good faith exception could not justify the searches and seizures. It reasoned that the officers were "reckless in not including in the affidavit information which was known or easily accessible to them," and that the warrant was so overbroad that the executing officers could not reasonably presume it to be valid. See also United States v. Stubbs, 873 F.2d 210 (9th Cir.1989) (good faith exception unavailable where warrant authorizes seizure of virtually all business documents, and probable cause existed as to only one transaction).

Leon and Untrue or Omitted Statements in the Warrant Application

An exception to the good faith exception arises if the officer includes material information in the application that he "knew was false or would have known was false except for his reckless disregard of the truth." *Leon.* Exclusion also occurs if the officer knowingly omits material information that would have resulted in the magistrate's refusing to issue the warrant. The good faith exception cannot apply in these instances because the error is the officer's, not the magistrate's. Determining whether the officer has made such an error is sometimes difficult, however.

Consider United States v. Johnson, 78 F.3d 1258 (8th Cir.1996). A police officer received a call from an anonymous informant who stated that he had been present when marijuana had been delivered to Johnson's residence. The officer verified Johnson's address and discovered that Johnson had been arrested previously for marijuana possession. The officer then prepared an affidavit to obtain a search warrant of Johnson's address. The affidavit for search warrant had a printed form attached, Attachment B. This form had a section relating to whether the informant was anonymous or confidential, and a section with four printed reasons why the informant is reliable. The officer checked two reasons why the anonymous caller was reliable: "C. Information he has supplied has been corroborated by law enforcement personnel." and "D. He has not given false information in the past." The warrant was issued and a search turned up drugs. The government conceded that the tip was too conclusory and the corroboration too thin to support probable cause under *Gates*, but the government argued that the information provided was close enough that reasonable minds could differ about whether the *Gates* standards were satisfied.

Because the officer had corroborated at least some part of the informant's tip as asserted in the warrant application, the question was whether the officer had knowingly or recklessly disregarded the truth in checking the line stating that the informant had not given false information in the past. The Court held that the officer's assertion did not trigger the "officer misrepresentation" exception to *Leon.* The court reasoned as follows:

> The officer took the literal view of the phrase that the caller had not given false information in the past even though this was the informant's first call. We do not believe that checking this statement rises to the level of making a false statement knowingly or intentionally or with a reckless disregard for the truth. * * * [W]e do not subject law enforcement officers to absolute syllogistic precision.

Judge Arnold, in dissent, disagreed and argued that the affidavit was deceptive and outside the realm of *Leon* good faith:

> This is hardly a matter of requiring law enforcement officers to observe "syllogistic precision". It is, rather, a matter of common ordinary speech. A statement that an informant had not previously given false information is clearly calculated to influence the magistrate to whom the application for warrant was to be submitted. The statement could hardly have been other than deliberate. To read the statement absolutely literally seems disingenuous to me, and certainly not the way one would understand the statement under the circumstances. * * * For this reason, it seems to me that the affidavit falls clearly within one of the exceptions to the *Leon* "good faith" rule, and that the motion to suppress should have been granted.

Why did the form affidavit have a "fill in the blank" for whether the informant had ever given *false* information in the past? Why wasn't the issue phrased as whether the informant had ever given *truthful* information in the past? Isn't that the important question under *Gates*? If it is the form itself that is deceptive, should *Leon* apply?

For a case in which *Leon* was found inapplicable due to officer misrepresentations in the warrant application, see United States v. Vigeant, 176 F.3d 565 (1st Cir.1999). Officers filed a detailed affidavit, based in large part on a tip from a confidential informant (CI) alleging that Vigeant was engaged in money-laundering resulting from sales of drugs. Among the allegations was that Vigeant was unemployed and yet had purchased a "pleasure boat"—the inference being that he must have done so with laundered funds. One problem with the case, however, was that Vigeant filed a proper Currency Transaction Report (CTR) for each of his financial transactions, and made no attempt to disguise the electronic or paper trail of any transaction. The court reviewed the affidavit and found it insufficient to establish probable cause; it also found the good faith exception inapplicable due to the various misrepresentations and omissions in the affidavit. It elaborated as follows:

> We believe this is a case in which excluding the evidence will have a substantial deterrent effect on the police. Our conclusion rests on the fact that a finding of good faith is inconsistent with the numerous material omissions excluded from—and false and misleading statements included in—the underlying affidavit. * * * Officer Botelho's numerous omissions of material facts were at least reckless. An enumeration of Botelho's omissions follows.
>
> First, and most important, Botelho neglected to mention the CI's long criminal history, his numerous aliases, his recent plea agreement, and other indicia of his unreliability. Second, Botelho failed to note that Vigeant had filed the necessary CTR, yet Botelho

included in the affidavit such minute details about the transaction as that it involved "small bills"—a fact he presumably obtained from the CTR. Filing a CTR, like failing to "structure" the transaction to avoid the reporting requirement, is evidence manifestly inconsistent with money laundering. Third, Botelho mentioned an additional deposit by cashier's check, but neglected to say that Vigeant's grandmother, who was above suspicion in this case, was the purchaser of the check. Fourth, Botelho could have (but did not) obtain Vigeant's employment status from the probation office, apparently deciding instead to infer (without informing the magistrate that he had done so) Vigeant's present unemployment from a blank space marked "current employment" on a two-year-old bank application. Fifth, Botelho stated that "the evidence indicates that Robert Vigeant has created front companies," which implies the existence of underlying evidence not disclosed. Such evidence did not, in fact, exist. Sixth, the government failed to note that the supposed "pleasure boat" mentioned in the affidavit was, in fact, a stripped-down craft in poor condition in need of considerable repair and refurbishing before it could be sold at a profit. Seventh, the affidavit implies that the CI personally witnessed a marijuana transaction and personally received $10,000; neither is true. * * *

The government offers no rational explanation for these omissions and foundationless conclusions. Instead, the government argues in its brief—with information obtained after the search in question—that Vigeant is a bad person. Be that as it may, even unsavory persons have constitutional rights. We conclude that a reasonable officer in Botelho's position—that is, in possession of the omitted information—would have known that he should not have applied for the warrant, at least not without further investigation.

Leon and the Abdicating Magistrate

United States v. Decker, 956 F.2d 773 (8th Cir.1992), is a rare case in which the court held that *Leon* could not apply because the magistrate abdicated his neutral and detached role. Agents subjected a suspicious-looking UPS package to a canine sniff, and the dog positively alerted to drugs. The agents then made a controlled delivery, and followed the package to Decker's house. Decker was arrested when he received the package. A search of his person revealed a small amount of narcotics. An agent prepared an affidavit setting forth these facts and applying for permission to seize narcotics at Decker's house. The magistrate issued a warrant to search Decker's house, but the warrant failed to list any items to be seized other than the UPS package, which was already in the possession of the agents. The search warrant was a standard form relating to stolen property, not to drugs, and referred to the UPS package

as "unlawfully stolen." The magistrate later admitted that the flaws in the warrant were his fault and attributed these errors "to the fact that he was intrigued by the manner in which Agent Hicks became suspicious of the package and the ensuing investigation and therefore did not focus on the language of the warrant." Pursuant to the warrant, the officers seized more than 300 items from Decker's house, including a clock radio, two lamps, a microwave oven, and a weed eater. The court found that the magistrate signed the warrant without reading it, that he acted as "a rubber stamp," and that the agents could not reasonably rely on the warrant. So the evidence had to be suppressed. Compare United States v. Breckenridge, 782 F.2d 1317 (5th Cir.1986), where the court held that the good faith exception applied even though the judge who issued the warrant never read the officer's affidavit. The court reasoned that the officer could reasonably rely on the warrant because, while the judge did not read the affidavit, he "appeared to Agent Alexander to be doing so."

The good faith exception will not apply if the person who issues the warrant is affiliated with law enforcement. See, e.g., United States v. Lucas, 451 F.3d 492 (8th Cir. 2006) (officers could not reasonably rely on a warrant issued by the Director of Corrections, a member of the executive branch: "the good faith exception does not apply when the individual who issued the warrant is not neutral and detached.").

The Teaching Function

The *Leon* dissenters were concerned that appellate courts will routinely refuse to decide Fourth Amendment questions about the validity of a warrant, preferring instead to reach the easier holding that the officer was not totally unreasonable in relying on a magistrate's determination that the warrant was valid. Lower court decisions suggest that the dissenters' concerns were justified—many courts are avoiding decisions about substantive Fourth Amendment law and ruling instead on the easier question of good faith. For example, in United States v. Henderson, 746 F.2d 619 (9th Cir.1984), defendants convicted of drug offenses challenged an order authorizing beeper surveillance. Rather than rule on whether the order was valid, the court sustained the search by citing *Leon* and relying upon the good faith of the agents. Thus, in future cases, the agents have no guidance as to the validity of similar orders. Presumably, officers continue to act in good faith until a similar order actually is invalidated. Likewise, in United States v. Tedford, 875 F.2d 446 (5th Cir.1989), the court bypassed a probable cause question and proceeded directly to the issue of good faith. The court stated that the probable cause issue was fact-bound, and resolution would not provide important guidance on Fourth Amendment limitations. See also United States v. Perez, 393 F.3d 457 (4th Cir. 2004) ("Assuming without deciding that the * * * search warrant was invalid for lack of probable cause, we

exercise our discretion to proceed directly to the question of good faith."; assuming arguendo that the warrant lacked probable cause, it was close enough for reasonable minds to differ, and therefore evidence could not be excluded).

Despite the general trend to avoid Fourth Amendment questions after *Leon*, there are some courts that have taken their teaching function seriously. Illustrative is United States v. Dahlman, 13 F.3d 1391 (10th Cir.1993), discussed above. In *Dahlman*, the court held that a warrant authorizing the search of a certain "lot", without mentioning a residence, was insufficiently particular to justify a search of the residence. Then the court found that the good faith exception applied to the search of the residence, because the law on particularity, as applied to the search of a "lot", was unsettled at the time of the search. The court had this to say about the teaching function after *Leon*:

> This court could have simply affirmed the trial court on the good faith issue without first discussing the underlying Fourth Amendment issue, i.e., the validity of the warrant. * * * However, a close reading of *Leon* reveals that, while the Supreme Court intended to vest lower courts with discretion, the preferred sequence is to address the Fourth Amendment issues before turning to the good faith issue unless there is no danger of "freezing" Fourth Amendment jurisprudence or unless the case poses "no important Fourth Amendment questions."
>
> * * * If we were to have avoided addressing the underlying Fourth Amendment question today, a magistrate could legitimately issue an identical warrant tomorrow and the officers could engage in the same conduct without consequence—since there would be no adverse ruling to guide the magistrate or the officers, the warrant would be issued and the search would once again be valid under principles of good faith. In effect, Fourth Amendment jurisprudence would be frozen on this issue because of this never-ending cycle. Thus, the policy of avoiding "freezing" Fourth Amendment jurisprudence, discussed by the Court in *Leon*, compels us in this case to resolve the constitutional issue so that magistrates and law enforcement officers do not continue to make the same mistake indefinitely.

Once a court, such as in *Dahlman*, declares a particular practice illegal—though without an attendant exclusion of evidence in that case—an officer who thereafter engages in the conduct is acting unreasonably, and the good faith exception will not apply. See United States v. Buck, 813 F.2d 588 (2d Cir.1987), where the court held that a warrant with a catch-all clause was insufficiently particular, but nonetheless applied the good faith exception because "what the officers failed to do was to anticipate our holding today that the particularity clause of the Fourth

Amendment prohibits the use of a catch-all description in a search warrant, unaccompanied by any list of particular items or any other limiting language." However, the court stated in a footnote that "with respect to searches conducted hereafter, police officers may no longer invoke the reasonable-reliance exception to the exclusionary rule when they attempt to introduce as evidence the fruits of searches undertaken on the basis of warrants containing only a catch-all description of the property to be seized." And the court was true to its word. In United States v. George, 975 F.2d 72 (2d Cir.1992), the court invalidated a warrant similar to that in *Buck*, and refused to apply the good faith exception "in light of the settled nature of the law."

2. The Good Faith Exception and Warrantless Searches

The Court in *Leon* applied the good faith exception because an officer reasonably relied on the magistrate's decision. The Court reasoned that the magistrate, rather than the officer, made the error, and that magistrates cannot be deterred by the exclusionary rule. An important question is whether this reasoning can be applied to excuse illegal but "good faith," objectively reasonable—but illegal—searches *without a warrant.*

Reasonable Reliance on Legislative Acts: Illinois v. Krull

In Illinois v. Krull, 480 U.S. 340 (1987), Illinois had enacted a statute authorizing warrantless searches by state officials to inspect the records of dealers in motor vehicles, automobile parts, or automobile scrap metal. Officers searched Krull's premises without a warrant, under the authority of the statute. The statute was found unconstitutional after the search. The government argued that while the search was illegal, the error was that of the legislature, not the officer, and so exclusion was unwarranted.

Justice Blackmun's majority opinion reasoned that, as in *Leon,* the presence of an intermediary upon whom the officer could reasonably rely meant that the officer could not be deterred by the exclusionary rule. Justice Blackmun recognized that the legislature made a mistake by passing an unconstitutional statute, but reasoned that the legislature could not be deterred from passing unconstitutional laws by application of the exclusionary rule. According to the Court, legislators enact statutes for "broad programmatic purposes, not for the purpose of procuring evidence in particular criminal investigations."

The *Krull* Court decided, as in *Leon,* that a good faith claim must have an objective basis, so that "[a] statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws," and "a law enforcement officer [cannot] be said to have acted in good-faith reliance

upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional." But neither of these exceptions were applicable to the facts of the case.

Justice O'Connor, joined by Justices Brennan, Marshall and Stevens, dissented. She distinguished legislators from magistrates, finding that "[t]he judicial role is particularized, fact-specific and nonpolitical," and argued that "[p]roviding legislatures a grace period during which the police may freely perform unreasonable searches in order to convict those who might have otherwise escaped creates a positive incentive to promulgate unconstitutional laws." See also United States v. Duka, 671 F.3d 329 (3rd Cir. 2011) (finding that FISA amendment allowing domestic wiretapping was reasonable and even if it were not, officer's reliance on it was objectively reasonable and so exclusion was unwarranted).

