guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish.

Justice Powell emphasized that the Court was not making a categorical rule that the issuance of warrants by non-lawyers would always satisfy the Fourth Amendment requirements of neutrality and detachment. Rather, the Court simply rejected the categorical rule that non-lawyers could never act as neutral and detached magistrates. Justice Powell concluded: "States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them."

NOTE ON SHADWICK

Shadwick dealt with arrest warrants, not search warrants. But, the Court's disclaimers notwithstanding, it is clear that the Court was defining the term "magistrate" for Fourth Amendment purposes. The *Shadwick* Court cited arrest and search cases interchangeably. And in Illinois v. Gates, 462 U.S. 213 (1983), considered supra, the Court assumed that non-lawyers may issue search warrants. Do you believe that the warrant clause is meaningful when the magistrate is not a lawyer? What message, if any, does *Shadwick* send to magistrates about the importance of their screening function?

3. Magistrate Decisions

There is no requirement that a magistrate give reasons for finding probable cause or for rejecting a warrant application. Is there an argument that magistrates should have to signify in writing their reasons for finding probable cause before issuing a warrant? Would you be persuaded by a counter-argument that it does not matter whether the magistrate reasoned properly as long as the Fourth Amendment probable cause standard actually is satisfied by the warrant application? Can the Fourth Amendment be satisfied if the magistrate is not reasoning properly?

V. TO APPLY OR NOT APPLY THE WARRANT CLAUSE

As stated previously, the Court has held that a search or seizure is presumptively unreasonable in the absence of a warrant based upon probable cause. However, the Court has found that the presumption of unreasonableness can be overcome in a variety of circumstances. Some of the circumstances excuse the officer from obtaining a warrant, but still require the officer to have probable cause. Other circumstances permit a search or seizure even though the officer has neither a warrant nor

probable cause. As you read through the "exceptions" to the warrant clause discussed below, be sure to keep straight exactly what requirements the Court retains for each exception. In order to do this, it is helpful to begin with the justification for each exception.

A. ARRESTS IN PUBLIC AND IN THE HOME

1. Standards for Warrantless Arrests

Once the point is made that warrants are necessary to search for property and seize it, it might seem that to search for and seize a person would *a fortiori* require a warrant. But this is not the law.

Section 120.1 of the ALI Model Code of Pre-Arraignment Procedure illustrates the powers that police may be given to proceed without a warrant.

Section 120.1. Arrest Without a Warrant

(1) **Authority to Arrest Without a Warrant.** A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

(a) a felony;

(b) a misdemeanor, and the officer has reasonable cause to believe that such person

(i) will not be apprehended unless immediately arrested; or

(ii) may cause injury to himself or others or damage to property unless immediately arrested; or

(c) a misdemeanor or petty misdemeanor in the officer's presence.

* * *

Note that even though an arrest is permitted in certain circumstances without a warrant, the officer must always have probable cause to arrest a suspect. See the discussion of probable cause to arrest, earlier in this Chapter.

2. Arrest Versus Summons

Why is it reasonable under the Fourth Amendment to begin the criminal process by arresting a suspect, rather than by simply notifying him to appear in court? In 1791, when the Fourth Amendment was adopted, the prevalence of the death penalty and the incentive it provided offenders to escape might have provided a reason for seizing a person at the time he was charged with any felony. Then, and now, arresting someone who is committing an offense in the officer's presence, especially

one who is disturbing the public peace, could be defended on the ground that officers should stop criminal activities before they are completed, if reasonably possible. See, e.g., Diaz v. City of Fitchburg, 176 F.3d 560 (1st Cir.1999) (not unreasonable to effect custodial arrest on persons who violated an ordinance that prohibits the obstruction of public passages: "If the officer always were obligated to allow the criminal obstruction to continue, he or she would be unable to satisfy the Ordinance's apparent purpose of assuring public convenience and safety."). But, why should other cases begin with forcible detention? Is it clear that persons charged with criminal offenses are much more likely to flee than persons named as defendants in civil actions?

In Gustafson v. Florida, 414 U.S. 260, 267 (1973), Justice Stewart suggested that "a persuasive claim might have been made * * * that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." But that suggestion has never become law.

To the contrary: in Atwater v. City of Lago Vista, 532 U.S. 318 (2001), the Court opted for a bright-line rule that a custodial arrest is *always* reasonable if the officer has probable cause of a criminal violation. Atwater was arrested for a minor traffic offense (a seat belt violation) that was punishable only by a fine. Yet instead of getting a ticket that would operate as a notice to appear, Atwater was detained, brought to the police station and booked. She argued that these custodial actions were unreasonable for such a minor offense. But the Court reasoned, among other things, that it would be too difficult to distinguish among offenses that could justify custodial arrest and those that could not. *Atwater* is set forth in full in the section on arrest powers, *infra*. It is clear after *Atwater* that the decision to proceed by arrest or summons (where custodial arrest is authorized) is totally within the police officer's discretion.

Atwater holds that an officer does not need to proceed by summons, even for minor offenses as long as the state authorizes a custodial arrest for the offense. Some states have laws that *require* police officers to arrest anyone suspected of seriously beating a spouse. See "Albany Set to Require Arrest In Domestic Violence Cases," New York Times, June 22, 1994, p.A1, col. 5 (noting the view of the sponsors of such a bill that it "would sharply reduce police discretion in such cases and remedy spotty enforcement of domestic violence laws"). These bills have been criticized by some law enforcement officials on the grounds that they "hamstring police officers" and "force the police to make unwarranted arrests." Id. Is it better to leave the entire question of "arrest versus summons" to the discretion of police officers or to impose some constraints on the decision whether to arrest or issue a citation?

3. The Constitutional Rule: Arrests in Public

The following case sets forth the constitutional basis for permitting a public arrest in the absence of a warrant.

UNITED STATES v. WATSON

Supreme Court of the United States, 1976.
423 U.S. 411.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents questions under the Fourth Amendment as to the legality of a warrantless arrest * * *.

* * *

The relevant events began on August 17, 1972, when an informant, one Khoury, telephoned a postal inspector informing him that respondent Watson was in possession of a stolen credit card and had asked Khoury to cooperate in using the card to their mutual advantage. On five to 10 previous occasions Khoury had provided the inspector with reliable information on postal inspection matters, some involving Watson. Later that day Khoury delivered the card to the inspector. On learning that Watson had agreed to furnish additional cards, the inspector asked Khoury to arrange to meet with Watson. * * * Khoury met with Watson at a restaurant designated by the latter. Khoury had been instructed that if Watson had additional stolen credit cards, Khoury was to give a designated signal. The signal was given, the officers closed in, and Watson was forthwith arrested. * * * A search having revealed that Watson had no credit cards on his person, the inspector asked if he could look inside Watson's car, which was standing within view. Watson said, "Go ahead," and repeated these words when the inspector cautioned that "[i]f I find anything, it is going to go against you." Using keys furnished by Watson, the inspector entered the car and found under the floor mat an envelope containing two credit cards in the names of other persons. * * *

Prior to trial, Watson moved to suppress the cards, claiming that his arrest was illegal for want of * * * an arrest warrant * * *. The motion was denied, and Watson was convicted of illegally possessing the two cards seized from his car.

[The court of appeals held that Watson's arrest was illegal because the officers had not obtained an arrest warrant, and there were no exigent circumstances to justify the absence of a warrant. The court of appeals further held that the credit cards should have been suppressed as the fruits of the illegal arrest.]

* * *

[T]here is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary.

The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony * * *. * * *

The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest. This has also been the prevailing rule under state constitutions and statutes. * * *

* * *

The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization. * * *

This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances. Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.

Watson's arrest did not violate the Fourth Amendment, and the Court of Appeals erred in holding to the contrary.

* * *

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

[JUSTICE STEWART's one paragraph opinion concurring in the judgment is omitted.]

MR. JUSTICE POWELL, concurring.

* * *

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. * * *.

But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests. * * *

[A] constitutional rule permitting felony arrests only with a warrant or in exigent circumstances could severely hamper effective law enforcement. Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury. Under the holding of the Court of Appeals such additional investigative work could imperil the entire prosecution. Should the officers fail to obtain a warrant initially, and later be required by unforeseen circumstances to arrest immediately with no chance to procure a last-minute warrant, they would risk a court decision that the subsequent exigency did not excuse their failure to get a warrant in the interim since they first developed probable cause. If the officers attempted to meet such a contingency by procuring a warrant as soon as they had probable cause and then merely held it during their subsequent investigation, they would risk a court decision that the warrant had grown stale by the time it was used. Law enforcement personnel caught in this squeeze could ensure validity of their arrests only by obtaining a warrant and arresting as soon as probable cause existed, thereby foreclosing the possibility of gathering vital additional evidence from the suspect's continued actions.

* * *

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

By granting police broad powers to make warrantless arrests, the Court today sharply reverses the course of our modern decisions construing the Warrant Clause of the Fourth Amendment. * * *

* * *

The Government's assertion that a warrant requirement would impose an intolerable burden stems, in large part, from the specious supposition that procurement of an arrest warrant would be necessary as soon as probable cause ripens. There is no requirement that a search warrant be obtained the moment police have probable cause to search. The rule is only that present probable cause be shown and a warrant obtained before a search is undertaken. The same rule should obtain for arrest warrants, where it may even make more sense. Certainly, there is less need for prompt procurement of a warrant in the arrest situation. Unlike probable cause to search, probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light.

* * *

It is suggested, however, that even if application of this rule does not require police to secure a warrant as soon as they obtain probable cause, the confused officer would nonetheless be prone to do so. If so, police "would risk a court decision that the warrant had grown stale by the time it was used." This fear is groundless. * * * Just as it is virtually impossible for probable cause for an arrest to grow stale between the time of formation and the time a warrant is procured, it is virtually impossible for probable cause to become stale between procurement and arrest. Delay by law enforcement officers in executing an arrest warrant does not ordinarily affect the legality of the arrest. In short, staleness should be the least of an arresting officer's worries.