Clerical Errors and Reliance on Court Clerical Personnel: Arizona v. Evans

The Court continued to adhere to the *Leon* framework in Arizona v. Evans, 514 U.S. 1 (1995), a case that arose from a clerical error attributed to the judicial branch. Evans was stopped for a traffic violation. The officer entered Evans's name in a computer data terminal, and the computer inquiry indicated that there was an outstanding misdemeanor warrant for Evans' arrest. On the basis of that information, the officer arrested Evans, and in a search incident to the arrest, the officer found marijuana. Subsequently, it was discovered that the arrest warrant had been quashed well before Evans had been stopped by the officer, but that an entry to that effect had never been made in the computer records of outstanding warrants. The Supreme Court assumed that the error was caused by court clerical personnel who, contrary to standard procedure, never called the Sheriff's office with notification that Evans' arrest warrant had been quashed.

Chief Justice Rehnquist, writing for a seven-person majority, held that the critical analysis under "the *Leon* framework" was whether the government official who makes a mistake that leads to an illegal search or seizure can be deterred by operation of the exclusionary rule. Applying this reasoning to errors of court clerical personnel, the Chief Justice stated as follows:

> [T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of

evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.

The next question under the *Leon* framework is whether application of the exclusionary rule would deter misconduct of *police officers* where the initial mistake was made by a different government official. The Chief Justice concluded that officers could not be deterred when they reasonably rely on erroneous computer records prepared and maintained by court clerical personnel.

Justice O'Connor, joined by Justices Souter and Breyer, wrote a concurring opinion emphasizing that the Court had not decided whether the good faith exception should apply if the computer error was caused by police personnel rather than court personnel. She also stated that the exclusionary rule should be applicable if police officers rely on a court recordkeeping system that is known to be rife with error. She elaborated as follows:

> Surely it would not be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).
>
> In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly.

Justice Souter, joined by Justice Breyer, wrote a separate, short concurring opinion in which he left open the possibility that the exclusionary rule might be necessary as a last resort to combat erroneous computerized recordkeeping by non-police personnel.

Justice Stevens dissented from the Court's opinion in *Evans*. He contended that court clerical personnel often "work in the same building with police officers and may have more regular and direct contact with police than with judges or magistrates." Justice Stevens found it "outrageous" for a citizen to be "arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base."

Justice Ginsburg wrote a separate dissent that was joined by Justice Stevens. She noted her concern with the risk to privacy that could result from errors in computer entries. She explained the scope of the problem in the following passage:

> Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities

of error, due to both computer malfunctions and operator mistakes. Most germane to this case, computerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database. * * *

Evans' case is not idiosyncratic. Rogan v. Los Angeles, 668 F.Supp. 1384 (C.D.Cal.1987), similarly indicates the problem. There, the Los Angeles Police Department, in 1982, had entered into the NCIC computer an arrest warrant for a man suspected of robbery and murder. Because the suspect had been impersonating Terry Dean Rogan, the arrest warrant erroneously named Rogan. Compounding the error, the Los Angeles Police Department had failed to include a description of the suspect's physical characteristics. During the next two years, this incorrect and incomplete information caused Rogan to be arrested four times, three times at gunpoint, after stops for minor traffic infractions in Michigan and Oklahoma.

Justice Ginsburg concluded that, in light of the enormity and relative recency of the problem arising from illegal searches based on computer error, the Court should have dismissed the grant of certiorari and allowed the issue to be developed and argued throughout the lower courts.

Good-Faith Exception Applied Where Error Was the Result of Negligence Attenuated from the Arrest or Search: Herring v. United States

HERRING v. UNITED STATES

Supreme Court of the United States, 2009.
555 U.S. 135.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

Herring was arrested by Coffee County Officer Anderson after Anderson sought and received information that there was an outstanding warrant for his arrest in nearby Dale County. There had, however, been a mistake about the warrant. It had been quashed, but the database had not been changed to reflect that fact. Unlike in *Evans,* though, the clerical error was made by a law enforcement officer. By the time Anderson found out about the error, Herring had already been arrested, and evidence had been found in a search incident to arrest. The court of appeals found that the good faith exception applied and so the evidence was properly admitted.]

In analyzing the applicability of the [exclusionary] rule, *Leon* admonished that we must consider the actions of all the police officers involved. * * * The Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

* * *

1. * * * [E]xclusion has always been our last resort, not our first impulse, and our precedents establish important principles that constrain application of the exclusionary rule. * * *

2. The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. * * *

Anticipating the good-faith exception to the exclusionary rule, Judge Friendly wrote that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights." The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L.Rev. 929, 953 (1965).

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Weeks*, a foundational exclusionary rule case, the officers had broken into the defendant's home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U.S. Marshal to confiscate even more. Not only did they have no search warrant, which the Court held was required, but they could not have gotten one had they tried. * * * Equally flagrant conduct was at issue in Mapp v. Ohio, which * * * extended the exclusionary rule to the States. Officers forced open a door to Ms. Mapp's house, kept her lawyer from entering, brandished what the court concluded was a false warrant, then forced her into handcuffs and canvassed the house for obscenity. An error that arises

from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place. And in fact since *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.

3. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.[a]

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. * * * If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. We said as much in *Leon*, explaining that an officer could not "obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant, are thus unfounded.

* * * In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system. But there is no evidence that errors in Dale County's system are routine or widespread. * * *

Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its

---

[a] We do not quarrel with Justice GINSBURG's claim that "liability for negligence . . . creates an incentive to act with greater care," and we do not suggest that the exclusion of this evidence could have no deterrent effect. But our cases require any deterrence to be weighed against the substantial social costs exacted by the exclusionary rule, and here exclusion is not worth the cost.

way. In such a case, the criminal should not "go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the Court by Cardozo, J.).

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

* * *

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases. Moreover, States are actively expanding information sharing between jurisdictions. As a result, law enforcement has an increasing supply of information within its easy electronic reach.

The risk of error stemming from these databases is not slim. Herring's amici warn that law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system.

* * * The Court assures that "exclusion would certainly be justified" if "the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests." This concession provides little comfort.

First, by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights. There can be no serious assertion that relief is available under 42 U.S.C. § 1983. The arresting officer would be sheltered by qualified immunity, and the police department itself is not liable for the negligent acts of its employees. Moreover, identifying the department employee who committed the error may be impossible.

Second, I doubt that police forces already possess sufficient incentives to maintain up-to-date records. The Government argues that police have no desire to send officers out on arrests unnecessarily, because arrests consume resources and place officers in danger. The facts of this case do not fit that description of police motivation. Here the officer wanted to arrest Herring and consulted the Department's records to legitimate his predisposition.

Third, even when deliberate or reckless conduct is afoot, the Court's assurance will often be an empty promise: How is an impecunious

defendant to make the required showing? If the answer is that a defendant is entitled to discovery (and if necessary, an audit of police databases), then the Court has imposed a considerable administrative burden on courts and law enforcement.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

I agree with Justice GINSBURG and join her dissent. I write separately to note one additional supporting factor that I believe important. In Arizona v. Evans, we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon the court clerk's recordkeeping. The rationale for our decision was premised on a distinction between judicial errors and police errors * * *.

Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than THE CHIEF JUSTICE's case-by-case, multifactored inquiry into the degree of police culpability. I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.

* * *

New Rules and Retroactivity: Davis v. United States

Justice Alito wrote for the Court in Davis v. United States, 131 S. Ct. 2419 (2011), as it held that the exclusionary rule did not require suppression of evidence when police officers executed a search in compliance with binding Supreme Court authority that was later overruled. In *Davis*, officers stopped a car, arrested the driver for driving under the influence and a passenger for giving a false name to the police, and searched the passenger compartment of the car in reliance on New York v. Belton, supra. They found a revolver in Davis's jacket pocket. Davis was prosecuted and convicted for being a felon in possession of the firearm. While his conviction was on appeal, the Court decided Arizona v. Gant, supra, and limited searches of automobiles following an arrest.

Justice Alito agreed that *Gant* applied on direct review, given the Court's approach to direct and collateral review spelled out in Griffith v. Kentucky (discussed in Chapter 1). But, Justice Alito concluded that the question was not whether *Gant* applied, but whether suppression was required where "the police conduct in this case was in no way culpable." He reasoned that "this acknowledged absence of police culpability dooms Davis's claim." In other words, *Gant* applied retroactively but the question of whether evidence should be excluded had to run through the Court's exclusionary rule cost-benefit analysis. Justice Alito concluded that exclusion was unwarranted because officers were reasonably

applying the law as it existed at the time of their conduct. Thus, there would be no deterrent effect in exclusion of evidence based on a case decided after that conduct.

Justice Sotomayor concurred in the judgment and stated that "[i]n my view, whether an officer's conduct can be characterized as 'culpable' is not itself dispositive," but "an officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence."

Justice Breyer, joined by Justice Ginsburg, dissented. He argued that under the majority's position, no defendant would have an incentive to seek a change in Fourth Amendment law, because they would not get the benefit of its application.

Davis and the Applicability of the Supreme Court's Jones Ruling on GPS Tracking

In United States v. Pineda-Moreno, 688 F.3d 1087 (9th Cir. 2012), officers tracked the defendant's movements by attaching an electronic tracking device to the undercarriage of his car. This tracking occurred before the Supreme Court's decision in Jones v. United States, supra, where the Court held that physically installing a tracking device constituted a search. By the time of appeal to the Ninth Circuit, *Jones* had been decided. The court concluded that while *Jones* was retroactive and therefore the tracking was illegal, the evidence should not be excluded, because at the time of the tracking, "circuit precedent held that placing an electronic tracking device on the undercarriage of a car was neither a search nor a seizure under the Fourth Amendment." But didn't the Court in *Jones* hold that its trespass theory—upon which both Jones and Pineda-Moreno relied—had *never* been rejected and had *always* been applicable to protect citizens by supplementing the *Katz* expectation of privacy test? And if that is so, isn't it the case that Pineda-Morena was not seeking to rely on a new rule of law? Also, why did Jones get the benefit of the ruling in *his* case? Weren't the officers in *Jones* reasonably relying on pre-*Jones* case law permitting public tracking of cars?

Good Faith Where the Arresting/Searching Officer Is at Fault?

The Supreme Court has not addressed the question whether the good faith exception applies to illegal searches and seizures where the fault is that of the searching or seizing officer, i.e., where that officer is relying only his or her own mistaken judgment. Can the officer argue that he was wrong in thinking that there was, e.g., voluntary consent, exigent circumstances, etc., but reasonable minds could differ about whether he was wrong and therefore the evidence should not be excluded?

The rationale of *Leon*, *Krull*, and *Evans* does not easily extend to "good faith" mistakes by police officers who rely on their own mistaken judgment. In each of those cases, the Court held that mistakes of intermediary officials (such as magistrates and legislators) cannot be deterred by the exclusionary rule, but presumed that an officer in the competitive enterprise of ferreting out crime *can* be deterred by strict operation of the exclusionary rule. How could the Court then turn around and say that officers cannot be deterred by the exclusionary rule when they wrongly, but reasonably, interpret Fourth Amendment law?

That turnaround becomes a bit easier after *Herring*, however. *Herring* is the first case in which the good faith exception was applied to excuse an error by a police department official. (In *Davis* it is the court that has made the error, which it recognizes by overruling a prior case). The wrinkle in *Herring* is that the error, though by a police official, was not by the officer who actually made the arrest and conducted the search. As the Court put it, the error was "attenuated" from the arrest and search. There is much in *Herring*, however, that could lead to the conclusion that the good faith exception is to apply to *all* police errors, even those of the officer directly involved. The majority spends a good deal of time arguing that the exclusionary rule can only deter reckless or intentional misconduct. That analysis could be used by the government to argue that while the searching officer made a mistake and violated the Fourth Amendment, reasonable minds could differ about the illegality and therefore the evidence should not be excluded.

How exactly could an officer be deterred from violating the law if reasonable minds can differ about whether it is a violation? Doesn't the majority in *Herring* have it right? One possible response is that police departments, with the exclusionary rule in mind, will train officers to follow a *strict application* of Fourth Amendment law, and will instruct them not to "push the envelope" for fear that action on the frontier of Fourth Amendment reasonableness will result in exclusion. In contrast, if officers are entitled to good faith protection for their own mistakes, police departments will have an incentive to conduct searches that are of dubious legality, so long as reasonable minds can differ on whether the search is legal.

For a post-*Herring* case adopting the good-faith exception for officer error—and applying what Justice Breyer in dissent in *Herring* referred to as the majority's "case-by-case, multifactored inquiry" into the degree of police culpability required for exclusion, see United States v. Julius, 610 F.3d 60 (2nd Cir. 2010). Julius had violated parole, and officers arrested him in his girlfriend's apartment where he was residing. The girlfriend consented to entry into the apartment, and the officers found Julius on the bed in a bedroom, with his son. Julius offered no resistance to the arrest. After he was taken out of the room, an officer noticed that the

mattress of the bed hung over the box spring by about a foot. The officer lifted the mattress and found a gun. Julius was charged with felon-firearm possession. The lower court found that the search was illegal, because: 1) the officers had taken Julius out of the room so the search was not within his grab area for purposes of search incident to arrest; and 2) the officers did not have the reasonable suspicion required to support a search of a parolee's premises under cases like Samson v. California, discussed earlier in this Chapter. In a decision rendered *before Herring*, the lower court excluded the evidence because it was illegally obtained. But on appeal, the Second Circuit remanded in light of the intervening decision in *Herring*. The Second Circuit did *not* read *Herring* as applying the good faith exception only when the error is attenuated from the illegal search—if it had, there would have been no need to remand, because the error in *Julius* was by the officer who *did* the search. The Second Circuit held that *Herring* mandates "a case-by-case, multifactored inquiry into the degree of police culpability." It provided the following analysis of how *Herring* might apply to the search that found the gun.

> Unlike in *Herring*, in which the alleged error was attenuated from the search, the error here was made by the searching officer. Also unlike *Herring*, this case involves a warrantless search, which entails different concerns about deterrence of police misconduct. * * * Wood, the officer who conducted the search, however, testified that he thought he had a right to search the area within the arrestee's reach at the time of the arrest regardless of the arrestee's status at the time of the search as long as it was within a reasonable amount of time after the arrest. The district court may consider whether the other circumstances of the search support a finding that the law enforcement officers had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment, requiring suppression [under] *Herring*. The district court may consider whether any of the * * * grounds relied upon by the government as justifying Deputy Wood's initial search * * * suggested the requisite level of culpability on the part of the officers.
>
> On the other hand, there is no question that the arrest of Julius was justified because it is undisputed that he was in violation of the terms of his special parole. The search itself was not prolonged; Officer Barry testified that "less than two minutes" had elapsed between the arrest of Julius and Deputy Wood's announcement that he had found a gun. Further, the court may also consider the issue of officer safety when deciding whether the conduct of the officers was "the result of . . . systemic error or reckless disregard of constitutional requirements." *Herring*. Deputy Wood articulated a concern for the safety of the officers and others. He explained there

was minimal possibility that Julius could have obtained the gun "because he was restrained," but that there was a risk that the minor child "could have accessed the weapon accidently" or that [the girlfriend] could have obtained the weapon if allowed to get clothes for Julius. Additionally, immediately upon finding the firearm, Deputy Wood and his colleagues: (1) ceased searching; (2) obtained [the girlfriend's] permission to search the entire residence, permission that the district court found was properly obtained; and (3) contacted New Haven police officers for assistance. We do not conclude that any of these circumstances are necessarily dispositive.

We emphasize that *Herring* should not serve as an enticement for law enforcement personnel to depart from search procedures which comply with the Fourth Amendment. Rather, *Herring* requires careful consideration by district courts of whether the goal of deterring violations of the Fourth Amendment outweighs the costs to truth-seeking and law enforcement objectives in each case.

But how can an exclusionary rule deter officer misconduct where it is subject to a multifactor, case-by-case application that must be applied by officers before the search? Are we expecting officers, before searching, to try to figure out how a court will apply an indefinite case-by-case application to the search? Or is all this just code for telling the officer that everything will be okay so long as the violation of the Fourth Amendment is not egregious? And if that is the message, how much deterrent effect does the exclusionary rule have after *Herring*?

3. Establishing a Violation of a Personal Fourth Amendment Right

Fourth Amendment rights are personal rights. It therefore follows that for a defendant to be entitled to exclusion of evidence, he must establish that his own personal rights were affected by the government's search or seizure. This has been characterized by many courts as a question of "standing"—though as will be seen below, the Supreme Court has chafed at this label. The question of "standing" is determined by whether the person seeking to suppress the evidence has had his own Fourth Amendment rights violated.

In the 1960's, the Court developed a generous view of a defendant's ability to invoke the exclusionary rule. Jones v. United States, 362 U.S. 257 (1960), held that a defendant had "automatic standing" to challenge the legality of the search that produced the very drugs that he was charged with possessing at the time of the search. The Court in *Jones* also stated that a search could be challenged by anyone "legitimately on the premises where a search occurs." In the following case the Court substantially cuts back on *Jones* and, more importantly, recharacterizes

"standing" questions so that they are now resolved by substantive standards of Fourth Amendment law.

RAKAS v. ILLINOIS

Supreme Court of the United States, 1978.
439 U.S. 128.

JUSTICE REHNQUIST delivered the opinion of the Court.

[Officers received a radio call concerning a robbery and describing the getaway car. They stopped a vehicle which matched the description. Petitioners and two female companions were ordered out of the car. The officers searched the passenger compartment and found a box of rifle shells in the glove compartment and a sawed-off rifle under the front passenger seat. Petitioners had been passengers in the car; the owner of the car was driving when the car was stopped. The lower court denied the motion to suppress, reasoning that petitioners lacked standing, and the Illinois appellate courts affirmed. The Supreme Court found that petitioners had the burden of proof as to standing, and that they failed to meet their burden of showing ownership of the rifle or shells. The Court proceeded to consider whether standing could be established in the absence of ownership of the property seized].

* * *

Petitioners first urge us to relax or broaden the rule of standing enunciated in Jones v. United States, so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively, petitioners argue that they have standing to object to the search under *Jones* because they were "legitimately on [the] premises" at the time of the search.

* * * Adoption of the so-called "target" theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial. If we reject petitioners' request for a broadened rule of standing such as this, and reaffirm the holding of *Jones* and other cases that Fourth Amendment rights are personal rights that may not be asserted vicariously, we will have occasion to re-examine the "standing" terminology emphasized in *Jones.* For we are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry identified in *Jones* as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge. * * *

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. * * * A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

* * *

In Alderman v. United States, 394 U.S. 165 (1969) * * * Mr. Justice Harlan [dissenting] * * * identified administrative problems posed by the target theory:

> "[T]he [target] rule would entail very substantial administrative difficulties. In the majority of cases, I would imagine that the police plant a bug with the expectation that it may well produce leads to a large number of crimes. A lengthy hearing would, then, appear to be necessary in order to determine whether the police knew of an accused's criminal activity at the time the bug was planted and whether the police decision to plant a bug was motivated by an effort to obtain information against the accused or some other individual * * *"

When we are urged to grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's, we cannot but give weight to practical difficulties such as those foreseen by Mr. Justice Harlan in the quoted language.

Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials. * * * Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. * * *

* * * [H]aving rejected petitioners' target theory * * * the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in *Jones* and

reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. * * * The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

* * *

Analyzed in these terms, the question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. We are under no illusion that by dispensing with the rubric of standing used in *Jones* we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.

* * *

Here petitioners, who were passengers occupying a car which they neither owned nor leased, seek to analogize their position to that of the defendant in Jones v. United States. In *Jones,* petitioner was present at the time of the search of an apartment which was owned by a friend. The friend had given Jones permission to use the apartment and a key to it, with which Jones had admitted himself on the day of the search. He had a suit and shirt at the apartment and had slept there "maybe a night," but his home was elsewhere. At the time of the search, Jones was the only occupant of the apartment because the lessee was away for a period of several days. Under these circumstances, this Court stated that while one wrongfully on the premises could not move to suppress evidence obtained as a result of searching them, "anyone legitimately on premises where a search occurs may challenge its legality." Petitioners argue that their occupancy of the automobile in question was comparable to that of Jones in the apartment and that they therefore have standing to contest the legality of the search—or as we have rephrased the inquiry, that they, like Jones, had their Fourth Amendment rights violated by the search.

We do not question the conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful. Nonetheless, we believe that the phrase "legitimately on premises" coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights. For example, applied

literally, this statement would permit a casual visitor who has never seen, or been permitted to visit, the basement of another's house to object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search. Likewise, a casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends would be able to contest the legality of the search. * * *

We think that *Jones* on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. * * *

Katz v. United States, provides guidance in defining the scope of the interest protected by the Fourth Amendment. * * * [T]he Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Viewed in this manner, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest in common law.

* * * In abandoning "legitimately on premises" for the doctrine that we announce today, we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment. * * * We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling.

* * *

Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. * * *

JUSTICE POWELL, with whom CHIEF JUSTICE BURGER joins, concurring.

* * *

This is not an area of the law in which any "bright line" rule would safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system. The range of variables in the fact situations of search and seizure is almost infinite. Rather than seek facile solutions, it is best to apply principles broadly faithful to Fourth Amendment purposes.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

* * * Insofar as passengers are concerned, the Court's opinion today declares an "open season" on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no "mere" passenger may object, regardless of his relationship to the owner. * * *

More importantly, the ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle, or of the item, will have standing to seek suppression, and the evidence will presumably be usable against the other occupants. The danger of such bad faith is especially high in cases such as this one where the officers are only after the passengers and can usually infer accurately that the driver is the owner. * * *

NOTE ON RAKAS

The Rakas Court ties standing to the *Katz* reasonable expectation of privacy test. But after Jones v. United States—the landmark case on electronic tracking discussed earlier in this Chapter—the reasonable expectation of privacy test is not the only test for determining whether the Fourth Amendment applies. The Court in *Jones* held that a trespass for investigatory purposes constituted a search even if the investigation does not intrude on a reasonable expectation of privacy. Because *Rakas* evaluates standing by whether a person has a Fourth Amendment right at all, it follows that if a person's Fourth Amendment right is triggered under *either Katz* or *Jones,* then that person will have standing to raise the Fourth Amendment claim. This is why Jones himself was allowed to raise the argument that his Fourth Amendment rights were violated even if he had no expectation of privacy in his public movements.

Abolition of Automatic Standing: United States v. Salvucci

Rakas was relied upon by the Supreme Court in United States v. Salvucci, 448 U.S. 83 (1980) (stolen checks found in apartment of one defendant's mother; only defendants whose Fourth Amendment rights were violated can challenge warrant), which finally overruled *Jones* and abolished the automatic standing doctrine. The notion of automatic standing was that possession of property gave a person an automatic right to complain about the search or seizure of that property. Justice Rehnquist's majority opinion concluded that possession of a seized good should not be used as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched. The automatic standing rule had been based on fairness concerns—that it would be unfair for the government to argue at the suppression hearing that the defendant did not possess the property sought to be suppressed, and then to turn around and argue at trial that the defendant did possess the same property. According to the *Salvucci* majority, however, *Rakas* and other cases "clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction." This was because, after *Rakas,* a "person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation." Thus, there was no unfairness or inconsistency in arguing, for example, that the defendant constructively possessed a gun, but had no Fourth Amendment protection in the area that was searched to find the gun.

Ownership of Seized Property Does Not Necessarily Confer Standing: Rawlings v. Kentucky

Rawlings v. Kentucky, 448 U.S. 98 (1980), demonstrated the significance of *Salvucci.* Rawlings was convicted of trafficking in and possession of various controlled substances. These substances were seized from the purse of a woman who, along with Rawlings, was visiting the premises when police arrived. The Supreme Court found that Rawlings had no right to object to the search of the purse because he had no legitimate expectation of privacy in the purse. The Court added that even assuming that the woman consented to have the drugs stored in the purse, "the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy." Ownership of the drugs was not enough to confer a right to object to the search, because the question was whether Rawlings had a legitimate expectation of privacy in the area that was searched, i.e., the purse. Justice Marshall, joined by Justice Brennan, dissented.

While ownership of the property seized does not necessarily provide the right to object to a search, it does provides right to object to a *seizure* of that property—because a seizure is by definition an intrusion on an ownership interest. Of course, this did not help Rawlings, because the seizure of his property was completely reasonable—the officers searched the purse and found contraband. Rawlings did not have a legitimate possessory interest in contraband.

Targets Without Standing: United States v. Payner

United States v. Payner, 447 U.S. 727 (1980), shows the consequences of the Court's rejection of the "target" theory of standing in *Rakas*. An IRS investigation of American citizens doing business in the Bahamas focused on a certain Bahamian bank. When an official of that bank visited the United States, IRS agents stole his briefcase and removed and photographed hundreds of documents. They did this to obtain evidence against Payner. Under *Rakas,* Payner had no right to object to the search of the briefcase, even though he was the target of the illegal search. Payner argued that the federal district court should exercise its supervisory power to exclude the evidence and thus to deter such purposefully illegal tactics. The district court agreed with Payner and excluded the evidence given the officers' bad intent, but the Supreme Court held "that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." Justice Marshall, joined by Justices Brennan and Blackmun, dissented and argued that the government agents acted in bad faith by manipulating the standing rules in order to conduct an unconstitutional search; therefore, suppression of the illegally seized evidence was essential to protect the integrity of the judiciary whose rules were being manipulated.

Presence in the Home of Another: Minnesota v. Carter

Assume that you are at a party and police officers enter and conduct a thorough search of the premises, and they find evidence that is being used against you in a criminal trial. If the search of the premises is illegal, do you, as a partygoer, have the right to complain that the search was a violation of your Fourth Amendment rights? In Minnesota v. Carter, 525 U.S. 83 (1998), the defendants complained about a search of a premises in which they were visitors—bagging cocaine with the owner. Chief Justice Rehnquist, writing for the Court, held that persons who are temporarily on the premises for a commercial transaction have no Fourth Amendment rights at stake in a search of the premises. He accepted the fact that a person might have a reasonable expectation of privacy in the home of another as did the overnight guest in Minnesota v. Olson,

discussed earlier in this Chapter, but he concluded that "the purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents' situation is closer to that of one simply permitted on the premises."

Justice Scalia, joined by Justice Thomas, wrote a concurring opinion. Justice Kennedy wrote a concurring opinion emphasizing that social guests might have expectations that business visitors do not. Justice Breyer wrote an opinion concurring in the judgment. Justice Ginsburg, joined by Justices Stevens and Souter, dissented.

Cars, Drivers, Passengers

Standing questions arise quite frequently when vehicles are stopped and searched. It is clear that the owner of a car has standing to object to a search. But there are several problematic questions, such as: 1. What if the owner is not present? 2. What if the owner is in the car but somebody else is driving? 3. Can a passenger ever have a protectible Fourth Amendment interest in the car? and 4. Who can object to the seizure of the car, as distinct from the search?

Some of these questions are discussed in United States v. Carter, 14 F.3d 1152 (6th Cir.1994). Carter was a passenger in a van owned and operated by Locklear. The police stopped the car for a traffic violation, then illegally searched suitcases in the back of the van and found drugs. Locklear was able to suppress the evidence and was never tried. Carter sought in turn to suppress the evidence. Carter argued that he had standing he had agreed to accompany Locklear on a lengthy trip; that he had taken toilet articles and a change of clothing with him in the van; that he had entertained an expectation of privacy in the vehicle throughout the duration of the trip; and that he had been detained in violation of his Fourth Amendment rights during the time the vehicle was illegally searched. Carter had no ownership interest in the van and no control over it; he had no possessions in the van other than a change of clothes (a pair of jeans and a shirt) and a shaving kit found in the front of the vehicle; and he claimed no possessory or other interest in the suitcases filled with marijuana.