* * *

NOTE ON THE USE OF EXCESSIVE FORCE IN MAKING AN ARREST

The Supreme Court limited the use of deadly force to apprehend a suspect in Tennessee v. Garner, 471 U.S. 1 (1985). The Court held that under the Fourth Amendment, deadly force may not be used to prevent the escape of a felon unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of causing death or serious physical injury to the officer or others. The felon who was running from the police in *Garner* had committed a non-violent felony and was not known to be violent. The Court concluded that the felon's Fourth Amendment rights were violated when he was shot and killed by an officer who chased and could not catch him. Justice White wrote for six Justices that "[i]t is not better that all felony suspects die than that they escape."

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, dissented in *Garner*. She argued that "the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a

police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape."

After *Garner*, the Supreme Court held in Graham v. Connor, 490 U.S. 386 (1989), that all claims of excessive force in the making of an arrest (whether deadly or not) are to be governed by Fourth Amendment standards of reasonableness. Chief Justice Rehnquist, writing for the Court, indicated that some of the relevant factors in the Fourth Amendment reasonableness inquiry "include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Consequently, while an officer may use non-deadly force in apprehending a fleeing or resistant felon, the manner in which the force is asserted might be unreasonable. For example, if the officer uses a police dog that is improperly trained, or fails to give a proper warning or instruction before letting the dog loose, this might be found to be an unreasonable use of force. See, e.g., Vathekan v. Prince George's County, 154 F.3d 173 (4th Cir.1998) (officer who releases an attack dog during a burglary investigation, without giving verbal warning to the suspect, would act unreasonably under the Fourth Amendment).

High-Speed Chases: Scott v. Harris

In Scott v. Harris, 550 U.S. 372 (2007), the Court held a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing a public-endangering flight by ramming the motorist's car from behind. Justice Scalia, writing for the Court, declared that officers were not required to avoid a risk to the public by simply stopping their pursuit of a suspect in a car. If that were the rule, drivers could avoid arrest simply by speeding away from the officers. Justice Scalia also noted that in determining reasonableness, it was appropriate to balance the risk to the suspect of ramming his car against the risk to the public of a continued chase. And in doing so, officers could consider the culpability of the suspect against the innocence of members of the public who could be put in danger.

Justice Scalia concluded by stating the rule of law from the case: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[10]

4. Protections Against Erroneous Warrantless Arrests

Watson holds that if an officer has probable cause to believe that a person has committed a felony, he can arrest the suspect in a public place

[10] Justice Ginsburg wrote a short concurring opinion. Justice Stevens dissented.

without a warrant. As discussed earlier in this Chapter, the risk of a warrantless search or seizure is that an officer, in the competitive enterprise of ferreting out crime, may be mistaken in his assessment of probable cause. The Supreme Court has held that while a warrant is not required for a public arrest, certain post-arrest protections are necessary to minimize the intrusion on a person who is arrested without probable cause. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Court declared that if a person is arrested without a warrant, he is entitled to a "prompt" post-arrest assessment of probable cause by a magistrate. The *Gerstein* Court also held, however, that the state need not provide the adversary safeguards associated with a trial. The Court reasoned that the probable cause standard traditionally has been decided by a magistrate in a nonadversary hearing on the basis of hearsay and written testimony.

In County of Riverside v. McLaughlin, 500 U.S. 44 (1991), Justice O'Connor wrote for the Court in a class action by pretrial detainees as it defined what is "prompt" under *Gerstein.* She reasoned as follows:

> Given that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable. * * * On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.
>
> But flexibility has its limits; *Gerstein* is not a blank check. A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. * * *
>
> * * *
>
> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in *Gerstein,* we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein.* For this reason, such jurisdictions will be immune from systemic challenges.
>
> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate

Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. * * * A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

* * *

Justice Scalia dissented and argued that "it is an 'unreasonable seizure' * * * to delay a determination of probable cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest." He added that "I would treat the time limit as a presumption; when the 24 hours are exceeded the burden shifts to the police to adduce unforeseeable circumstances justifying the additional delay."

Justice Marshall, joined by Justices Blackmun and Stevens also dissented and wrote that "I agree with Justice Scalia that a probable-cause hearing is sufficiently "prompt" under *Gerstein* only when provided immediately upon completion of the 'administrative steps incident to arrest.'"

Detentions for Less Than 48 Hours

The Court in *McLaughlin* noted that an individual detention might be unreasonable even if it is less than 48 hours. The court in United States v. Davis, 174 F.3d 941 (8th Cir. 1999), found a warrantless detention unreasonable even though it lasted only two hours. Officers arrested Davis for falsely reporting a theft. She was placed in a holding cell for two hours, and was then questioned about her boyfriend, who was suspected of illegally trafficking in firearms. She was released after

agreeing to obtain evidence against her boyfriend. Booking procedures on the false report charge were never initiated, and she was never taken before a magistrate to determine whether there was probable cause to arrest her on that charge. Under these circumstances, the court found that Davis had been detained illegally. The court read *McLaughlin* and subsequent lower court cases as having made clear "that a delay may be unreasonable if it is motivated by a desire to uncover additional evidence to support the arrest or to use the suspect's presence solely to investigate the suspect's involvement in other crimes." The court concluded that *McLaughlin* "does not * * * stand for the proposition that authorities may violate the Constitution as long as they do so for only a brief period of time."

Is the court saying that Davis's detention was illegal because the officer had an improper motive in detaining her? Isn't a focus on an officer's motive inconsistent with the Fourth Amendment's standard of objective reasonableness?

Remedy for a McLaughlin Violation

What is the remedy for an unreasonable delay in presentment to a magistrate? Certainly there could be a possible damages recovery, but what about excluding evidence (most likely a confession) that was obtained from the defendant during an unreasonably excessive delay before presentment to the magistrate?

Courts have found that evidence can be excluded only if it was obtained as a result of an unreasonable detention. Thus, exclusion is not required if the magistrate would have found probable cause for the detention even if the hearing had been promptly conducted. See State v. Tucker, 137 N.J. 259, 645 A.2d 111 (1994) (confession made after 48 hour period was admissible, where evidence against the defendant was so strong that he would not have been released had a hearing been held earlier). And exclusion would not be required if the evidence was obtained outside the context of an unreasonably lengthy detention. See United States v. Fullerton, 187 F.3d 587 (6th Cir. 1999) (even though the defendant was detained for 72 hours without a hearing, this did not result in exclusion of evidence obtained from him at the time of the arrest, as there was no causal connection between the *McLaughlin* violation and the seizure of the evidence).

5. Arrests in the Home

The Payton Rule

Watson and *Gerstein* left open the question whether a warrant is necessary to enter a home to make an arrest. The Court took up that

question in Payton v. New York, 445 U.S. 573 (1980), and held that the exception to the warrant requirement for public arrests did not extend to arrests in the home. The Court described the facts as follows:

> On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a.m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was seized and later admitted into evidence at Payton's murder trial.
>
> In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment.

Justice Stevens's majority opinion emphasized that the home has always been viewed as an especially private place; set forth a history that indicated there were doubts at common law concerning authority to invade a home to make an arrest; conceded that a majority of state courts addressing the question had permitted warrantless arrests in the home, but observed a trend in the opposite direction in the previous decade; and finally decided that the home deserved special protection. Justice Stevens concluded that "the Fourth Amendment has drawn a firm line at the entrance to the house" and that "absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[11]

In its penultimate paragraph, the opinion addressed the kind of warrant it required—specifically whether the officers needed a search warrant (with a magistrate's determination that there was probable cause to believe that the arrestee could be found in a particular place) or an arrest warrant (allowing the officers to make an arrest wherever the find the person named in the warrant):

> Finally, we note the State's suggestion that only a search warrant based upon probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument

[11] If negative consequences could occur in the time it takes to obtain a warrant, the officers are excused from obtaining one under the doctrine of "exigent circumstances." This doctrine applies both to arrest warrants otherwise required by *Payton*, and to search warrants. See the discussion of exigent circumstances later in this Chapter.

> unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement [because it is not specific as to location], but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.[12]

An in-home arrest is no worse than a public arrest in terms of the seizure that occurs. Both arrestees end up in the same place. So the difference between an in-home arrest and one in public must be that, in conducting the arrest in the home, the officer also ends up *searching* the home.

Reason to Believe the Suspect Is at Home

Payton leaves it to the officer executing the arrest warrant to determine whether there is "reason to believe the suspect is within" the home. Is this consistent with the theory of the warrant clause? Is the officer who executes a search warrant free to determine whether enough information exists to believe that evidence described in the warrant is located in a certain place?

Does the Court in *Payton* mean that an arresting officer must have *probable cause* to believe the suspect is at home? Or does "reason to believe" mean something less than probable cause? In United States v. Magluta, 44 F.3d 1530 (11th Cir.1995), the defendant argued that there was no probable cause to believe that he was at home when the officers entered with an arrest warrant, and the government argued that officers only needed "reason to believe" that he was at home, not probable cause. The court, noting that *Payton* was vague at best on this point, declared as follows:

> We think it sufficient to hold that in order for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry. * * * In evaluating this on the spot

[12] Justice Blackmun wrote a one paragraph concurring opinion. Justice White dissented and was joined by the Chief Justice and Justice Rehnquist. Justice Rehnquist also added a short dissent.

> determination * * * courts must be sensitive to common sense factors indicating a resident's presence. For example, officers may take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home, and officers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule.

The *Magluta* court found that the officers had "reason to believe" Magluta was at home, because a visitor was on the premises, Magluta's car was in the driveway, and a porch light was on. The fact that the officers had not seen Magluta about the premises that day was not dispositive, because "the officers were entitled to consider that Magluta was a fugitive from justice, wanted on a 24 count drug trafficking indictment, who might have been concealing his presence." Compare United States v. Hill, 649 F.3d 258 (4th Cir. 2011) (mere fact that noise was coming from the premises did not provide reason to believe the defendant was there: "Here, at best, the police had reason to believe that someone was present and that the individual insides was [the defendant's] sister.").

Some courts have held that the "reason to believe" standard must mean less than probable cause, because the Court in *Payton* could have said "probable cause" if it wanted to do so. See United States v. Thomas, 429 F.3d 282 (D.C. Cir. 2005) (it is more likely that "the Supreme Court in *Payton* used a phrase other than 'probable cause' because it meant something other than probable cause"). Other courts have found that the "reason to believe" language in *Payton* was the Court's shorthand for probable cause and so the standards are the same. See United States v. Pruitt, 458 F.3d 477 (6th Cir. 2006) ("Despite some courts' attempt to distinguish between the two monikers, the 'reason to believe' standard directly echoes the underlying definition of probable cause."). See also United States v. Barrera, 464 F.3d 496 (the distinction between probable cause and reasonable belief is "more about semantics than substance").

Is the Arrest at Home or in Public?

In light of *Payton* and *Watson*, it becomes important to determine whether an arrest occurs in the home, where a warrant is generally required, or in public, where it is not. In United States v. Holland, 755 F.2d 253 (2d Cir.1985), the defendant was in his second-floor apartment in a two-family house when he heard someone ring the doorbell to his apartment. To answer the bell, he had to walk down a flight of stairs through a common hallway and open the door in the front of the building. There he was arrested without a warrant. The court found no intent in *Payton* to broaden the definition of "home" so as to include the

entranceway to a common hallway. Judge Newman in dissent noted that if Holland had been living in a modern building with a buzzer mechanism, the officer would have had to arrest him at the door to his apartment. He concluded that *Payton* should apply as well to the "humble surroundings" in which the defendant lived.

What if the officers announce their presence and order the citizen to open the door, and the citizen opens the door to his home and is placed under arrest right there? Is that arrest made in the home or in public? Lower courts have split on this question. Some courts have stated that if the defendant is ordered to open the door under a lawful claim of authority, and is arrested upon opening the door, then the arrest occurs in the home and a warrant is required. See United States v. Flowers, 336 F.3d 1222 (10th Cir. 2003). Compare United States v. Vaneaton, 49 F.3d 1423 (9th Cir.1995) (no arrest warrant required where the defendant voluntarily opened the door, and thus "his actions were not taken in response to a claim of lawful authority"). Other courts hold that if the officers remain outside the doorway and inform the defendant that he is under arrest, then the arrest is made in public because the officers never physically entered the home. This latter view leads to difficult fact questions when the officer subsequently enters the home, for example to secure the premises or to follow the defendant while he gets his coat. Under this latter "officer was outside" view, if the arrest was made before the physical entry, then the entry can be justified as incident to the arrest and information discovered during the incident search will be considered legally obtained. However, if the arrest is made after the entry and without a warrant, then there has been a *Payton* violation, and the information discovered during the entry is illegally obtained. See United States v. Berkowitz, 927 F.2d 1376 (7th Cir.1991) (remanding to determine whether the officers informed the defendant that he was under arrest before or after entering his home). Courts holding that a doorway arrest constitutes an arrest in the home do not have to deal with such fine-line distinctions.

If the defendant is in his home, can the officer wait for ten hours for the defendant to come outside and then arrest him without a warrant? See United States v. Bustamante-Saenz, 894 F.2d 114 (5th Cir.1990) (yes). The holding in *Bustamante-Saenz* receives support from the Supreme Court decision in New York v. Harris, 495 U.S. 14 (1990), in which the Court held that a violation of *Payton* constitutes an illegal *search* of the home, but that the warrantless in-home *arrest* is not itself illegal so long as the officer has probable cause to arrest. *Harris* concerned the fruits of an alleged *Payton* violation, and is discussed in the material on the exclusionary rule later in this Chapter.

Hotels and Motels

The protections against warrantless intrusions into the home announced in *Payton* apply with equal force to a properly rented hotel or motel room during the rental period. See, e.g., United States v. Morales, 737 F.2d 761 (8th Cir.1984). However, this is only the case as long as the arrestee has rightful possession of the room. If the rental period has terminated, or if the person has been ejected from the premises, then the premises can no longer be considered a "home," and an arrest warrant is not required. See, e.g., United States v. Larson, 760 F.2d 852 (8th Cir.1985). See also United States v. Gooch, 6 F.3d 673 (9th Cir.1993) (arrest warrant required for an arrest inside a tent pitched in a public campground: "A guest in Yellowstone Lodge, a hotel on government park land, would have no less an expectation of privacy in his hotel room than a guest in a private hotel, and the same logic would extend to a campsite where the opportunity is extended to spend the night.").

Arrests in the Home of a Third Party

The Court in *Payton* held that an arrest warrant was sufficient to permit the search of a suspect's house to arrest him there. A search warrant—containing a magistrate's determination of probable cause to believe that the defendant was in his home—was not found necessary. But what if the suspect is arrested in the home of a third person? Does the officer need a search warrant to search that house for the suspect? That was the question in Steagald v. United States, 451 U.S. 204 (1981). Officers obtained an arrest warrant for Ricky Lyons, a federal fugitive wanted on drug charges. They received information that Lyons was staying at a certain house for the next 24 hours. Armed with the arrest warrant, they searched the house. They did not find Lyons, but they did find drugs in the house. These drugs were offered against Steagald, the owner of the house. Steagald moved to suppress the drugs on the ground that the officers failed to secure a search warrant before entering the house to look for Lyons.

Justice Marshall's majority opinion in *Steagald* concluded that a search warrant must be obtained to look for a suspect in the home of a third party, absent exigent circumstances or consent. [Again, the difference between an arrest warrant and a search warrant in this context is that the arrest warrant only requires the magistrate's determination that there is probable cause to arrest a person; it is not specific as to location. A search warrant would require a magistrate to determine that there is probable cause to believe that the suspect is located in the home of the third party.] The majority held that an arrest warrant did not sufficiently protect the privacy interests of *the third party homeowner*. Justice Marshall noted that Steagald's only protection from

an illegal search "was the agent's personal determination of probable cause" to believe that Lyons was in Steagald's house. The majority was concerned with the possibility of abuse that could arise if a search warrant were not required in the absence of exigent circumstances: "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances."

Justice Rehnquist's dissent was joined by Justice White. He focused on the mobility of fugitives—making probable cause determinations as to location quite difficult—and the likelihood of escape. He also observed that when a suspect lives in another's place for a significant period, this may convert the place into the suspect's home and thus justify a search for that suspect under an arrest warrant.

The majority in *Steagald* showed concern that a third party may be the victim of a search where there is no probable cause to believe that the arrestee is on the premises. But what about those third parties who live with the arrestee? See United States v. Litteral, 910 F.2d 547 (9th Cir.1990) ("if the suspect is a co-resident of the third party, then *Steagald* does not apply, and *Payton* allows both arrest of the subject of the arrest warrant and use of evidence found against the third party"). As an arrest warrant is sufficient to arrest a person in his home, aren't those who live with him subject to the same risk that concerned the Court in *Steagald?* Is the real difference between *Payton* and *Steagald* that the officer's error as to probable cause can result in a greater number of mistaken searches in the latter case than in the former? Or does the difference lie in the risk that a person assumes in living with somebody, as opposed to having somebody visit their home temporarily? See United States v. Lovelock, 170 F.3d 339 (2d Cir. 1999) ("A person who occupies premises jointly with another has a reduced expectation of privacy since he assumes the risk that his housemate may engage in conduct that authorized entry into the premises.").

After *Steagald,* it is important for the officer to determine whether the suspect lives in the premises (in which case an arrest warrant is sufficient) or is merely a visitor (in which case a search warrant is required). What considerations should an officer take into account? See United States v. Pallais, 921 F.2d 684 (7th Cir.1990) (suspect who was staying in garage overseeing the renovation of his children's home was a resident, so that arrest warrant was sufficient). What if the officer wants to arrest a person in a third party's home, and knows that the suspect has a residence somewhere else? Does this prohibit the officer from reasonably believing that the suspect might reside in the third party's home as well? See United States v. Risse, 83 F.3d 212 (8th Cir.1996) (officer could enter defendant's home with an arrest warrant to arrest the defendant's girlfriend, even though the officer knew that the girlfriend had her own apartment: "We have found no authority to support Risse's

implicit assumption that a person can have only one residence for Fourth Amendment purposes.").

QUESTIONS OF STANDING

In *Steagald*, the officers entered Steagald's home to arrest the suspect *Lyons*. While trying to find Lyons, the officers discovered evidence that was used against Steagald at trial. The Court held that the evidence should have been suppressed because Steagald's Fourth Amendment rights were violated in the absence of a search warrant. Does that mean that Lyons, the suspect, could have objected to the lack of a search warrant if the officers had found him in the home? The courts have answered in the negative, reasoning that *Steagald* was concerned with the privacy rights of the third-party homeowner, not with the visiting arrestee. See United States v. Underwood, 717 F.2d 482 (9th Cir.1983) (*Steagald* addressed only the right of a third party not named in the arrest warrant to the privacy of his or her home; this right is personal and cannot be asserted vicariously by the person named in the arrest warrant). A contrary rule would be anomalous: the suspect would be entitled to demand a search warrant when arrested in the home of another, while under *Payton* he could demand only an arrest warrant when arrested in his own home. See United States v. Jackson, 576 F.3d 465 (7th Cir. 2009) ("Because it addresses only the Fourth Amendment rights of persons not named in an arrest warrant, *Steagald* did not hold that the subject of an arrest warrant has a higher expectation of privacy in another person's residence than he does in his own.").