The court held that Carter had the right to challenge the *seizure* of his person that occurred when the van was searched, but the evidence could not be excluded as the fruit of Carter's seizure. It was the search of the car that uncovered the evidence, and that search was not connected to Carter's seizure. The court explained with a hypothetical:

> Suppose that at the time of the driver's arrest the police had summoned a taxi cab for Mr. Carter and told him he was free to

leave. The marijuana would still have been discovered, because it was located in a van owned and controlled by Mr. Locklear (who was not going anywhere until his vehicle had been searched) and not in a vehicle controlled by Mr. Carter.

As to the search of the back of the van, the court held that the presence of the shaving kit and change of clothing in the front of the van did not give Carter a legitimate expectation that the police would not open the van's back door. Thus, Carter did not meet his burden of showing that his expectation of privacy was violated by the search. [Nor would he have been any more successful under the trespassory investigation theory of *Jones,* because he had no ownership or control of the van.]

Would the result in *Carter* have been different if his shaving kit and change of clothing had been in the back of the van? What if he could show that he had been traveling in the van across country for a week before it was stopped by the police?

United States v. Lopez, 474 F.Supp. 943 (C.D.Cal.1979), holds that defendants who had been given keys to a truck, who had permission to use it and who did use it, had the right to challenge a search of the truck. Compare United States v. Tropiano, 50 F.3d 157 (2d Cir.1995) ("a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car"). In United States v. Powell, 929 F.2d 1190 (7th Cir.1991), the court held that where the owner of a car was absent at the time the car was stopped and searched, he had the right to object to the search but not to the stop. Does this make sense?

Disassociation from Property

If a person disassociates himself from certain property, then he loses standing to object to a search of that property, at least under the resonable expectation of privacy theory of *Rakas*. United States v. Boruff, 909 F.2d 111 (5th Cir.1990), provides an example. A pick-up truck driven by Taylor and a rented car driven by Boruff were involved in a drug-smuggling scheme. The truck had been purchased by Boruff, but title, registration and insurance were put in Taylor's name. Boruff added improvements to the truck, and it was understood that if the truck were sold, the money would go to Boruff. The car was rented by Boruff's girlfriend in her own name. The standard rental agreement signed by the girlfriend stated that only she could drive the car and that the car would not be used for any illegal purpose. Boruff and Taylor drove to Mexico, loaded marijuana into the pick-up truck, and started back. They travelled 100 yards apart on the highway. When a suspicious Border Patrol agent began to pursue the pick-up truck, Boruff did two u-turns in an effort to divert the agent's attention. A second agent pursued Boruff, while the

first agent stopped the truck, searched it, found drugs, and placed Taylor under arrest. The second agent stopped Boruff, searched the rented car and found incriminating evidence. Boruff argued that both searches were illegal and moved to suppress all the evidence. As to the truck, the court held that Boruff had failed to establish an expectation of privacy, even though he paid for it.

> Despite his asserted ownership interest, Boruff did everything he could to disassociate himself from the truck in the event it was stopped by law enforcement officials. [Besides placing all documentation in Taylor's name], during the smuggling operation, Taylor, not Boruff, drove the truck. Boruff travelled in a separate vehicle, * * * and left his position in front of the truck after spotting the Border Patrol vehicle. * * * In addition, Boruff was not present when the truck was stopped or searched. See Rakas v. Illinois (legitimate presence at time of search an important factor). * * * Boruff also disavowed any knowledge of the truck and its contents after his own vehicle was stopped.

As to the rental car, the court found that Boruff had no standing to contest the search because his girlfriend was the only legal operator of the vehicle under the terms of the agreement and thus "had no authority to give control of the car to Boruff. The rental agreement also expressl forbade any use of the vehicle for illegal purposes." Do you agree with th court? Shouldn't Boruff have had some expectation of privacy somewhere

For another case in which disavowal of ownership resulted in a loss of "standing", see United States v. Mangum, 100 F.3d 164 (D.C.Cir.1996). Mangum was a passenger in a car that was stopped by police. Mangum conceded that there was reasonable suspicion for the stop. A knapsack was removed from the trunk and Mangum, when asked, denied that it was his and said it belonged to the driver. The officer searched the bag and found that it contained a loaded handgun and Mangum's driver's license. The court held that because Mangum denied ownership, "he abandoned his property and waived any legitimate privacy interest in it. Courts have long held that, when a person voluntarily denies ownership of property in response to a police officer's question, he forfeits any privacy interest in the property; consequently, police may search it without a warrant."

Query whether these "disassociation" cases rejecting standing have been altered by the holding in United States v. Jones that the Fourth Amendment protects against trespassory investigation regardless of whether a reasonable expectation of privacy has been invaded. Couldn't Boruff claim that the search of the truck was a trespass because, despite his efforts to disassociate himself from the property, he was still the

owner? Would the answer depend on the niceties of the state tort law on trespass?

Coconspirator "Standing" Rejected: United States v. Padilla

A unanimous Supreme Court held in United States v. Padilla, 508 U.S. 77 (1993) (per curiam), that a person does not have an automatic right to challenge a search or seizure simply because he is a member of the conspiracy that owned the property that was searched or seized. In *Padilla,* the lower court held that the defendants could contest the legality of the stop and search of a car that was being operated by a coconspirator, even though the defendants were not present during the stop and did not own the car. But the Supreme Court reversed, explaining that a "coconspirator standing" rule "squarely contradicts" *Rakas*, under which each person must establish an individual expectation of privacy, or a legitimate possessory interest, that has been affected by the search or seizure.

The Court concluded: "Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds nor detracts from them." The Court remanded the case so that the lower court could consider "whether each respondent had either a property interest protected by the Fourth Amendment that was interfered with by the stop of the automobile" or "a reasonable expectation of privacy that was invaded by the search thereof." On remand, the court of appeals held that the conspirators had no right to object to the seizure of the car: they did not own the car, and they were not driving it. United States v. Padilla, 111 F.3d 685 (9th Cir.1997).

4. The Requirement of Causation and the Exception for Attenuation

The exclusionary rule does not apply unless there is a substantial causal connection between the illegal activity and the evidence offered at trial. Deterrence is unjustified in the absence of that causal link. Determining whether a causal link exists is often a difficult inquiry.

Searches and Seizures That Produce No Evidence: The Ker-Frisbie Doctrine

The exclusionary rule cannot apply unless evidence is seized as a result of a search or arrest. See United States v. Occhipinti, 998 F.2d 791 (10th Cir. 1993) (legality of protective sweep need not be decided because no evidence was obtained, so there was nothing to exclude). In Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952),

the Supreme Court held that an illegal arrest of a person did not deprive the court of jurisdiction to try that person. That is, the body of the person, as distinct from evidence, was not subject to exclusion. The *Ker-Frisbie* doctrine has been used to uphold the abduction of suspects from foreign countries in order for them to be tried in the United States. See United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that because the U.S.-Mexican Extradition Treaty did not explicitly prohibit abduction, "the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.").

Causal Connection: Evidence Found After a Fourth Amendment Violation

Wong Sun v. United States, 371 U.S. 471 (1963) and the following case, Brown v. Illinois, are the Court's leading cases on whether there is a sufficient causal connection between proffered evidence and an illegal search or seizure to justify exclusion. In these cases, the defendant asserts that there is a direct link between the illegality and the proffered evidence. The government, while admitting at least for argument's sake that there was an illegal search or seizure, nonetheless contends that the relationship between the illegality and the proffered evidence is too attenuated to justify exclusion. *Wong Sun* is discussed in detail in *Brown*.

BROWN V. ILLINOIS

Supreme Court of the United States, 1975.
422 U.S. 590.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

* * *

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: "Don't move, you are under arrest." Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 p.m. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. * * * As both officers held him at gunpoint, the three entered the apartment. Brown was ordered to stand against the wall and was searched. No weapon was found. * * * Detective Lenz informed him that he was under arrest for the murder of Roger Corpus, handcuffed him, and escorted him to the squad car.

The two detectives took petitioner to the Maxwell Street police station. [While at the station, Brown was twice given *Miranda* warnings

and twice confessed. The first confession occurred 90 minutes after the arrest, the second occurred seven hours after the arrest. Brown moved to suppress the confessions as having been caused by an arrest without probable cause. The trial court denied the motion, and Brown was convicted. The Illinois Supreme Court found that Brown had been arrested without probable cause, but nonetheless held that the motion to suppress was properly denied because the confessions were too attenuated from the illegal arrest to justify exclusion].

* * * The [Illinois] court appears to have held that the *Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments.

* * *

In *Wong Sun,* the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. In that case, federal agents elicited an oral statement from defendant Toy after forcing entry at 6 a.m. into his laundry, at the back of which he had his living quarters. The agents had followed Toy down the hall to the bedroom and there had placed him under arrest. The Court of Appeals found that there was no probable cause for the arrest. This Court concluded that that finding was "amply justified by the facts clearly shown on this record." Toy's statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as "Sea Dog." Under questioning, Toy said that "Sea Dog" was Wong Sun. Toy led agents to a multifamily dwelling where, he said, Wong Sun lived. Gaining admittance to the building through a bell and buzzer, the agents climbed the stairs and entered the apartment. One went into the back room and brought Wong Sun out in handcuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later, he returned voluntarily to give an unsigned confession.

This Court ruled that Toy's declarations and the contraband taken from Yee were the fruits of the agents' illegal action and should not have been admitted as evidence against Toy. It held that the statement did not result from "an intervening independent act of a free will," and that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." With respect to Wong Sun's confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to

make the statement, the connection between his unlawful arrest and the statement "had become so attenuated as to dissipate the taint." The Court said:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

* * *

The Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun,* whether Brown's statements were obtained by exploitation of the illegality of his arrest. They assumed that the *Miranda* warnings, by themselves, assured that the statements (verbal acts, as contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest. *Wong Sun,* of course, preceded *Miranda.*

* * *

* * * In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." * * *

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. * * * Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

* * *

While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or "but for" rule. * * * The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. * * * The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and

flagrancy of the official misconduct are all relevant. * * * And the burden of showing admissibility rests, of course, on the prosecution.

* * * We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*.

Brown's first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*.[a] We could hold Brown's first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.

* * *

[The concurring opinion of JUSTICE WHITE is omitted.]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in part.

I join the Court insofar as it holds that the *per se* rule adopted by the Illinois Supreme Court for determining the admissibility of petitioner's two statements inadequately accommodates the diverse interests underlying the Fourth Amendment exclusionary rule. I would, however, remand the case for reconsideration under the general standards articulated in the Court's opinion and elaborated herein.

* * *

* * * If an illegal arrest merely provides the occasion of initial contact between the police and the accused, and because of time or other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose: the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement. * * * Bearing these considerations in mind, and recognizing that the deterrent

[a] The situation here is thus in dramatic contrast to that of Wong Sun himself. Wong Sun's confession, which the Court held admissible, came several days after the illegality, and was preceded by a lawful arraignment and a release from custody on his own recognizance.

value of the Fourth Amendment exclusionary rule is limited to certain kinds of police conduct, the following general categories can be identified.

Those most readily identifiable are on the extremes: the flagrantly abusive violation of Fourth Amendment rights, on the one hand, and "technical" Fourth Amendment violations, on the other. In my view, these extremes call for significantly different judicial responses.

I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. * * * In such cases the deterrent value of the exclusionary rule is most likely to be effective * * *. I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed.

At the opposite end of the spectrum lie "technical" violations of Fourth Amendment rights * * *.

* * * [In "technical" violation cases], with the exception of statements given in the immediate circumstances of the illegal arrest * * * I would not require more than proof that effective *Miranda* warnings were given and that the ensuing statement was voluntary in the Fifth Amendment sense. * * *

Between these extremes lies a wide range of situations that defy ready categorization, and I will not attempt to embellish on the factors set forth in the Court's opinion other than to emphasize that the *Wong Sun* inquiry always should be conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus. * * *

Statements Tainted by an Illegal Arrest: Dunaway v. New York, Taylor v. Alabama, and Kaupp v. Texas

Brown is followed in Dunaway v. New York, 442 U.S. 200 (1979), where the defendant was arrested without probable cause, taken down to the station, and confessed after receiving *Miranda* warnings. The Court found that Dunaway's situation was "virtually a replica of the situation in *Brown*." As in *Brown,* the Court was concerned that officers would "violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth."

Brown and *Dunaway* were deemed to be dispositive in Taylor v. Alabama, 455 U.S. 1014 (1982). Police arrested Taylor for a grocery store robbery without probable cause, searched him, took him to the station for questioning and gave him *Miranda* warnings. At the station, he was fingerprinted, re-advised of his rights, questioned and placed in a lineup.

Police told Taylor that his fingerprints matched those on some grocery items that had been handled by a participant in the robbery, and after a short visit with his girlfriend and a male companion, Taylor signed a *Miranda* waiver and confessed. Although the length of time between the illegal arrests and the confessions in *Brown* and *Dunaway* was two hours and in this case it was six hours, the Court said that "a difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, and he was questioned on several occasions, fingerprinted and subjected to a line-up." Although Taylor was given *Miranda* warnings three times, the Court found that this was insufficient to break the connection with the illegal arrest and detention. Four dissenters agreed on the applicable law but disagreed on its application to the facts of the case.