The Rights of an Overnight Guest: Minnesota v. Olson

The Court concluded in Minnesota v. Olson, 495 U.S. 91 (1990), that a warrant was required under *Payton* to arrest a person who was an overnight guest in the home of a third party. [A search warrant would be required to protect the interests of the homeowner under *Steagald*.] Justice White wrote the majority opinion. Chief Justice Rehnquist and Justice Blackmun dissented without opinion. Justice White stressed that a person's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to accept as reasonable." The Court specifically rejected the State's argument that a place must be one's own home in order to have a legitimate expectation of privacy there.

Temporary Visitors

The Court in *Olson* held that an overnight guest had a sufficient expectation of privacy in the premises to be entitled to the protections of the warrant requirement. What if the guest's connection with the premises is less substantial than that of an overnight guest? In Minnesota v. Carter, 525 U.S. 83 (1998), Carter and Johns objected to a

warrantless search of an apartment. Their connection with the apartment was that they were there for a couple of hours cutting up cocaine. Chief Justice Rehnquist, writing for the Court, held that the defendants had no expectation of privacy sufficient to trigger their Fourth Amendment rights. The Chief Justice explained as follows:

> If we regard the overnight guest in Minnesota v. Olson as typifying those who may claim the protection of the Fourth Amendment in the home of another, and one merely "legitimately on the premises" as typifying those who may not do so, the present case is obviously somewhere in between. But 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. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

6. Material Witness

The power to arrest is usually applied to persons suspected of criminal activity. However, the police also have the power to arrest and detain a material witness to a crime under certain circumstances. The Federal material witness statute, 18 U.S.C.A. § 3144, provides as follows:

> If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person [like an arrestee for a crime]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

In addition to the Federal statute, every state provides for detention of material witnesses. The Supreme Court has cited the practice with approval in Stein v. New York, 346 U.S. 156, 184 (1953) and Barry v. United States ex rel. Cunningham, 279 U.S. 597, 617 (1929).

There is no constitutional right to monetary compensation for time spent in confinement as a material witness. In Hurtado v. United States, 410 U.S. 578 (1973), the Court held that payment of one dollar per day as compensation did not constitute a "taking" without just compensation or a denial of equal protection.

The expansiveness of the power to arrest a material witness was shown in United States v. Awadallah, 349 F.3d 42 (2d Cir. 2003). A few days after 9/11, Awadallah was detained without probable cause that he was involved in terrorist activity; the detention was based on his purported knowledge of persons so involved. His detention as a material witness lasted for 20 days. Bail was denied. Awadallah eventually testified before a grand jury that he did not know the suspected terrorists named by the government. The government then indicted Awadallah for lying to the grand jury when he denied knowing the suspected terrorists. The court upheld the material witness detention as reasonable, and refused to dismiss the indictment, stating that detention of a witness during a grand jury investigation was permissible, as a grand jury proceeding was a "criminal proceeding" within the meaning of section 3144. [Five years after his initial detention, Awadallah was acquitted of all perjury charges and finally released.]

Pretextual Use of Material Witness Detention: Ashcroft v. Al-Kidd

The dangers of material witness detention, especially after 9/11, are emphasized by Studnicki and Apol in Witness Detention and Intimidation: The History and Future of Material Witness Law, 76 St. John's L.Rev. 483 (2002):

> Material witness law is unique because of the potential *carte blanche* it provides to the government and law enforcement officials who may abuse it. In the aftermath of the September 11, 2001 terrorist attacks, the FBI has been accused of misusing the material witness law to detain people while investigating their backgrounds and activities. Indeed, the United States Attorney General announced that the "aggressive detention" of material witnesses in the wake of September 11th would be the norm. The secrecy surrounding the detention of material witnesses adds to the potential of misuse of this authority as an investigatory tool, rather than a legitimate means of obtaining testimony or protecting a witness. Further, it is easier to arrest an individual as a material witness than as a criminal defendant since there is no required showing of probable cause that the witness has committed a crime.

In Ashcroft v. Al-Kidd, 131 S.Ct. 2074 (2011), the Supreme Court reviewed *Bivens* claims brought against former Attorney General Ashcroft and other officials. The plaintiff alleged that the defendants suspected him of terrorist activity and employed the Material Witness statute to subject him to a long-term detention, even though they had no intent to use him as a witness in any case. Thus, the plaintiff argued that

the use of a statute was a pretext to detain him as a terrorism suspect rather than a material witness.

The Court, in an opinion by Justice Scalia, noted first that Al-Kidd "does not assert that Government officials would have acted unreasonably if they had used a material-witness warrant to arrest him for the purpose of securing his testimony for trial. He contests * * * the reasonableness of using the warrant to detain him as a suspected criminal." Justice Scalia rejected Al-Kidd's Fourth Amendment pretext argument because, under cases such as Whren v. United States [discussed in the section in this Chapter on pretextual searches], and *Devenpeck, supra,* the reasonableness of government activity is determined objectively, without regard to an official's state of mind. The Court conceded that the subjective intent of a police officer has been considered in cases where searches were made without suspicion and justified as promoting "special needs" beyond ordinary criminal law enforcement. [See the section on "special needs" searches later in this Chapter.] But the "special needs" cases were not applicable to Al-Kidd's detention, as Justice Scalia explained in the following passage:

> Needless to say, warrantless, suspicionless intrusions pursuant to a general scheme are far removed from the facts of this case. A warrant issued by a neutral Magistrate Judge authorized al-Kidd's arrest. The affidavit accompanying the warrant application (as al-Kidd concedes) gave individualized reasons to believe that he was a material witness and that he would soon disappear. The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of ["special needs" suspicionless searches and seizures].

On the question of pretext, Justice Scalia concluded as follows:

> Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.

Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor, wrote a concurring opinion emphasizing that the Court had not decided "whether the Government's use of the Material Witness statute in this case was lawful." That is, Al-Kidd challenged only the pretextual use of the statute, and conceded for argument that detaining a material witness upon satisfying the statutory criteria was a reasonable seizure under the Fourth Amendment. On that broader Fourth Amendment question, Justice Kennedy noted his reservations:

The scope of the statute's lawful authorization is uncertain. For example, a law-abiding citizen might observe a crime during the days or weeks before a scheduled flight abroad. It is unclear whether those facts alone might allow police to obtain a material witness warrant on the ground that it "may become impracticable" to secure the person's presence by subpoena. The question becomes more difficult if one further assumes the traveler would be willing to testify if asked; and more difficult still if one supposes that authorities delay obtaining or executing the warrant until the traveler has arrived at the airport. These possibilities resemble the facts in this case.

In considering these issues, it is important to bear in mind that the Material Witness Statute might not provide for the issuance of warrants within the meaning of the Fourth Amendment's Warrant Clause. The typical arrest warrant is based on probable cause that the arrestee has committed a crime; but that is not the standard for the issuance of warrants under the Material Witness Statute. If material witness warrants do not qualify as "Warrants" under the Fourth Amendment, then material witness arrests might still be governed by the Fourth Amendment's separate reasonableness requirement for seizures of the person. Given the difficulty of these issues, the Court is correct to address only the legal theory put before it, without further exploring when material witness arrests might be consistent with statutory and constitutional requirements.

Justice Ginsburg wrote a separate opinion concurring in the judgment, joined by Justices Breyer and Sotomayor. Justice Sotomayor wrote a separate opinion concurring in the judgment, joined by Justices Ginsburg and Breyer.

B. STOP AND FRISK

There are numerous situations in which the police recognize that they do not have probable cause to act, but want to stop a suspicious person for preliminary questioning to determine whether a crime has or is about to occur. From the police perspective, if officers have to wait for probable cause to develop before conducting these preliminary investigations, they would be severely hampered in their efforts to prevent and detect crime. In their view, a standard of proof less demanding than probable cause is needed to nip a crime problem in the bud. Following the adoption in 1964 of a New York statute that became known as the "stop and frisk" law and the conclusion of several important studies of what police do in the real world, the United States Supreme Court placed its first imprimatur on searches and seizures of persons and things on a standard of proof less than probable cause.

1. Stop and Frisk Established

TERRY V. OHIO

Supreme Court of the United States, 1968.
392 U.S. 1.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. * * * He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked

west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. * * * When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe * * * that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the

right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

* * *

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated * * *." This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. * * *

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

* * *

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer * * * to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk')." But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. [The Court suggests that the exclusionary rule may not deter all Fourth Amendment violations. For example, where an officer is bent on harassment, and doesn't care about whether he finds evidence, the exclusionary rule cannot deter the officer because the exclusionary rule is dependent on litigation-oriented disincentives.]

* * *

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a

rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. * * *

* * *

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

* * *

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

* * *

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure or that in most

instances failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." Camara v. Municipal Court, 387 U.S. 523, 534–535, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. * * * And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple good faith on the part of the arresting officer is not enough. * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects, only in the discretion of the police.

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Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on

a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

* * *

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of

the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

* * *

We need not develop at length in this case * * * the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. Suffice it to note that such a search, unlike a search without a warrant incident to arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. * * *

V

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to

discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in Katz v. United States and the concurring opinion in Warden v. Hayden.

MR. JUSTICE HARLAN, concurring.

* * *

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. * * *

* * * The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

* * *

MR. JUSTICE WHITE, concurring.