The Court applied *Brown*, *Dunaway* and *Taylor* in Kaupp v. Texas, 538 U.S. 626 (2003) (per curiam) as it held that a suspect's confession was, on the record before it, the fruit of an arrest without probable cause. Police officers suspected Kaupp, an adolescent, of involvement in a murder, but did not have probable cause to arrest him. The officers entered Kaupp's house at 3 a.m., went to his bedroom, woke him up, placed him in handcuffs, and took him in his underwear to a patrol car. They drove and stopped for 5 to 10 minutes at the site where the victim's body had been found, and then went on to the sheriff's headquarters, where they removed his handcuffs, gave him *Miranda* warnings, and told him that the victim's brother had confessed to the crime and implicated him as an accomplice. Kaupp then admitted to some part in the crime. The Court analyzed the situation as follows:

> Since Kaupp was arrested before he was questioned, and because the state does not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was an act of free will sufficient to purge the primary taint of the unlawful invasion. Demonstrating such purgation is, of course, a function of circumstantial evidence, with the burden of persuasion on the state. Relevant considerations include observance of *Miranda*, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.
>
> The record before us shows that only one of these considerations, the giving of *Miranda* warnings, supports the state, and we held in *Brown* that "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." All other factors point the opposite way. There is no indication from the record that any substantial time passed between Kaupp's removal from his home in

handcuffs and his confession after only 10 or 15 minutes of interrogation. In the interim, he remained in his partially clothed state in the physical custody of a number of officers, some of whom, at least, were conscious that they lacked probable cause to arrest. In fact, the state has not even alleged any meaningful intervening event between the illegal arrest and Kaupp's confession.

Statements Not Tainted by an Illegal Arrest: Rawlings v. Kentucky

Brown was distinguished in Rawlings v. Kentucky, 448 U.S. 98 (1980). The Court assumed that Rawlings and others were improperly detained in a house while police went to get a search warrant, but found that the improper detention did not require suppression of statements made by Rawlings after evidence was discovered. Justice Rehnquist's majority opinion observed that *Miranda* warnings were given (also true in *Brown*); that the 45 minute detention was in a congenial atmosphere; that the statements were apparently spontaneous reactions to the discovery of evidence rather than the product of the illegal detention; that the police action did not involve flagrant misconduct; and that no argument was made that the statements were involuntary. Justices White and Stewart would have remanded for consideration of the "fruit" question. Justices Marshall and Brennan thought that the statements "were obviously the fruit of the illegal detention."

Warrantless In-Home Arrest Is Not Causally Connected to a Subsequent Confession: New York v. Harris

Brown, *Dunaway* and *Taylor* each excluded confessions as the fruit of an arrest made without probable cause. In New York v. Harris, 495 U.S. 14 (1990), the defendant confessed at the station after police made a warrantless in-home arrest, with probable cause but without a warrant—and so the in-home arrest was in violation of Payton v. New York, *supra* (holding that an arrest warrant is necessary for an in-home arrest in the absence of exigent circumstances). The challenged confession was made at the station an hour after the arrest. Justice White concluded for the Court that there was no substantial causative connection between the *Payton* violation and the confession, because unlike the prior cases, the defendant was not unlawfully in custody when he made the confession. Justice White reasoned that "the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects * * * protection for statements made outside their premises where the police have probable cause to arrest the suspect." Thus, a violation of *Payton* constitutes an illegal *search* of the home, but it does not result in an illegal arrest, so long as there is probable cause; and

while evidence obtained in the warrantless search of the home is subject to exclusion, there is no automatic connection between that search and a subsequent confession outside the home.

Justice Marshall dissented in an opinion joined by Justices Brennan, Blackmun and Stevens. Justice Marshall contended that the rule adopted by the majority would give the police an incentive to violate *Payton*. He reasoned that the officer might find it beneficial to enter the arrestee's home illegally in order to save time, and perhaps to rattle the suspect and increase the likelihood of a confession. Excluding evidence found in the house would be no deterrent, because such suppression would make the officer no worse off than if he had waited outside to make the arrest.

In *Harris* the *Payton* violation turned up no evidence; nothing incriminating was seen in Harris's home. Would exclusion be required if the officers found incriminating evidence in Harris's house in the course of making a warrantless arrest, and subsequently used that evidence to obtain a stationhouse confession from Harris? In United States v. Beltran, 917 F.2d 641, 645 (1st Cir.1990), police arrested Beltran in her home without a warrant. During the arrest the police saw cocaine in plain view. They took the defendant to the stationhouse where she made incriminating statements. The court stated that "whether or the extent to which *Harris* applies may turn on questions of fact such as when the police seized the items in question or what motivated Ms. Beltran's statements" and remanded the case to the district court for a factual determination. Does this mean that if Beltran was rattled into a confession by the fact that the police saw the cocaine—rather than by the arrest—then *Harris* would not apply and the confession would be excluded?

Insufficient Causal Connection Between a Knock-and-Announce Violation and Evidence Found in the Home: Hudson v. Michigan

In Hudson v. Michigan, 547 U.S. 586 (2006), Justice Scalia wrote for the Court as it decided a violation of the knock-and-announce requirement does not justify the exclusion of evidence found in the warranted search. The Court uses an analysis like that found in Harris v. New York, supra. But the case has broader importance as it seems to signal that the Court is questioning whether the exclusionary rule is necessary *at all* given developments since *Mapp*.

Police had a warrant to search Hudson's house for drugs and firearms. They executed the warrant and found both. The only question before the Supreme Court was whether the fact that the officers only waited several seconds after announcing themselves before turning the

doorknob and entering the house required exclusion of the evidence because the knock-and-announce rule was violated.

Justice Scalia found that exclusion was not required:

> [E]xclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred or *not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have never held that evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, but-for cause * * * can be too attenuated to justify exclusion. * * *
>
> Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. * * * Thus, in New York v. Harris, where an illegal warrantless arrest was made in Harris' house, we held that suppressing Harris's statement taken outside the house would not serve the purpose of the [*Payton*] rule that made Harris' in-house arrest illegal. * * *
>
> For this reason, cases excluding the fruits of unlawful warrantless searches say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. * * * Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.

Justice Scalia had this to say about the exclusionary rule:

> Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs. The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted * * * justification for a no-knock entry had inadequate

support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that the exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded. * * *

* * *

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. * * * To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, *suspend the knock-and-announce requirement anyway.* Massive deterrence is hardly required.

It seems to us not even true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course even if this assertion were accurate, it would not necessarily justify suppression. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly "undeterred." When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only "effective deterrent"? And what, other than civil suit, is the "effective deterrent" of police violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes—and yet nothing but "ineffective" civil suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.

* * *

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to

such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

Justice Kennedy concurred in part and in the judgment and wrote as follows:

> Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20.

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissented and wrote that "the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement"; "the Court does so without significant support in precedent"; "[t]oday's opinion is thus doubly troubling"; "[i]t represents a significant departure from the Court's precedents"; and "it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection."

Consent as Breaking the Chain of Causation

Police often argue that an illegal search or seizure should not result in exclusion of evidence because the suspect voluntarily consented to the search that ultimately uncovered that evidence. For example, assume that the defendant is illegally pulled over while driving. After a short period, the officer asks nicely whether the defendant would permit a search of the trunk; the defendant is told of his right to refuse; the defendant consents and weapons are found in the trunk. The defendant argues that there is a direct causal link between the illegal stop and the discovery of the evidence. The government argues that the voluntary consent broke the chain of causation.

The question in such cases is whether the voluntary consent is enough to break the chain of causation running from the illegal police activity to the evidence ultimately uncovered. The answer is dependent on the circumstances, and the analysis is no different from that employed

in *Brown* to determine whether an admittedly voluntary confession should be excluded as the fruit of an illegal arrest. As one court put it:

> To determine whether the defendant's consent was an independent act of free will, breaking the causal chain * * * we must consider three factors: 1) the temporal proximity of the illegal conduct and the consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the initial misconduct.

United States v. Hernandez, 279 F.3d 302 (5th Cir. 2002). In *Hernandez*, the court found that the defendant voluntarily consented to a search of luggage, but that this voluntary act was not sufficient to break the chain of causation from the officer's initial illegal search. Hernandez was traveling on a bus when police seized her bag and manipulated it in such a way as to determine that a hard package was inside it. This manipulation constituted an illegal search under United States v. Bond, discussed earlier in this Chapter. The officer then immediately sought and obtained consent from Hernandez to open the suitcase. The Court found that there were no intervening circumstances, and therefore the opening of the suitcase was a fruit of the *Bond* violation. The Court stated that while the police misconduct was not flagrant, the officer exploited the illegality as the officer's suspicions were aroused only after manipulating Hernandez's suitcase. As a result, "even though Hernandez voluntarily consented to Officer Ordaz's opening her suitcase and searching it, her consent did not cure the Fourth Amendment violation caused by Officer Ordaz's prior manipulation of the suitcase." For a contrary result, see United States v. Becker, 333 F.3d 858 (8th Cir. 2003) (voluntary consent severed the chain of causation from an illegal detention to the evidence obtained: consent was removed in time from the detention, and the officers were not engaged in flagrant misconduct).

Other Ways of Breaking the Chain

Suppose a police officer makes a *Terry* stop of a car without reasonable suspicion, discovers that someone in the car has an outstanding warrant, arrests the person, does a search incident and finds drugs or an illegal firearm. Must the evidence be suppressed or does the warrant break the chain that began with the illegal stop? United States v. Gross, 662 F.3d 393 (6th Cir. 2011), is just such a case. The court in *Gross* held that discovery of a warrant during an illegal stop constituted an intervening circumstance and held, 2–1, that "where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not itself dispositive." The court explained that "[t]o hold otherwise would

create a rule that potentially allows for a new form of police investigation" and "would create perverse incentives."

Witness Testimony After Illegal Arrests and Searches: United States v. Ceccolini

Courts are reluctant to suppress the testimony from a live witness that is alleged to be the product of an illegal search or arrest. The witness's decision to testify is ordinarily enough to break any causal connection between the illegality and the testimony. The leading case is United States v. Ceccolini, 435 U.S. 268 (1978), where an officer stopped to talk with a friend who was in Ceccolini's flower shop. While there, the officer illegally picked up and opened an envelope, and found money and gambling slips. He then learned from his friend, who did not know about this discovery, that the envelope belonged to Ceccolini. The officer relayed his information to detectives who in turn transmitted it to the FBI. Four months later, an FBI agent questioned the officer's friend who had been in the flower shop, without mentioning the illegally discovered gambling slips. The friend expressed a willingness to testify against Ceccolini, and did so before the grand jury and at Ceccolini's trial.

Justice Rehnquist, writing for the Court, declined to adopt a rule that the testimony of a live witness could never be excluded. But he stated that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." The Court noted that the willingness of the witness to testify is very likely, if not certain, to break the chain of causation under *Wong Sun*. Justice Rehnquist also noted that exclusion of a live witness would have a serious cost, as it would "perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." Because of this cost, the Court concluded that the exclusionary rule could only apply if there is a very close and direct link between the illegality and the witness's testimony. The Court found no such close link under the facts in *Ceccolini*, where the witness was willing to testify, four months passed between the illegality and the agent's contact with the witness, and the witness was unaware of the illegality. Justice Marshall, in a dissent joined by Justice Brennan, found no meaningful distinction between live witnesses and inanimate evidence. He argued that "the same tree" cannot bear "two different kinds of fruit, with one kind less susceptible than the other to exclusion."

After *Ceccolini*, can you think of facts that would result in the exclusion of a live witness? See United States v. Akridge, 346 F.3d 618

(6th Cir. 2003) (stating that after *Ceccolini*, the question of causal connection between an illegality and witness testimony is determined by the following factors: "(a) the degree of free will exercised by the witnesses; (b) the role of the illegality in obtaining the testimony; (c) the time elapsed between the illegal behavior, the decision to cooperate, and the actual testimony at trial; and (d) the purpose and flagrancy of the officials' misconduct.").

5. Independent Source

Evidence will not be excluded if it is obtained independently from and without reliance on any illegal police activity. The "independent source" doctrine allows "the introduction of evidence discovered initially during an unlawful search if the evidence is discovered later through a source that is untainted by the initial illegality." United States v. Markling, 7 F.3d 1309 (7th Cir.1993).

In Segura v. United States, 468 U.S. 796 (1984), and in the following case, Murray v. United States, the Court considered whether an illegal search of premises could be cured when the officers later obtained a warrant, and where the probable cause supporting the warrant was not derived from information obtained in the illegal search. *Segura* is discussed in detail in *Murray*.

MURRAY V. UNITED STATES

Supreme Court of the United States, 1988.
487 U.S. 533.

JUSTICE SCALIA delivered the opinion of the Court.

In Segura v. United States, we held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In these consolidated cases we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

* * * Based on information received from informants, federal law enforcement agents had been surveilling petitioner Murray and several of his co-conspirators. At about 1:45 p.m. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other

drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued—at 10:40 p.m., approximately eight hours after the initial entry—the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

[The motion to suppress was denied and the Court of Appeals affirmed.]

* * *

Almost simultaneously with our development of the exclusionary rule, * * * we also announced what has come to be known as the "independent source" doctrine. That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." Nix v. Williams, 467 U.S. 431, 443 (1984).

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of "independent source" in a more general and a more specific sense. The more general sense identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts x and y, but fact z has been learned by other means,

fact *z* can be said to be admissible because derived from an "independent source." This is how we used the term in Segura v. United States. In that case, agents unlawfully entered the defendant's apartment and remained there until a search warrant was obtained. The admissibility of what they discovered while waiting in the apartment was not before us, but we held that the evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an "independent source."

The original use of the term, however, and its more important use for purposes of this case, was more specific. It was originally applied in the exclusionary rule context * * * with reference to that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired*—that is, in the example just given, to knowledge of facts *x* and *y* derived from an independent source.

* * *

Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.[a]

---

[a] * * * To say that a district court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to police officers' assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply.

We might note that there is no basis for pointing to the present cases as an example of a "search first, warrant later" mentality. The District Court found that the agents entered the warehouse "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence." While they may have misjudged the existence of sufficient exigent circumstances to justify the warrantless entry * * * there is

It is possible to read petitioners' briefs as asserting the more narrow position that the "independent source" doctrine does apply to independent acquisition of evidence previously derived *indirectly* from the unlawful search, but does not apply to what they call "primary evidence," that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government's knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant's apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

* * *

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.

We think this is also true with respect to the tangible evidence, the bales of marijuana. It would make no more sense to exclude that than it would to exclude tangible evidence found upon the corpse in *Nix*, if the search in that case had not been abandoned and had in fact come upon the body. * * * The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. * * * The District Court found that the agents did not reveal their warrantless entry to the Magistrate and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have

---

nothing to suggest that they went in merely to see if there was anything worth getting a warrant for.

sought a warrant if they had not earlier entered the warehouse. * * * To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

JUSTICE BRENNAN and JUSTICE KENNEDY took no part in the consideration or decision of this litigation.

JUSTICE MARSHALL, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

* * * In holding that the independent source exception may apply to the facts of these cases, I believe the Court loses sight of the practical moorings of the independent source exception and creates an affirmative incentive for unconstitutional searches. * * *

* * * Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first to determine whether it is worthwhile to obtain a warrant. Probable cause is much less than certainty, and many "confirmatory" searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant. If contraband is discovered, however, the officers may later seek a warrant to shield the evidence from the taint of the illegal search. The police thus know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search.

Under the Court's view, today's decision does not provide an incentive for unlawful searches, because the officer undertaking the search would know that "his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." The Court, however, provides no hint of why this risk would actually seem significant to the officers. Under the circumstances of these cases, the officers committing the illegal search have both knowledge and control of the factors central to the trial court's determination. First, it is a simple

matter, as was done in these cases, to exclude from the warrant application any information gained from the initial entry so that the magistrate's determination of probable cause is not influenced by the prior illegal search. Second, today's decision makes the application of the independent source exception turn entirely on an evaluation of the officers' intent. It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search. The testimony of the officers conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed. Under these circumstances, the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search.

* * *

[The dissenting opinion of JUSTICE STEVENS is omitted.]

QUESTIONS ABOUT MURRAY

The majority in *Murray* expresses concern about a "confirmatory" search, and states that the subsequent search will be invalidated if the officer's testimony denying a confirmatory motivation is "implausible." The officer denying a confirmatory motivation must explain why he or she made the original search without a warrant, and after *Murray* this explanation must rise only to the level of plausibility. In *Murray,* the explanation found plausible was that the officers thought they had exigent circumstances, even though in fact they did not. (If they did have exigent circumstances, *Murray* would not be an exclusionary rule case, because the original search would have been legal). Recall the discussion of exigent circumstances earlier in the Chapter. Under what facts could the officers be *so wrong* about exigent circumstances that their explanation on that point would not even be plausible? Could that *ever* happen in a narcotics case?

Has the Court in *Murray* established a good faith exception for warrantless searches that are later sanitized by a warrant? As in *Leon,* discussed *infra,* the search, though illegal, does not result in exclusion so long as the officers are not totally unreasonable in believing that they were acting legally. For criticism of *Murray* on these points, see Bradley, Murray v. United States: The Bell Tolls for the Search Warrant Requirement, 64 Ind.L.J. 907 (1989). See also United States v. Johnson, 994 F.2d 980 (2d Cir.1993) (independent source doctrine applies where officers made an initial search under the mistaken impression that it was incident to an arrest; while mistaken, the officers were not totally unreasonable).

Is the primary purpose of the exclusionary rule to deter police misconduct, or to restore the situation to what it was before the illegal search? If the primary purpose is deterrence, can it be argued that it is

sometimes necessary to place the government in a worse position than if the illegal search had not occurred?

6. Inevitable Discovery

The inevitable discovery exception has been termed the "hypothetical independent source" exception. See Forbes, The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment, 55 Fordham L.Rev. 1221 (1987). For the exception to apply, the government must show that the illegally obtained evidence *would have been* discovered through legitimate means independent of the official misconduct. Note that if the evidence is *actually* discovered through legitimate independent means, the independent source exception would apply. So the inevitable discovery exception is one step removed from the independent source exception.

Establishing the Exception: Nix v. Williams

The Supreme Court approved the inevitable discovery limitation upon the exclusionary rule for the first time in Nix v. Williams, 467 U.S. 431 (1984), which is discussed in *Murray*. Seven years earlier, the Court had held that Williams's conviction for murdering a 10-year-old girl was tainted when a police officer managed to obtain statements from Williams in violation of Williams's Sixth Amendment right to counsel. In the course of making statements, Williams led police to the girl's body. Although the Court held that the statements must be suppressed, it left open the question whether evidence as to the location and condition of the body might be admissible in a new trial.

At Williams's second trial, a state court judge found that the government proved by a preponderance of the evidence that a search party, which had suspended its activities once Williams agreed to lead the police to the body, would have found the body shortly afterwards anyway and that the body would have been found in essentially the same condition as when Williams led the police to it. Thus, the judge admitted evidence concerning the body's location and condition on the ground that it would have been inevitably discovered through legal means. But a federal court on habeas review found that the inevitable discovery rule could not be invoked where a police officer acted in bad faith, as it found the officer had in dealing with Williams.

Chief Justice Burger wrote for a majority as it reversed the federal court. He treated the independent source and inevitable discovery doctrines as related, reasoning that both doctrines limit the exclusionary rule so that the government is not denied evidence it would have had even without the officers' illegal activity. The Court indicated that the exclusionary rule works to assure that police do not benefit from

constitutional violations, and that the inevitable discovery exception simply recognizes that the government actually obtains no advantage from illegal conduct *if* the government can prove that it would have obtained the evidence legally anyway.

The Court declined to restrict the inevitable discovery limitation to situations in which an officer acts in good faith. It found that a "good faith" requirement is not needed to deter officers from violating constitutional rules, because officers seeking to gather evidence cannot know in advance whether the government will be able to prove that their evidence would have been discovered inevitably through legal means. Thus, sufficient deterrence flows from the uncertainty that any evidence would have been inevitably obtained legally. The Chief Justice found that excluding evidence that would have been inevitably discovered legally, on the ground that officers acted in bad faith, "would put the police in a *worse* position than they would have been if no unlawful conduct had transpired" and that the exclusionary rule could not be used to punish the state in that way.

The Court in *Nix* held that to invoke the inevitable discovery exception, the government must prove by a *preponderance* that the challenged evidence would have been discovered through independent legal means. Chief Justice Burger rejected the more stringent clear and convincing evidence standard, stating that "we are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries." Applying the preponderance of the evidence standard to the facts, the Chief Justice found that the government had established its burden that the body would have been found by the search team only a short time after Williams directed the officers there.

Justice Stevens concurred in the judgment. He expressed concern, however, that the majority emphasized the "societal costs" of the exclusionary rule without also emphasizing the "societal costs" of unconstitutional police conduct.

Justice Brennan, joined by Justice Marshall, dissented in *Nix*. Justice Brennan accepted the inevitable discovery doctrine but emphasized that inevitable discovery was a more hypothetical concept than independent source, and so concluded that the government should have to prove inevitability by clear and convincing evidence.

Although *Williams* was a case involving a Sixth Amendment violation, the Court discussed the exclusionary rules it has adopted to enforce Fourth, Fifth and Sixth Amendment standards. The Court's opinion strongly suggests that the inevitable discovery doctrine limits the exclusionary rule under all three amendments. Both before and after *Nix*, lower courts have applied the inevitable discovery exception to Fourth

Amendment violations. See, e.g., United States v. Jackson, 901 F.2d 83 (7th Cir.1990) (even if defendant did not give voluntary consent to a search of his person, officers would have inevitably conducted a *Terry* frisk and uncovered crack cocaine in defendant's pockets); United States v. Kennedy, 61 F.3d 494 (6th Cir.1995) (evidence discovered by airport police in an illegal search of lost luggage was properly admitted, because if the police had not searched the suitcase, they would have returned it to the airline, and the airline's policy was to open lost luggage to determine the identity of the owner).

Inevitable Discovery Through a Hypothetical Inventory Search

An oft-repeated example of inevitable discovery in the Fourth Amendment context is presented in United States v. Andrade, 784 F.2d 1431 (9th Cir.1986), where officers searched Andrade's bag and found cocaine after he was arrested for a drug violation. The search did not occur until an hour after the arrest. The court held that even if the search could not be justified as incident to arrest and was thus unlawful, "the cocaine was admissible because it would have been inevitably discovered through a routine inventory search." The court noted that it was normal DEA procedure to inventory the contents of bags held by arrestees, and that such a procedure was valid under Illinois v. Lafayette, *supra*. Judge Reinhardt, concurring, agreed that the "confluence" of *Nix* and *Lafayette* required this result, but concluded that "the result we are required to reach will serve only to encourage illegal and unconstitutional searches." See also United States v. Seals, 987 F.2d 1102 (5th Cir.1993) (evidence found in car held admissible where it "would have been discovered pursuant to an authorized inventory search").

If *Andrade* is correct that the existence of routine inventory procedures allows admission of the evidence obtained from the illegal search of a car or container, then why would an officer ever have to comply with the rules that still limit searches of cars or containers? For example, probable cause is required to search the trunk of a car of an arrestee. But does the probable cause requirement mean anything if the inevitable discovery exception applies by way of the (hypothetical) inventory search of anything found in the trunk? Is there any reason for an officer even to follow the standardized inventory procedures themselves, given the fact that standards are in place to permit an argument that such an inventory would have been conducted? See United States v. Martin, 982 F.2d 1236 (8th Cir.1993) (improper inventory excused because a proper one would have been conducted under police guidelines).

In United States v. $639,558.00 in United States Currency, 955 F.2d 712 (D.C.Cir.1992), the court refused to apply the inevitable discovery

rule to situations in which the hypothetical independent source is an inventory search. The court reasoned as follows:

> If the evidence stemming from the violation is nevertheless admissible on the basis that the bags inevitably would have been opened when they were inventoried, the practical consequence is apparent. In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, we should add, of waiting for a lawful inventory to occur during normal processing). The police could readily make this assessment on their own. Contrary to what *Nix* supposed, they would almost invariably be in a position to calculate whether the evidence would inevitably have been discovered, because they would know that inventory procedures were in place.

Note that even if a court follows the "inevitable discovery through a hypothetical inventory" analysis, the government will have to prove that the search conducted would have been permissible under the inventory standards. Thus, if the officer searches the door panels of a car, the inevitable discovery exception will not work because a search of door panels cannot be justified under the inventory rules. See the discussion in United States v. Martinez, 512 F.3d 1268 (10th Cir. 2008) (noting cases excluding evidence found in door panels because "searching behind the door panel of a vehicle does not qualify as standard police inventory procedure").

"We Would Have Obtained a Warrant"

Under the inevitable discovery exception, what is to stop the government from making the following argument:

> "We realize that we conducted an illegal warrantless search. Sorry. However, we had probable cause, and we would have obtained a warrant on that basis. Because we had probable cause, the warrant inevitably would have issued, and we would have searched pursuant to the warrant (if we had bothered to obtain it). So all the evidence we obtained is admissible under the inevitable discovery exception."

Do *Nix* and *Murray* require that such an argument must be accepted? If so, is there anything left of the warrant requirement?

Most courts have rejected government arguments that the inevitable discovery exception is met on the simple assertion that the officers had probable cause and would have obtained a warrant. Judge Easterbrook rejected that argument in United States v. Brown, 64 F.3d 1083 (7th Cir. 1995):

> What makes a discovery "inevitable" is not probable cause alone, * * * but probable cause plus a chain of events that would have led to a

> warrant (or another justification) independent of the search. Otherwise the requirement of a warrant for a residential entry will never be enforced by the exclusionary rule. A warrant requirement matters only when the police have probable cause, because otherwise they can't get one. (Under the second clause of the fourth amendment, "no Warrants shall issue, but upon probable cause".) To say that a warrant is required for a search is to say that the police must get judicial approval before acting. Yet if probable cause means that discovery is inevitable, then the prior-approval requirement has been nullified.

See also United States v. Johnson, 22 F.3d 674 (6th Cir.1994) ("to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause"); United States v. Echegoyen, 799 F.2d 1271 (9th Cir.1986) ("to excuse the failure to obtain a warrant merely because the officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the Fourth amendment").

Some decisions can be found, however that rely on *Nix* to hold that evidence found in an illegal warrantless search was admissible because a warrant could and would have been obtained. See, e.g., United States v. Goins, 437 F.3d 644 (7th Cir.2006) (excusing an illegal search because police inevitably would have sought a search warrant and a magistrate would have issued one).

Establishing Inevitability

Nix holds that the government must prove by a preponderance that the illegally obtained evidence inevitably would have been discovered by legal means. In United States v. Feldhacker, 849 F.2d 293 (8th Cir.1988), the court cautioned that in deciding whether the inevitable discovery exception applies, courts must focus on what the officers actually *would have done*, not on what they *could possibly have done.*

> There are reasonable limits to the scope that courts will impute to the hypothetical untainted investigation. An investigation conducted over an infinite time with infinite thoroughness will, of course, ultimately or inevitably turn up any and all pieces of evidence in the world. Prosecutors may not justify unlawful extractions of information post hoc where lawful methods present only a theoretical possibility of discovery. While the hypothetical discovery by lawful means need not be reached as rapidly as that actually reached by unlawful means, the lawful discovery must be inevitable through means that would actually have been employed.

Similar concerns arose in United States v. Allen, 159 F.3d 832 (4th Cir.1998). The government sought to avoid exclusion after Officer Tackett illegally searched a bag in a bus sweep. The government argued, and Officer Tackett testified, that if she hadn't opened the bag and discovered drugs, she would have called the K-9 unit and had a dog sniff the bag. The government presented testimony that a dog unit was at the bus terminal that day, and that the dog would have had no problem alerting to the drugs in Allen's bag. Officer Tackett testified that if the dog alerted, she would have sought a search warrant to search the bag. But the court found this scenario speculative.