* * * I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. * * *

MR. JUSTICE DOUGLAS, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

* * *

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. * * *

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. * * *

NOTE ON THE IMPACT OF TERRY

It would be hard to overestimate the effect of *Terry* on Fourth Amendment jurisprudence. The Court not only permitted stops and frisks on less than probable cause; it also explicitly invoked the reasonableness clause over the warrant clause as the governing standard. Perhaps the Court intended to limit use of the reasonableness clause and its balancing approach to the area of stop and frisk; but once that balancing process was launched in one area, it became difficult to prevent its application to other searches and seizures. See Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of *Camara* and *Terry*, 72 Minn.L.Rev. 383 (1988) (noting that *Terry* has led, in time, to a general diminution of Fourth Amendment protection).

Critique of Terry

Professor Maclin provides a critique on *Terry*, and assesses the impact of that decision on minorities, in Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, 72 St.John's L.Rev. 1271, 1278 (1998):

> After *Terry*, police intrusions would be controlled by a malleable "reasonableness" standard that gave enormous discretion to the police. When this reasonableness norm was applied to street encounters between the police and urban residents, the result was predictable—expanded police powers and diminished individual freedom. One of the flaws of *Terry* was that this shift in constitutional doctrine was implemented without a full examination of the consequences for blacks and other disfavored persons most affected by police investigatory methods. Moreover, the result in *Terry* provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions. For some, the *Terry* Court made the right choice. The need for police safety justified the loss of Fourth Amendment freedom. But those that have been the most vocal defenders of *Terry* tend to come from socioeconomic and racial backgrounds that are predominantly free from police harassment. For many blacks and other disfavored groups, however, the *Terry* Court wrongly subordinated their Fourth Amendment rights to police safety. The Court's failure to treat as dispositive the clear correlation between stop and frisk and the violation of their Fourth Amendment rights only served to remind blacks and other minorities of their second-class status in America.

An Early Application of Terry—Adams v. Williams

The *Terry* decision with its companion cases—Sibron v. New York, and Peters v. New York, 392 U.S. 40 (1968)—was only the first step in the articulation of what the Fourth Amendment permits the police to do without probable cause. The Supreme Court's first post-*Terry* effort was Adams v. Williams, 407 U.S. 143 (1972). Williams was convicted of illegal possession of a handgun and possession of heroin, after unsuccessfully challenging a stop and frisk. Justice Rehnquist, writing for the Court, set forth the facts surrounding the stop and frisk as follows:

> Police Sgt. John Connolly was alone early in the morning on car patrol duty in a high-crime area of Bridgeport, Connecticut. At approximately 2:15 a.m. a person known to Sgt. Connolly approached his cruiser and informed him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist.

After calling for assistance on his car radio, Sgt. Connolly approached the vehicle to investigate the informant's report. Connolly tapped on the car window and asked the occupant, Robert Williams, to open the door. When Williams rolled down the window instead, the sergeant reached into the car and removed a fully loaded revolver from Williams' waistband. The gun had not been visible to Connolly from outside the car, but it was in precisely the place indicated by the informant. Williams was then arrested by Connolly for unlawful possession of the pistol. A search incident to that arrest was conducted after other officers arrived. They found substantial quantities of heroin on Williams' person and in the car, and they found a machete and a second revolver hidden in the automobile.

Williams argued that the informant's tip was not a reliable basis on which to conduct the initial stop. But Justice Rehnquist disagreed:

> [W]e believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.
>
> In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability.

Justice Rehnquist also held that the search of Williams' person was permissible in light of the safety risks presented to the officer:

> While properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, Sgt. Connolly had ample reason to fear of his safety. When Williams rolled down his window, rather than complying with the policeman's request to step out of the car so that his movements could more easily be seen, the revolver allegedly at Williams' waist became an even greater threat. Under these circumstances the policeman's action in reaching to the spot where the gun was thought to be hidden

constituted a limited intrusion designed to insure his safety, and we conclude that it was reasonable.

Finally, Justice Rehnquist concluded that the search of the passenger compartment of the car, which led to discovery of the heroin, was permissible in light of everything that had gone before—not as a *Terry* search but rather as a search supported by probable cause to arrest Williams.

Justice Douglas, joined by Justice Marshall, dissented in *Williams*. He argued that Williams was illegally arrested, because there was no indication at the time of arrest that it was illegal for Williams to possess a gun.

Justice Brennan wrote a separate dissent in *Williams*, arguing that *Terry* should not be applicable to crimes like narcotics possession, because "[t]here is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."

Justice Marshall, joined by Justice Douglas, also wrote a separate dissent in *Williams*. He observed that the informant, on whom the officer relied to stop Williams, had no track record of giving reliable information. He concluded as follows:

> The Court explains what the officer knew about respondent before accosting him. But what is more significant is what he did not know. With respect to the scene generally, the officer had no idea how long respondent had been in the car, how long the car had been parked, or to whom the car belonged. With respect to the gun, the officer did not know if or when the informant had ever seen the gun, or whether the gun was carried legally, as Connecticut law permitted, or illegally. And with respect to the narcotics, the officer did not know what kind of narcotics respondent allegedly had, whether they were legally or illegally possessed, what the basis of the informant's knowledge was, or even whether the informant was capable of distinguishing narcotics from other substances.
>
> Unable to answer any of these questions, the officer nevertheless determined that it was necessary to intrude on respondent's liberty. I believe that his determination was totally unreasonable. As I read *Terry*, an officer may act on the basis of *reliable* information short of probable cause to make a stop, and ultimately a frisk, if necessary; but the officer may not use unreliable, unsubstantiated, conclusory hearsay to justify an invasion of liberty. *Terry* never meant to approve the kind of knee-jerk police reaction that we have before us in this case.

Do you see anything in the language or tone of *Terry* indicating that the Court never meant to approve the kind of police conduct at issue in

Williams? Or is Justice Marshall simply regretful that he didn't join Justice Douglas in dissent in *Terry*?

Bright Line Rules Under Terry—Pennsylvania v. Mimms

Another case in the Court's early development of the *Terry* doctrine was the per curiam decision in Pennsylvania v. Mimms, 434 U.S. 106 (1977). While on routine patrol, two Philadelphia police officers observed Mimms driving a car with an expired license plate. The officers stopped the car to issue a traffic summons. One of the officers approached and told Mimms to step out of the car and produce his owner's card and operator's license. When Mimms got out of the car, the officer noticed a large bulge under his sports jacket. Thinking that Mimms might be carrying a weapon, the officer frisked Mimms and found that the bulge was a loaded revolver. Mimms unsuccessfully moved to suppress the gun, and was convicted for firearms violations.

The Court held that the officer had acted properly under the *Terry* doctrine, and therefore that the revolver was properly admitted at Mimms' trial. The Court noted that the parties agreed (1) that the officer was justified in stopping Mimms for the traffic violation, and (2) that the officer had sufficient cause to frisk Mimms for a weapon once he observed the bulge. The question in dispute was whether the officer was justified in ordering Mimms to get out of the car. If this seizure was unlawful under *Terry*, then the subsequent frisk would be unlawful as well. But the Court held that officers in the course of a legal stop of an automobile have an *automatic* right under *Terry* to order the driver out of the vehicle. The Court came to its bright line rule in the following analysis:

> We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty. * * * According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. * * *
>
> The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.
>
> Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the

> order to get out of the car. We think this additional intrusion can only be described as *de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. * * * What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Justice Marshall dissented in *Mimms*. He argued that *Terry* requires a nexus between the reason for the stop and the need for self-protection that justifies a further intrusion. He found no nexus between the traffic violation and a subsequent order to get out of the car.

Justice Stevens, joined by Justices Brennan and Marshall, wrote a separate dissent in *Mimms*. He argued that the bright-line rule chosen by the Court could not be supported by safety concerns:

> [Ordering the suspect out of the car] could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this area of human behavior strongly recommend that the police officer "never allow the violator to get out of the car * * *."

Justice Stevens strenuously objected to the Court's adoption of a bright line rule to cover all vehicle stops, regardless of the circumstances:

> Until today the law applicable to seizures of a person has required individualized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment. * * * [T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.

QUESTIONS ABOUT MIMMS

Are the safety concerns cited by the *Mimms* majority likely to arise so often that the Court is justified in adopting a bright line rule? The dissenters consider the safety concerns overstated; but they do not argue that the Court's assessment of the individual right at stake is understated. Given the minimal nature of the intrusion at issue in *Mimms*, why are the dissenters so upset?

What if the driver of the car *wants to get out*, and the officer (perhaps thinking it the safest procedure) *wants the driver to stay in the car*? Is this an additional seizure for Fourth Amendment purposes? Is the dissent's position that the driver can do whatever she wants? What if the officer permits the

driver to remain in the car, but says "keep your hands where I can see them"? Does the officer have the automatic right to so order?

Mimms and Passengers

In Maryland v. Wilson, 519 U.S. 408 (1997), the Court considered whether the automatic rule established in *Mimms* applied to passengers as well as drivers. An officer stopped a car traveling on Interstate 95. The car was going 64 miles per hour in a 55 mile per hour zone. The officer ordered the driver and Wilson, a passenger, to get out of the car. The officer did not have reasonable suspicion to believe that Wilson was up to anything special. When Wilson stepped out of the car, a quantity of cocaine allegedly fell to the ground. The state court had held that the *Mimms* rule did not apply to passengers, and therefore that Wilson could not be ordered out of the car in the absence of reasonable suspicion to believe he was involved in a crime. But the Supreme Court, in an opinion by Chief Justice Rehnquist for seven members of the Court, disagreed and held that the bright-line rule of *Mimms* applied to passengers. The Chief Justice balanced the factors discussed in *Mimms*:

> On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger. Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops. In the case of passengers, the danger of the officer's standing in the path of oncoming traffic would not be present except in the case of a passenger in the left rear seat, but the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer.
>
> On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car.

Justice Stevens, joined by Justice Kennedy, dissented in *Wilson*. He argued that police officers are rarely at risk from passengers during routine automobile stops, and that any "limited additional risk to police officers must be weighed against the unnecessary invasion that will be imposed on innocent citizens under the majority's rule in the tremendous number of routine stops that occur each day." He asserted that "the aggregation of thousands upon thousands of petty indignities has an

impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority."

Justice Kennedy wrote a separate dissent in which he stated that officers should be able to order a passenger out of a car only if necessary under the circumstances to investigate a crime or to protect the officer.

Protective Frisk of Passengers: Arizona v. Johnson

In the later case of Arizona v. Johnson, 555 U.S. 323 (2009), the Court upheld the next step of a process begun by *Mimms*: the protective search of a passenger, when the driver has been lawfully stopped for a traffic violation. The Court stated that "officers who conduct routine traffic stops may perform a patdown of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." But unlike the seizure involved in making drivers and passenger come out from the car, the power to frisk is not automatic. As the *Johnson* Court notes, the officer must have reasonable suspicion that the passenger or driver is armed and dangerous.

Mimms Applied: New York v. Class

The Court authorized a limited investigative entry into a car during the course of a stop in New York v. Class, 475 U.S. 106 (1986). Class was stopped for a traffic violation. Officers peered through the windshield of Class's car to obtain the vehicle identification, but the number was covered by papers on the dashboard. One officer entered the car to move the papers away, and at that point discovered a gun, which was admitted against Class at his trial for firearms violations. The Court, in a 6–3 opinion by Justice O'Connor, relied on *Mimms* and held that the officer acted reasonably. The Court held that "in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car." Justice O'Connor reasoned that "[t]he VIN is a significant thread in the web of regulation of the automobile" and that "[a] motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished," especially for a driver who has committed a traffic violation.

Justice O'Connor noted that the Court's holding "does not authorize a police officer to enter a vehicle to obtain a dashboard-mounted VIN when the VIN is visible from outside the automobile," because "[i]f the VIN is in

the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it."

Justice Powell, joined by Chief Justice Burger, concurred in *Class*, emphasizing the important governmental interest in the VIN, and concluding that "the Fourth Amendment question may be stated simply as whether the officer's efforts to inspect the VIN were reasonable." Justice Brennan, joined by Justices Marshall and Stevens, dissented. He argued that "the mere fact that the state utilizes the VIN in conjunction with regulations designed to promote highway safety does not give the police a reason to *search* for such information every time a motorist violates a traffic law." Justice White, joined by Justice Stevens, also dissented, stating that he was unprepared to accept the Court's reasoning that "the governmental interest in obtaining the VIN by entering a protected area is sufficient to outweigh the owner's privacy interest in the interior of the car."

Car manufacturers now place a second VIN plate somewhere secret in the interior of the car—this is a response to the fact that car thieves often replace the visible VIN plate with a fake. Under *Class*, can an officer conduct a search of the car's interior to look for that second VIN plate?

Detention of Occupants of a Residence During Legal Law Enforcement Activity: Note on Michigan v. Summers, Muehler v. Mena, and Bailey v. United States

In Michigan v. Summers, 452 U.S. 692 (1981), the Court held, 6–3, that police officers with a search warrant for a home can require occupants of the premises, even if leaving when the police arrive, to remain while the search warrant is executed. The Court held that such a seizure would *always* be reasonable, given the state's interest in preventing flight, and the risk that persons leaving the premises would attempt to destroy evidence. The Court noted that the detention in *Summers* was less serious than the street stops sanctioned in *Terry*, because the occupant was being detained inside his home. The Court also observed that the search warrant provided protection against overreaching by the police officers. Does *Mimms* lend support to the result in *Summers*?

The Court applied *Summers* in Muehler v. Mena, 544 U.S. 93 (2005), to uphold a more serious detention—including handcuffing—of a person during the warranted search of the home of a suspected gang member. The Court also found it permissible for the officers to question the detainee about her alienage during the time it took to conduct the search. Officers obtained a search warrant for a premises after a gang-related driveby shooting, based on information that at least one of the gang

members lived there. The warrant authorized a broad search for deadly weapons and evidence of gang membership. Because of the violent gang connection, a SWAT team was used to secure the premises during the search. The proceedings started at 7 a.m.. Officers found Mena asleep in her bed and she was handcuffed and placed in a garage that had some furniture. While the search proceeded, officers guarded Mena and three other residents in the garage, all of them remaining in handcuffs for between two and three hours. The officers also notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During Mena's detention in the garage, she was asked her name, date and place of birth, and immigration status. The INS officer later asked her for her immigration documentation. Mena's status as a permanent resident was confirmed by her papers. In their lengthy search, the officer found some ammunition, a gun, and some gang paraphernalia, but did not find the gang members they were looking for. Mena was released at the end of the search. She brought a § 1983 suit against the officers, alleging that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment.

Chief Justice Rehnquist, writing for the Court, relied on *Summers* to conclude that Mena's Fourth Amendment rights were not violated by her detention and interrogation.

> Mena's detention was, under *Summers*, plainly permissible. An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.
>
> Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Indeed, *Summers* itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation."

The Court noted that while the detention in handcuffs was "more intrusive than that which we upheld in *Summers*" it was nonetheless reasonable given the risk to officer safety presented by a search of the premises.

> [T]his was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both

officers and occupants. Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

* * * The duration of a detention can, of course, affect the balance of interests * * *. However, the 2- to 3-hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.

Chief Justice Rehnquist found Mena's interrogation during detention to be reasonable as well, explaining that it was not necessary for the officers to have independent reasonable suspicion in order to question Mena concerning her immigration status. He noted that the Court had "held repeatedly that mere police questioning does not constitute a seizure." Because the detention was not prolonged by the questioning, "there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status."

Justice Kennedy wrote a concurring opinion in *Mena*. Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, wrote an opinion concurring in the judgment.

There are differences between *Summers* and *Mena*. Arguably *Mena* states an overbroad principle. See Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("Suppose that police officers have a search warrant to search a house for a gun belonging to X. They arrive and discover that a Lamaze birthing class is being conducted in a den by X's spouse. According to *Mena*, the officers executing the warrant have a per se right to detain all of the pregnant mothers-to-be and their coaches while the warrant is executed. This is indefensible.").

For a case applying *Summers* and *Mena*, see Los Angeles County v. Rettele, 550 U.S. 609 (2007) (detention at gunpoint of two people found in bed held reasonable even though those detained did not fit the description of those to be arrested: "The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets.").

In Bailey v. United States, 133 S.Ct. 714 (2013), police officers prepared to conduct a warranted search of an apartment, and saw the defendant leave the apartment and get into a car. They stopped him a mile away from the apartment and brought him back to the apartment

while the search was being conducted. That seizure led to evidence and the defendant moved to exclude. The lower court relied on the categorical *Summers* rule—which does not require reasonable suspicion that a resident is involved in a crime—to justify the detention. But the Supreme Court, in an opinion by Justice Kennedy for six Justices, held that the *Summers* rule did not extend to a detention that was made so far away from the premises being searched. Justice Kennedy reasoned that the reasons for the *Summers* rule—to preserve the integrity of the search by detaining the residents—did not apply to a resident who had left the premises and was a mile away when the search began. He also noted that the seizure of Bailey was more intrusive than in *Summers,* where the resident was merely forced to stay on the premises. In contrast, Bailey was stopped in public, placed in a police car, and driven back to the premises. Justice Kennedy summed up as follows:

> Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe.

The *Bailey* Court found it unnecessary to decide how far beyond the premises the *Summers* power to detain residents could extend. Justice Kennedy explained as follows:

> Here, petitioner was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question; and so this case presents neither the necessity nor the occasion to further define the meaning of immediate vicinity. In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors.

Justice Scalia, joined by Justices Ginsburg and Kagan, wrote a concurring opinion in *Bailey.* He emphasized the categorical nature of the *Summers* rule. Justice Breyer, joined by Justices Thomas and Alito, dissented. He argued that while the majority purportedly applied a categorical rule, it will be difficult to determine where the line is drawn between residents who are near enough to the premises to be detained, and those who are too far away. He stated that "the majority has substituted a line based on indeterminate geography for a line based on realistic considerations related to basic Fourth Amendment concerns such as privacy, safety, evidence destruction, and flight. In my view, these

latter considerations should govern the Fourth Amendment determination at issue here."

2. When Does a Seizure Occur? The Line Between "Stop" and "Encounter"

In *Terry*, it was not difficult to determine the precise point at which the stop occurred: the officer physically grabbed Terry and spun him around. However, the Court has had more difficulty determining whether a stop has occurred when the police conduct is not as affirmatively coercive or as physically intrusive as in *Terry*.

The Mendenhall "Free to Leave" Test

In United States v. Mendenhall, 446 U.S. 544 (1980), Mendenhall was observed by Drug Enforcement Administration agents at the Detroit Airport as she arrived on a flight from Los Angeles. They suspected her of being a drug courier. The agents approached her as she was walking through the concourse, identified themselves as DEA agents, and one agent asked to see her identification and airline ticket. The driver's license she produced was in her name, but her ticket was not. She became extremely nervous. The agent gave her back her license and ticket and asked Mendenhall to accompany him to the airport DEA office for further questions. Without saying anything, she did so. In the office the agent asked Mendenhall if she would allow a search of her person and handbag. She said yes. In a strip search of her person drugs were found. Mendenhall was arrested, prosecuted, and convicted.