> Our initial problem * * * lies in the lack of evidentiary support for the conclusion that Tackett would have used the dog. We have no doubt that Tackett *could* have used the dog, but whether she *would* have presents an entirely different question. Tackett testified specifically that if she had not conducted the illegal search and if she had thought the bag "could have been Allen's," she would have used the drug dog to sniff the bag. However, when Detective Kennedy (the dog's handler) testified, he did not so much as suggest that his dog had ever been used to sniff bags located inside the passenger compartment of a bus. Instead, he stated that his usual duty involved sending his dog into the undercarriage of the bus, as he had done that day. Furthermore, nothing in the record indicates that Tackett had ever previously called for a police dog to sniff baggage inside a bus, and Tackett conceded as much. * * *
>
> A finding of inevitable discovery necessarily rests on facts that did not occur. However, by definition the occurrence of these facts must have been likely, indeed "inevitable," absent the government's misconduct. On the record here, * * * we cannot possibly conclude that the government inevitably would have discovered the cocaine by employing a drug dog to establish probable cause.

7. Use of Illegally Seized Evidence Outside the Criminal Trial Context

Where it applies, the exclusionary rule operates to exclude evidence at a criminal trial. But in a series of cases, the Court has held that the exclusionary rule generally does not apply outside the context of a criminal trial on the merits. This is because, according to the Court, exclusion from the criminal prosecution's case-in-chief is all that is necessary to deter Fourth Amendment violations. The cost of exclusion in other "collateral" contexts generally has been held to outweigh the benefits in deterrence that the rule provides.

Grand Jury Proceedings

In United States v. Calandra, 414 U.S. 338 (1974), agents illegally seized certain documents located at Calandra's place of business. The documents related to loansharking activities. A grand jury was convened to investigate these activities, and Calandra was subpoenaed to appear so that he might be questioned on the basis of the information obtained from the illegally seized documents. Calandra moved to suppress the documents and refused to answer the grand jury's questions. The Supreme Court held that Calandra had no right to refuse to answer the questions, because the exclusionary rule does not apply to grand jury proceedings. The Court concluded that the marginal deterrent effect of allowing a witness to raise a Fourth Amendment claim before the grand jury was outweighed by the disruption of investigations that exclusion of evidence would produce. The Court declared that sufficient deterrence flowed from exclusion of the illegally obtained evidence at trial. Justice Brennan, whose dissent was joined by Justices Douglas and Marshall, de-emphasized the deterrent rationale of the rule and focused instead on the benefits of keeping courts from lending their assistance to unconstitutional practices.

The fact that indictments can be based on illegally seized evidence is another arrow in the government's quiver. It means that the government will get some benefits from an illegal search. On the other hand, there is something to the *Calandra* Court's assertion that it will ordinarily be impractical to use tainted evidence to obtain an indictment; because that evidence would not be admissible at trial, it seems that the chances of obtaining a conviction would be remote. See United States v. Puglia, 8 F.3d 478 (7th Cir.1993) ("Prosecutors will not waste their time seeking indictments of individuals against whom they do not have enough evidence to convict.").

Yet prosecutors have sometimes been quoted as saying that it is important to indict someone even if they are not convicted—that is, the indictment can be used as punishment in the public eye, and as a means of imposing inconvenience and distress on a suspected criminal. For example, the special prosecutor in the case against former Secretary of Agriculture Mike Espy was quoted as being content with Espy's acquittal, because law enforcement and deterrence interests were substantially furthered by the indictment itself. If prosecutors can use an indictment as an end in itself, did the Court get it right in *Calandra* when it reasoned that sufficient deterrence flows from excluding illegally obtained evidence at trial?

Civil Tax Proceedings

The Court has held that evidence illegally seized by state police can be used by federal tax officials in civil tax litigation. United States v. Janis, 428 U.S. 433 (1976). The Court in *Janis* found the deterrent effect of the exclusionary rule "attenuated when the punishment imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." This attenuation, coupled with the "existing deterrence" effected by exclusion of the evidence from both state and federal criminal trials, tilted the cost-benefit analysis in favor of admitting the evidence.

Civil Deportation Proceedings

In Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984), the question was whether illegally obtained statements could be used in deportation proceedings. INS officials had illegally obtained confessions from aliens concerning their immigration status. Justice O'Connor's opinion for the Court found that the consequence of exclusion would be especially severe, because exclusion could mean that a person who is committing a criminal offense *at the time of the proceeding* would be allowed to go free. Finding that the cost of exclusion outweighed the benefits in deterrence of misconduct, the Court held that illegally seized evidence may be used in a deportation proceeding.

Justice O'Connor reasoned specifically as follows:

- no matter how an arrest is made, deportation will still be possible when evidence derived independently of the arrest is available, and evidence of alienage alone might be sufficient to warrant deportation—thus, the use of illegally obtained evidence will ordinarily be harmless;
- as a practical matter, it is highly unlikely that deportees will raise exclusionary rule claims and therefore it is equally unlikely that the rule would deter INS agents;
- the INS has its own scheme for deterring Fourth Amendment violations by its agents;
- declaratory relief is available to restrain institutional practices by the INS that violate the Fourth Amendment;
- deportation currently requires only a simple hearing, and it would be inappropriate to add complex issues of exclusion to these hearings;
- INS agents handle so many cases that they might have difficulty accounting for exactly how they handled each suspected alien; and

- "[a]pplying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law."

Justice White dissented. He reasoned that INS agents seek to gather evidence specifically for use in deportation proceedings, and that their activities are closely analogous to those of police officers who seek to obtain evidence for criminal trials. So in his view the deterrent effect of the exclusionary rule is the same as it would be for criminal prosecutions. Justices Brennan, Marshall and Stevens each filed a short dissenting opinion.

Note that some courts have found that the exclusionary rule can apply to deportation proceedings under dicta in Justice O'Connor's opinion indicating that exclusion "might" be justified for "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." For a case involving egregious circumstances, see Cotzojay v. Holder, 725 F.3d 172 (2nd Cir. 2013)(forced entry into a home, made in pre-dawn hours in order to coerce consent by startling sleeping residents).

Habeas Corpus Proceedings

In Stone v. Powell, 428 U.S. 465 (1976), the Court, using its familiar cost-benefit analysis, held that the exclusionary rule could not be invoked in habeas corpus proceedings to challenge Fourth Amendment violations that resulted in evidence being admitted at a state trial. The Court stated that in the context of habeas proceedings, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." The deterrent effect of exclusion was considered low because the habeas proceeding is collateral to the criminal trial and therefore not something officers would think about in deciding whether to conduct an illegal search. And the costs of exclusion are especially high because reversing a state conviction on habeas review implicates serious federalism and finality interests. The practical consequence of *Stone* is that unless the Supreme Court grants certiorari, no federal court will ever review a state court ruling on a Fourth Amendment issue.

Parole Revocation Proceedings

In Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357 (1998), Scott's parole was revoked and he was returned to prison to serve the remainder of his sentence, on the basis of evidence uncovered in an

illegal search. The Court upheld the revocation, concluding that the exclusionary rule was not applicable in parole revocation proceedings.

Justice Thomas wrote the majority opinion for five members of the Court. Justice Thomas found that the cost of applying the exclusionary rule in parole revocation proceedings outweighed the benefits in deterrence of official misconduct. His "cost" argument proceeded as follows:

> The costs of excluding reliable, probative evidence are particularly high in the context of parole revocation proceedings. * * * In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an overwhelming interest in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so. The exclusion of evidence establishing a parole violation, however, hampers the State's ability to ensure compliance with these conditions by permitting the parolee to avoid the consequences of his noncompliance. * * *
>
> The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation. * * * Most States * * * have adopted informal, administrative parole revocation procedures in order to accommodate the large number of parole proceedings. These proceedings generally are not conducted by judges, but instead by parole boards, members of which need not be judicial officers or lawyers. * * * Nor are these proceedings entirely adversarial, as they are designed to be predictive and discretionary as well as factfinding.
>
> Application of the exclusionary rule would significantly alter this process. The exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded. Such litigation is inconsistent with the nonadversarial, administrative processes established by the States. Although States could adapt their parole revocation proceedings to accommodate such litigation, such a change would transform those proceedings from a predictive and discretionary effort to promote the best interests of both parolees and society into trial-like proceedings less attuned to the interests of the parolee. We are simply unwilling so to intrude into the States' correctional schemes. Such a transformation ultimately might disadvantage parolees because in an adversarial proceeding, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. And the financial costs of such a system could reduce the State's incentive to extend parole in the first place, as one of the purposes of parole is to reduce the costs of

criminal punishment while maintaining a degree of supervision over the parolee.

The majority's "benefit" argument found little deterrence value to the exclusionary rule in the context of parole revocation proceedings:

> [A]pplication of the exclusionary rule to parole revocation proceedings would have little deterrent effect upon an officer who is unaware that the subject of his search is a parolee. In that situation, the officer will likely be searching for evidence of criminal conduct with an eye toward the introduction of the evidence at a criminal trial. The likelihood that illegally obtained evidence will be excluded from trial provides deterrence against Fourth Amendment violations, and the remote possibility that the subject is a parolee and that the evidence may be admitted at a parole revocation proceeding surely has little, if any, effect on the officer's incentives.

Justice Thomas further rejected the lower court's position that the exclusionary rule should at least be applicable when the government official conducts an illegal search *for the specific purpose* of using illegally obtained evidence in the parole revocation proceeding, as opposed to a criminal trial. Despite the apparent deterrent effect of excluding the evidence in these circumstances, Justice Thomas was unpersuaded.

> We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence. Furthermore, such a piecemeal approach to the exclusionary rule would add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status.

Justice Stevens wrote a short dissenting opinion in *Scott*, emphasizing his continuing position that the Constitution requires exclusion of illegally obtained evidence. Justice Souter, in a dissenting opinion joined by Justices Ginsburg and Breyer, took issue with the majority's assessment of the costs and benefits of the exclusionary rule in the parole revocation context. He argued that the costs of applying the exclusionary rule in parole revocation proceedings are certainly no greater than the costs of applying the rule in a criminal trial. As to the benefits of applying the rule, Justice Souter noted that the parole revocation proceeding often takes the place of a criminal trial, rendering it the only venue in which illegally obtained evidence would be used against a parolee, and consequently raising the deterrent value of exclusion. He reasoned as follows:

> [P]arole revocation will frequently be pursued instead of prosecution as the course of choice, * * * because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State.

The reasons for this tendency to skip any new prosecution are obvious. If the conduct in question is a crime in its own right, the odds of revocation are very high. Since time on the street before revocation is not subtracted from the balance of the sentence to be served on revocation, the balance may well be long enough to render recommitment the practical equivalent of a new sentence for a separate crime. And all of this may be accomplished without shouldering the burden of proof beyond a reasonable doubt; hence the obvious popularity of revocation in place of new prosecution.

The upshot is that without a suppression remedy in revocation proceedings, there will often be no influence capable of deterring Fourth Amendment violations when parole revocation is a possible response to new crime.

Sentencing Proceedings

The Supreme Court has not considered whether illegally obtained evidence can be used in sentencing proceedings. But the lower courts have found the exclusionary rule inapplicable to sentencing hearings. United States v. Tejada, 956 F.2d 1256 (2d Cir.1992), is an example of the predominant approach. The *Tejada* court analyzed the costs and benefits of exclusion of illegally obtained evidence at sentencing as follows:

> [The defendants] posit that police and prosecutors with enough lawfully obtained evidence for a conviction of a relatively minor offense that has a broad sentencing range could guarantee a heavier sentence by seizing other evidence illegally and introducing it at sentencing. * * *
>
> Defendants * * * do not explain why this supposed incentive to violate the Fourth Amendment will prove incrementally stronger than the rewards that already exist. Illegally seized evidence long has played a role in our legal system, and many of its uses might motivate a police officer to violate the Fourth Amendment. [Citing *Lopez-Mendoza*, *Janis*, and *Calandra*]. The Supreme Court has held that these uses for illegally seized evidence do not diminish deterrence sufficiently to justify the exclusion of probative evidence. We see no reason why this additional use of illegally seized evidence justifies different treatment.

The *Tejada* court asserted that "[g]reat rewards still exist for following accepted police procedures." If evidence cannot be used at trial, the government may never get to the sentencing proceeding due to the weakness of its case. Against the perceived minimal deterrent effect of exclusion at the sentencing hearing, the court weighed the need for sentencing courts to have "as much information as possible at sentencing." The result:

> We conclude that the benefits of providing sentencing judges with reliable information about the defendant outweigh the likelihood that allowing consideration of illegally seized evidence will encourage unlawful police conduct. Absent a showing that officers obtained evidence expressly to enhance a sentence, a district judge may not refuse to consider relevant evidence at sentencing, even if that evidence has been seized in violation of the Fourth Amendment.

Note that the *Tejada* court provided a possible exception for cases in which officials obtain evidence expressly to enhance a sentence. Presumably those are cases in which application of the exclusionary rule would have some deterrent effect. But *Tejada* was written before the Supreme Court's decision in *Scott*, *supra*, in which the Court held that the exclusionary rule does not apply to parole revocation proceedings, even if it is clear that the officer conducted an illegal search for the specific purpose of using the evidence at the parole revocation proceeding. The Court reasoned that excluding the evidence depending on the mindset of the particular officer would be micromanaging the exclusionary rule. Presumably the rationale of *Scott* applies to the sentencing context as well, meaning that illegally obtained evidence can be considered even if it was obtained solely for purposes of using it at the sentencing proceeding.

8. Use of Illegally Obtained Evidence for Impeachment Purposes

Opening the Door on Direct Examination: Walder v. United States

In Walder v. United States, 347 U.S. 62 (1954), Walder testified on direct examination in a trial on narcotics charges that he had never possessed or sold narcotics in his life. The Supreme Court held that he was properly impeached with evidence of heroin that had been illegally seized from his home in an earlier, unrelated case. The Court reasoned that Walder had "opened the door" to this evidence and that the exclusionary rule could not be used as a license for perjury.