Justice Stewart, joined only by Justice Rehnquist, addressed an argument that the government had not made in the lower courts and concluded that when Mendenhall was approached in the airport, no "seizure" had occurred, and therefore this initial police-citizen contact was outside the scope of the Fourth Amendment. Just Stewart explained:

> The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. * * *

This conclusion resulted from application of the following rule:

> A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a

seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Justice Stewart's "free to leave" test did not command a majority of the Court in *Mendenhall;* seven Justices found that the question of whether a seizure had occurred was not properly raised in the lower court. But subsequent cases have established the "free to leave" test as the initial benchmark for determining whether a person has been stopped within the meaning of *Terry.*[13]

Applying the "Free to Leave" Test: Florida v. Royer

A plurality of the Court applied the Stewart "free to leave" test in Florida v. Royer, 460 U.S. 491 (1983). Justice White, writing for himself and Justices Marshall, Powell, and Stevens, stated the facts:

> On January 3, 1978, Royer was observed at Miami International Airport by two plain-clothes detectives of the Dade County, Florida, Public Safety Department assigned to the County's Organized Crime Bureau, Narcotics Investigation Section. Detectives Johnson and Magdalena believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile." Royer, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination, "LaGuardia". As Royer made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a "moment" to speak with them; Royer said "Yes."
>
> Upon request, but without oral consent, Royer produced for the detectives his airline ticket and his driver's license. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license carried respondent's correct name, "Royer." When the detectives asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact

[13] As will be seen later in this section, the Stewart test has been modified by more recent cases, such as *Bostick* and *Hodari,* to accommodate some specific fact situations arising in police-citizen encounters. But it still remains the basic test for determining whether a person has been stopped under *Terry.*

narcotics investigators and that they had reason to suspect him of transporting narcotics.

The detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately forty feet away, adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked to do. The room was later described by Detective Johnson as a "large storage closet," located in the stewardesses' lounge and containing a small desk and two chairs. Without Royer's consent or agreement, Detective Johnson, using Royer's baggage check stubs, retrieved the "Holt" luggage from the airline and brought it to the room where respondent and Detective Magdalena were waiting. Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which the detective then opened without seeking further assent from Royer. Drugs were found in that suitcase. According to Detective Johnson, Royer stated that he did not know the combination to the lock on the second suitcase. When asked if he objected to the detective opening the second suitcase, Royer said "no, go ahead," and did not object when the detective explained that the suitcase might have to be broken open. The suitcase was pried open by the officers and more marihuana was found. Royer was then told that he was under arrest. Approximately fifteen minutes had elapsed from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband.

Justice White observed that Royer had testified that he believed he was not free to leave the officers' presence and that Detective Johnson stated that he did not believe he had probable cause to arrest until after he opened the suitcases. Justice White summarized some of the law regarding "stops."

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no

> detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

The plurality found that a seizure occurred when the officers took Royer's ticket and driver's license and started walking away:

> Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them. In *Mendenhall*, no luggage was involved, the ticket and identification were immediately returned, and the officers were careful to advise that the suspect could decline to be searched. Here, the officers had seized Royer's luggage and made no effort to advise him that he need not consent to the search.

Justice Brennan concurred in the result. Four Justices dissented in *Royer* on the ground that, while Royer may have been seized, the seizure was supported by reasonable suspicion and the police lawfully obtained Royer's consent. Thus, none of the Justices disagreed with the proposition that Royer was seized within the meaning of the Fourth Amendment when the officers retained Royer's ticket and identification.

Does the *Royer* Court give sufficient guidance to the police to determine what type of conduct triggers a Fourth Amendment seizure? Lower courts have tried to impart some guidance. See Johnson v. Campbell, 332 F.3d 199 (3rd Cir. 2003) (motorist was stopped when officer persisted in telling him to roll his window down even after motorist refused: "At that time, Campbell made it clear that Johnson was not free to ignore him and would not be left alone until he complied."); United States v. Madden, 682 F.3d 920 (10th Cir. 2012) ("In this case, what began as a consensual encounter became an investigative detention when Officer Balderrama asked Madden to step out of the vehicle and then * * * directed Madden to sit in the back of his patrol car while he obtained Madden's personal information and ran it through the computer."); United States v. High, 921 F.2d 112 (7th Cir.1990) (suggesting that officers "preface their questions with a statement that the encounter is consensual and that the citizen is free to go"); United States v. Espinoza, 490 F.3d 41 (1st Cir. 2007) (ordering a driver to turn off the engine of his car is a seizure).

Factory Sweeps: INS v. Delgado

A majority of the Court adopted and applied the *Mendenhall* test in Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984), which held that INS officers did not seize workers when they conducted factory surveys in search of illegal aliens. Justice Rehnquist described the surveys as follows:

> At the beginning of the surveys several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.

Four employees questioned in one of the surveys filed suit, claiming that the factory sweeps violated the Fourth Amendment and seeking declaratory and injunctive relief. The employees lost in the district court, prevailed in the court of appeals, and lost again in the Supreme Court.

Justice Rehnquist noted that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." He rejected the argument that the employees were seized during the entire survey because of the guards being placed at the exits. Because the employees were at work and thus were not going to leave the factory in any event, Justice Rehnquist concluded that the guards at the exit could not have had a coercive or custodial effect. The majority reasoned that "[t]his conduct should have given [the employees] no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." And the majority also rejected an argument that individual employees were seized when they were questioned—because, generally, simple questions from a police officer do not amount to a seizure.

Justice Powell concurred in the result. Justice Brennan, joined by Justice Marshall, dissented from the holding that the individual interrogations were not seizures and argued that the testimony in the case "paints a frightening picture of people subjected to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers."

Put yourself in the workers' place. Would you feel free to leave, or to terminate the questioning? Would you assume the armed guards at the exits were placed there to keep you inside the factory? Would it affect you

if, as is likely, all of the other factory members were "cooperating" by answering the officers' questions?

Can Failure to Cooperate Lead to Reasonable Suspicion to Justify a Stop?

Would you think that the failure to cooperate in an encounter might be treated by the officers as suspicious conduct that would give rise to a more extensive investigation? The Court in *Royer* stated that the failure to cooperate in a consensual encounter cannot be treated as suspicious conduct that would justify a *Terry* stop. Otherwise, the officers would have it both ways: an encounter would be permissible because it is consensual, and yet a stop would be permissible when the individual refuses to consent. But how many people actually *know* that officers cannot treat as suspicious a person's refusal to cooperate in an encounter? And even if not permitted under the law to treat non-cooperation as suspicious, how many officers do *in fact* treat non-cooperation as a reason for detaining an individual?

Street Encounters

Officers in police cars, marked and unmarked, often seek to question people on the street. When officers pull up to question a person on the street in the absence of any articulable reasonable suspicion, have they violated the person's Fourth Amendment rights? This will depend on whether the officer's conduct amounts to a seizure, or is rather simply an encounter. United States v. Cardoza, 129 F.3d 6 (1st Cir.1997), provides an example. Cardoza arranged a gun purchase for his friend Ragsdale. At the time of the encounter with police officers, Ragsdale was carrying the gun fully loaded, and Cardoza had possession of an extra bullet. The court describes the encounter as follows:

> Sometime after the transaction was completed, Cardoza and Ragsdale began walking along Humboldt Avenue. As they walked, Ragsdale had the handgun in his waistband and Cardoza carried the single round of ammunition in his hand. By this time it was approximately 2:00 a.m. on the morning of July 15. They were spotted walking along Humboldt Avenue by four officers of the Boston Police's Youth Violence Strike Force who were patrolling the area in an unmarked police car. * * * Moving slowly, the police car approached Cardoza and Ragsdale from behind. As the patrol car approached, Cardoza and Ragsdale crossed Humboldt Avenue in order to walk up the sidewalk of Ruthven Street, a one-way thoroughfare that emptied onto Humboldt Avenue. As they crossed in front of the car, Officer Brown, who was sitting in the back seat on the driver's side, recognized Cardoza and directed the driver to make

a left turn off Humboldt, and proceed the wrong way up Ruthven for a short distance. Officer Brown testified that he wanted to ask Cardoza some questions concerning a shooting incident that had occurred some days earlier. The driver took the left turn, and pulled over to the curb just off Humboldt, facing the wrong way on Ruthven Street.

Officer Brown, whose window was rolled down, called out to Cardoza, asking "What's up Freddie? What are you doing out this time of night?" Cardoza stopped, turned, and approached the patrol car. Ragsdale continued walking a short distance. Officer Brown remained in the car conversing with Cardoza through the open car window. As he talked with Officer Brown, Cardoza began to gesture with his hand, exposing the round of ammunition. Seeing the round of ammunition, Brown exited the patrol car, and began to pat-frisk Cardoza. At the same time, two other officers exited the car and approached and pat-frisked Ragsdale, discovering the handgun loaded with eight rounds of ammunition.

Cardoza was convicted of being a felon in possession of a firearm and ammunition. He argued that the evidence should be suppressed because, by the time the officer saw the ammunition, he had been stopped by the officer without reasonable suspicion. But the court disagreed, and found that Cardoza had not been seized within the meaning of the Fourth Amendment. It explained as follows:

To begin with, no sirens or flashing lights were used by the officers to indicate to Cardoza that he should stop in his tracks. Similarly, the police cruiser pulled over and stopped at the curb before Officer Brown called out to Cardoza. And Officer Brown remained in the car when he called out to Cardoza. * * * Officer Brown did not ask Cardoza to stop, or even to approach the car. He simply called out through an open car window with the question "what are you doing out at this time of night?" Those words do not objectively communicate an attempt to restrain Cardoza's liberty. We are therefore unpersuaded that the police officers' actions transformed mere police questioning into a seizure.