Opening the Door on Cross-Examination: United States v. Havens

United States v. Havens, 446 U.S. 620 (1980), extended the impeachment exception to the exclusionary rule that had been applied in *Walder*. Officers stopped McLeroth and Havens coming off a flight. They illegally searched Havens's suitcase and found a shirt from which the pocket had been torn out. McLeroth was also searched, and officers found a pocket, matching the shirt found in Havens's bag, sewn into McLeroth's clothing. The officers found cocaine in the pocket. At his trial, Havens

took the stand and denied being involved with McLeroth in the transportation of cocaine; he did not mention anything about the shirt or the pocket. On cross-examination, Havens was asked specifically whether he had been involved in sewing a pocket into McLeroth's clothing, and whether he had a shirt in his own suitcase from which that pocket had been torn out. Havens answered in the negative, and this testimony was impeached by introduction of the illegally seized shirt. The court of appeals held that the evidence was improperly admitted. It reasoned that *Walder* permitted impeachment only if the defendant opened the door to it—and Havens had not done so in this case because he hadn't mentioned the shirt on direct.

But in a 5–4 decision written by Justice White, the Supreme Court held that illegally obtained evidence can be used to impeach the defendant's testimony no matter when that testimony is elicited. Justice White argued that there was no difference of constitutional magnitude between impeachment of direct testimony and impeachment of testimony elicited on cross-examination, so long as the questions put to the defendant on cross-examination "are plainly within the scope" of the direct. He stated that a contrary rule would severely impede the normal function of cross-examination. Justice White concluded as follows:

> [T]he policies of the exclusionary rule no more bar impeachment here than they did in *Walder* * * *. [The incremental deterrence which occurs] by forbidding impeachment of the defendant who testifies was deemed [in *Walder*] insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the fact-finding goals of the criminal trial. We reaffirm this assessment of the competing interests * * *.

Justice Brennan, joined by Justices Stewart, Marshall and Stevens, dissented. He complained that the majority had passed control of the impeachment exception to the government, "since the prosecutor can lay the predicate for admitting otherwise suppressible evidence with his own questioning." He argued that after *Havens*, a defendant who has been the victim of an illegal search will have to forego testifying on his own behalf, because it is impossible for the defendant to testify to anything on direct that would not open him up to impeachment through illegally obtained evidence on cross-examination.

Impeachment of Defense Witnesses: James v. Illinois

In James v. Illinois, 493 U.S. 307 (1990), the Court refused to extend the impeachment exception to allow impeachment of defense *witnesses* (as opposed to the defendant) with illegally obtained evidence. James made a statement to police officers that he had changed his hair color and style the day after taking part in a shooting. The trial court suppressed this

statement because it was the fruit of an arrest made without probable cause. Prosecution witnesses at trial identified James, though they admitted that his hair color at trial was different from that of the perpetrator at the time of the shooting. To rebut the identification testimony, James called a family friend, who testified that just before the shooting, James's hair color and style was the same as it was at trial. The trial court, relying on the impeachment exception to the exclusionary rule, allowed the prosecution to introduce James's suppressed statement to impeach the credibility of the defense witness—a mode of impeachment known as "contradiction."

The Supreme Court reversed in an opinion by Justice Brennan for five members of the Court. Justice Brennan found a compelling distinction between impeachment of a defendant's own testimony and that of defense witnesses. Despite his prior dissents on the impeachment exception, Justice Brennan argued that as applied to the defendant, the impeachment exception serves salutary purposes: it "penalizes defendants for committing perjury," and yet "leaves defendants free to testify truthfully on their own behalf." According to the Court, the impeachment exception keeps perjury out and allows truthful testimony in, thus furthering the search for truth.

In contrast, the Court found that expanding the impeachment exception to encompass the testimony of all defense witnesses would result in the loss of truthful testimony. Justice Brennan argued that the fear of impeachment of one's witnesses likely would discourage defendants from even presenting the testimony of others. He posited that the defendant could carefully limit his own truthful testimony to avoid reference to matters that could be impeached by illegally obtained evidence. But the defendant's witnesses could not be so easily controlled.

Justice Brennan also argued that impeachment was not needed to deter defense witnesses from offering perjurious testimony. Unlike the defendant, defense witnesses are sufficiently deterred by the threat of a perjury prosecution.

Justice Brennan concluded that the exclusionary rule would be robbed of significant deterrent effect if illegally obtained evidence could be used to impeach not only the defendant but the defendant's witnesses. He argued that illegally obtained evidence would have greater value to the government because it could be used to prevent defendants from calling witnesses to give truthful testimony. Justice Brennan asserted that a rule allowing impeachment of defense witnesses "would leave officers with little to lose and much to gain by overstepping constitutional limits on evidence gathering."

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, dissented. The dissenters complained that the

majority had granted the defendant "broad immunity to introduce whatever false testimony it can produce from the mouth of a friendly witness." Justice Kennedy argued that impeachment is even more vital for attacking untruthful testimony of a defense witness than it is for attacking the defendant's testimony:

> It is natural for jurors to be skeptical of self-serving testimony by the defendant. Testimony by a witness said to be independent has the greater potential to deceive. And if a defense witness can present false testimony with impunity, the jurors may find the rest of the prosecution's case suspect, for ineffective and artificial cross-examination will be viewed as a real weakness in the State's case. * * * The State must * * * suffer the introduction of false testimony and appear to bolster the falsehood by its own silence.

The majority in *James* bases its decision on the assumption that the defendant can restrict his testimony to avoid impeachment, while the defendant's witnesses cannot be so controlled. After *Havens*—which allowed impeachment on cross-examination even though the direct testimony was carefully tailored to avoid any reference to the shirt—is it ever possible for the defendant to avoid impeachment with illegally obtained evidence? If not, isn't the majority's decision in *James* based on a faulty premise? Is Justice Brennan simply making the best of what he thinks is bad law? *James* is criticized in Note, The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combatting a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses, 1990 U.Ill.L.Rev. 375.

F. PROCEDURAL ASPECTS OF THE EXCLUSIONARY RULE

1. Attacking the Warrant

If the search was pursuant to a warrant, the judge ruling on a motion to suppress will consider the sworn evidence presented to the magistrate who issued the warrant. The Fourth Amendment determination will be made on the basis of only this evidence. No after-acquired evidence can be considered because the issue is whether the magistrate properly issued the warrant on the basis of the information available to her. See generally Kaiser v. Lief, 874 F.2d 732 (10th Cir.1989) (magistrate may rely on affidavit, complaint, and other affidavits contemporaneously presented for other warrants).

Challenging the Truthfulness of the Warrant Application: Franks v. Delaware

In Franks v. Delaware, 438 U.S. 154 (1978), the Court held that a defendant has a limited right to attack the truthfulness of statements made in warrant applications. But the Court emphasized that it is difficult for a defendant to mount a successful challenge, because in order to obtain a hearing the defendant must make a case that the officers preparing the application engaged in deliberate falsification or reckless disregard for the truth that materially affected the showing of probable cause.

> * * * There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

The Court found that where defendants could make the required preliminary showing, the need to assure that the police act in good faith outweighed the drain on resources that the limited hearing requirement would necessitate. Justice Rehnquist, joined by Chief Justice Burger, dissented, arguing that, even if "some inaccurate or falsified information may have gone into the making of the determination" to issue a warrant, "I simply do not think the game is worth the candle in this situation." When you recall that the warrant application is made ex parte and the magistrate makes nothing like a credibility determination, what would become of the warrant requirement if Justice Rehnquist's view had prevailed?

United States v. Johns, 851 F.2d 1131 (9th Cir.1988), provides an example of a showing sufficient to warrant a *Franks* hearing. In *Johns*, probable cause was based in material part on the officer's averment that he had detected the odor of methamphetamine emanating from the defendant's premises. The defendant submitted affidavits from two experts stating that in light of the way the methamphetamine was stored, it would have been impossible for the officer outside the premises to smell it. *Johns* was distinguished in United States v. Mueller, 902 F.2d 336 (5th Cir.1990), where the officer averred that he could smell methamphetamine emanating from the defendant's house while standing across the street. The defendant submitted an expert affidavit to the effect that it would have been unlikely to pick up such a smell given the officer's distance from the house and the prevailing winds. The court denied a *Franks* hearing, noting that Mueller's expert merely concluded that the officer's story was "unlikely," while the experts in *Johns* concluded that the officer's story was "impossible."

Materiality Requirement

To obtain relief under *Franks*, the defendant must show that the deliberate falsehood or reckless disregard for the truth had a material effect on the issuance of the warrant. An officer's misstatement is not material under *Franks* if probable cause would exist even without the misstatement. See United States v. Campbell, 878 F.2d 170 (6th Cir.1989), citing cases in every circuit applying this test. In *Campbell*, the court found the search warrant valid even though the affidavit included a statement attributed to an informant known by the affiant to be fictitious. The court held that untainted information in the affidavit from three reliable informants was sufficient to establish probable cause under Illinois v. Gates, supra. Essentially, the officer's fabrication constituted harmless error.

2. Challenging a Warrantless Search

If no warrant was obtained, the government must justify the search. Generally, the state must prove by a preponderance of the evidence that an exception to the warrant requirement was satisfied. See United States v. Matlock, 415 U.S. 164 (1974) (government must prove voluntariness of consent by a preponderance of the evidence). This allocation of the burden of proof reflects the Court's mild preference for warrants. See generally Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stan.L.Rev. 271 (1975).

3. The Suppression Hearing and Judicial Review

At the hearing on the motion to suppress evidence, the government will have a privilege to protect the identity of informants. See McCray v.

Illinois, 386 U.S. 300 (1967) (holding that it is constitutional to withhold informant's identity on issue of probable cause). But the judge may in her discretion require the prosecution, *in camera,* to disclose to her the identity of the informant, or produce the informant for questioning. "If the judge does so require, the information or testimony so obtained shall be kept securely under seal and, in the event of an appeal from the judge's disposition of the motion, transmitted to the appellate court." § 290.4, ALI Model Code of Pre-Arraignment Procedure.

In a suppression hearing, the ordinary rules of evidence are not applicable, with the exception of rules of privilege. A judge can, for example, rely on hearsay to determine the legality of a search or seizure. In United States v. Matlock, 415 U.S. 164 (1974), the Court reasoned that "in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel." The *Matlock* Court concluded that at a suppression hearing "the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."

Limitations on Use of Suppression Hearing Testimony at Trial: Simmons v. United States

At the suppression hearing, the defendant may testify in support of his claim of a Fourth Amendment violation. Simmons v. United States, 390 U.S. 377 (1968), holds that when a defendant testifies on the question of "standing" (a subject discussed infra) at a suppression hearing, the government may not use his testimony against him on the question of guilt or innocence. So for example, the defendant to establish standing might testify at the suppression hearing that the briefcase searched by police that was full of narcotics was his. That statement cannot be used against him as an admission of guilt at trial. Justice Harlan's opinion for the 6–2 majority in *Simmons* reasoned that defendants would be unduly inhibited from making Fourth Amendment claims absent protection against automatic use of suppression hearing testimony at trial. In light of the way the opinion is written, it is likely that it extends to all Fourth Amendment questions (e.g., consent) considered at the hearing, not just to "standing" questions.

Can the testimony at the suppression hearing be used at trial to impeach a defendant who takes the stand and changes his testimony? *Simmons* left the impeachment question open. But lower courts have held that *Simmons* does not prevent the use of suppression hearing testimony for impeachment purposes. See, e.g., United States v. Beltran-Gutierrez, 19 F.3d 1287 (9th Cir.1994) (defendant's statements at a suppression

hearing can be used to impeach him if his trial testimony is inconsistent with them). Thus, a defendant who testifies at the suppression hearing that he owned the briefcase full of drugs will run into difficulty if the evidence is not suppressed and he takes the stand at trial to testify that the briefcase was not his. His suppression hearing testimony can be offered as a prior inconsistent statement to impeach him. He will be entitled to have the jury instructed that the prior statement is not to be used as substantive evidence that the briefcase was actually his, but only for its bearing on the defendant's credibility. But that limiting instruction is likely to have little practical effect.

If the defendant calls a witness to testify at the suppression hearing (e.g., a friend who testifies that the briefcase was the defendant's), the government is not precluded by *Simmons* from using that testimony against the defendant. This is because *Simmons* was designed to protect defendants from sacrificing one constitutional right (the Fifth Amendment right against self-incrimination) for another (the Fourth Amendment right). When the defendant calls a witness at the suppression hearing, the defendant's Fifth Amendment rights are not implicated. As the court stated in United States v. Boruff, 870 F.2d 316 (5th Cir.1989):

> While a defendant's decision to call third-parties to corroborate his testimony at a suppression hearing might be affected by his knowledge that the government may subsequently utilize that testimony at trial, this dilemma does not rise to the level of a constitutional problem.

Appellate Review

If a motion to suppress is granted, federal law permits immediate appellate review of the ruling subject to certain conditions. 18 U.S.C. § 3731. Most states are in accord. The federal statute provides that three conditions must be satisfied before the government can appeal from a suppression order: 1. The government cannot appeal if the defendant has been put in jeopardy, within the meaning of the Double Jeopardy Clause; 2. An appeal must not be taken for the purpose of delay; and 3. The suppressed evidence must be substantial proof of a fact material to the proceedings. See United States v. Gantt, 179 F.3d 782 (9th Cir.1999), for an application of these factors.

Most jurisdictions deny the defendant the right to an immediate appeal. This includes the federal courts, where an appeal from the denial of a suppression motion must await a judgment of conviction. It must be kept in mind that prosecutors cannot appeal the merits of an adverse judgment; only defendants can. Thus, prosecutors have to get an

immediate appeal or none at all. If the defendant is convicted, the denial of a suppression motion may be a subject of the appeal.

Where the case stands or falls on admitting the challenged evidence, and the court has denied the motion to suppress, a defendant may wish to plead guilty on condition that he reserves the right to appeal the court's Fourth Amendment ruling. Fed.R.Crim.P. 11(a)(2) permits a defendant, with the approval of the court and the consent of the government, to enter a conditional plea of guilty, reserving the right to appeal the court's denial of a motion to suppress. A defendant who prevails on appeal "may then withdraw the plea."