If a police car pulled up against traffic on a one-way street to speak to you, would you feel free to leave or to refuse to reply to the officers? Would any person in their right mind (much less reasonable mind) feel free to leave? Obviously not. But the *Cardoza* court had a response to this argument:

We recognize, of course, the import of Cardoza's observation that few people, including himself, would ever feel free to walk away from any police question. Under this reasoning, however, * * * every police-citizen encounter [is transformed] into a seizure. The "free to

> walk away" test, however, must be read in conjunction with the Court's frequent admonitions that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." What emerges between the two imperatives, therefore, is the directive that police conduct, viewed from the totality of the circumstances, must objectively communicate that the officer is exercising his or her official authority to restrain the individual's liberty of movement before we can find that a seizure occurred. Because there was no such objective communication in the instant case, we affirm the district court's denial of Cardoza's motion to suppress.

So the court held that the test for a *Terry* stop is not really whether a reasonable person would feel free to leave, but rather whether the police officer was acting coercively. That description of the test seems more realistic, and appears to track the case law: for example, there was a stop in *Royer* because police officers acted coercively when they took Royer's ticket and identification and walked away with the documents. But applying that test to the facts of *Cardoza*: isn't an officer acting coercively when he drives the wrong way down a one-way street at 2 a.m., pulls over, and asks the citizen what he is up to? That's not the kind of conduct you would expect from an ordinary citizen, is it? Compare United States v. Camacho, 661 F.3d 718 (1st Cir. 2011) (seizure found where the officers blocked the defendant's path with their Crown Victoria; both officers were wearing jackets labeled "New Bedford Police" and "Gang Unit"; one officer stepped out of the car and confronted the defendant with "accusatory" questions; and another officer ordered him to place his hands on the hood of the car).

Problem with the "Freedom to Walk Away" Test

Professor Steinbock takes the Court's "freedom to walk away" test to task in The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine, 38 San Diego L.Rev. 507 (2001):

> There are legal fictions and there are legal fictions. One means of differentiating good from bad legal fictions is their relationship to reality * * *. By that measure, in light of the available evidence, the consensual encounter doctrine paints a false picture of reality as applied to encounters involving investigation of the individual being questioned. In so doing, it mislocates the dividing line between freedom and restraint, including on the "freedom" side of this line many people who are effectively restrained or—to put it another way—are restrained in all but the eyes of the law.

> * * * The obscurity of the line between freedom and detention bespeaks an uncivil distrust of the persons whose liberty is at stake. It plays on their ignorance and understandable sense of powerlessness in relation to law enforcement officers. Moreover, attempts by citizens to clarify their status, or assert the rights they believe they have, produce additional incivility and friction on both sides. The consensual encounter doctrine virtually invites citizens, as an initial response, to question or rebuff police approaches. * * * Rudeness and confrontation by citizens, which are virtually required in order for citizens to determine whether they are free to go, stimulates rudeness and confrontation in response. This, in turn, poisons the relationship between citizens and their government, creating social friction and disunity.

But what is the alternative? Should it be considered a stop whenever a police officer approaches a citizen to ask questions? See also Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("A better approach is to focus on the conduct of law enforcement officers rather than on the reactions of individuals to law enforcement officers. This approach asks law enforcement officers to pay attention to their own actions, not to predict how reasonable civilians would respond to those actions.").

Bus Sweeps: Florida v. Bostick and United States v. Drayton

In the following case, the Court considers the permissibility of a "bus sweep" in the absence of reasonable suspicion. The case discusses and applies the Court's first analysis of this subject in Florida v. Bostick.

UNITED STATES V. DRAYTON

Supreme Court of the United States, 2002.
536 U.S. 194.

JUSTICE KENNEDY delivered the opinion of the Court.

The Fourth Amendment permits police officers to approach bus passengers at random to ask questions and to request their consent to searches, provided a reasonable person would understand that he or she is free to refuse. Florida v. Bostick, 501 U.S. 429 (1991). This case requires us to determine whether officers must advise bus passengers during these encounters of their right not to cooperate.

* * * On February 4, 1999, respondents Christopher Drayton and Clifton Brown, Jr., were traveling on a Greyhound bus en route from Ft. Lauderdale, Florida, to Detroit, Michigan. The bus made a scheduled stop in Tallahassee, Florida. The passengers were required to disembark so the bus could be refueled and cleaned. As the passengers reboarded, the

driver checked their tickets and then left to complete paperwork inside the terminal. As he left, the driver allowed three members of the Tallahassee Police Department to board the bus as part of a routine drug and weapons interdiction effort. The officers were dressed in plain clothes and carried concealed weapons and visible badges.

Once onboard Officer Hoover knelt on the driver's seat and faced the rear of the bus. He could observe the passengers and ensure the safety of the two other officers without blocking the aisle or otherwise obstructing the bus exit. Officers Lang and Blackburn went to the rear of the bus. Blackburn remained stationed there, facing forward. Lang worked his way toward the front of the bus, speaking with individual passengers as he went. He asked the passengers about their travel plans and sought to match passengers with luggage in the overhead racks. To avoid blocking the aisle, Lang stood next to or just behind each passenger with whom he spoke.

According to Lang's testimony, passengers who declined to cooperate with him or who chose to exit the bus at any time would have been allowed to do so without argument. In Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel. Lang could recall five to six instances in the previous year in which passengers had declined to have their luggage searched. It also was common for passengers to leave the bus for a cigarette or a snack while the officers were on board. Lang sometimes informed passengers of their right to refuse to cooperate. On the day in question, however, he did not.

Respondents were seated next to each other on the bus. Drayton was in the aisle seat, Brown in the seat next to the window. Lang approached respondents from the rear and leaned over Drayton's shoulder. He held up his badge long enough for respondents to identify him as a police officer. With his face 12-to-18 inches away from Drayton's, Lang spoke in a voice just loud enough for respondents to hear:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Both respondents pointed to a single green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," and Brown responded, "Go ahead." Lang handed the bag to Officer Blackburn to check. The bag contained no contraband.

Officer Lang noticed that both respondents were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics. The officer thus asked Brown if he had any weapons or drugs in his

possession. And he asked Brown: "Do you mind if I check your person?" Brown answered, "Sure," and cooperated by leaning up in his seat, pulling a cell phone out of his pocket, and opening up his jacket. Lang reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects similar to drug packages detected on other occasions. Lang arrested and handcuffed Brown. Officer Hoover escorted Brown from the bus.

Lang then asked Drayton, "Mind if I check you?" Drayton responded by lifting his hands about eight inches from his legs. Lang conducted a pat-down of Drayton's thighs and detected hard objects similar to those found on Brown. He arrested Drayton and escorted him from the bus. A further search revealed that respondents had duct-taped plastic bundles of powder cocaine between several pairs of their boxer shorts. Brown possessed three bundles containing 483 grams of cocaine. Drayton possessed two bundles containing 295 grams of cocaine.

[The defendants were charged with drug crimes. The trial court denied motions to suppress the drugs on the ground that the entire procedure was a consensual encounter.]

The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions to grant respondents' motions to suppress. The court held that this disposition was compelled by its previous decisions in United States v. Washington, 151 F. 3d 1354 (1998), and United States v. Guapi, 144 F. 3d 1393 (1998). Those cases had held that bus passengers do not feel free to disregard police officers' requests to search absent "some positive indication that consent could have been refused."

We granted certiorari. The respondents, we conclude, were not seized and their consent to the search was voluntary; and we reverse.

* * *

The Court has addressed on a previous occasion the specific question of drug interdiction efforts on buses. In *Bostick,* two police officers requested a bus passenger's consent to a search of his luggage. The passenger agreed, and the resulting search revealed cocaine in his suitcase. The Florida Supreme Court suppressed the cocaine. In doing so it adopted a *per se* rule that due to the cramped confines onboard a bus the act of questioning would deprive a person of his or her freedom of movement and so constitute a seizure under the Fourth Amendment.

This Court reversed. *Bostick* first made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." The Court noted next that the traditional

rule, which states that a seizure does not occur so long as a reasonable person would feel free "to disregard the police and go about his business," is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. A bus rider's movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive. The proper inquiry "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Finally, the Court rejected Bostick's argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs. The reasonable person test, the Court explained, is objective and "presupposes an *innocent* person."

In light of the limited record, *Bostick* refrained from deciding whether a seizure occurred. The Court, however, identified two factors "particularly worth noting" on remand. First, although it was obvious that an officer was armed, he did not remove the gun from its pouch or use it in a threatening way. Second, the officer advised the passenger that he could refuse consent to the search.

Relying upon this latter factor, the Eleventh Circuit has adopted what is in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search. * * *

The Court of Appeals erred in adopting this approach.

Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.

* * * There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure

in his or her decision not to cooperate with police on a bus than in other circumstances.

Respondents make much of the fact that Officer Lang displayed his badge. In Florida v. Rodriguez, 469 U.S., at 5–6, however, the Court rejected the claim that the defendant was seized when an officer approached him in an airport, showed him his badge, and asked him to answer some questions. Likewise, in INS v. Delgado, 466 U.S. 210, 212–213 (1984), the Court held that INS agents' wearing badges and questioning workers in a factory did not constitute a seizure. And while neither Lang nor his colleagues were in uniform or visibly armed, those factors should have little weight in the analysis. Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

Officer Hoover's position at the front of the bus also does not tip the scale in respondents' favor. Hoover did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear. * * *

Finally, the fact that in Officer Lang's experience only a few passengers have refused to cooperate does not suggest that a reasonable person would not feel free to terminate the bus encounter. * * * [B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them. * * *

Drayton contends that even if Brown's cooperation with the officers was consensual, Drayton was seized because no reasonable person would feel free to terminate the encounter with the officers after Brown had been arrested. * * * The arrest of one person does not mean that everyone around him has been seized by police. If anything, Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. * * * And, as the facts above suggest, respondents' consent to the search of their luggage and their persons was voluntary. Nothing Officer Lang said indicated a command to consent to the search. Rather, when respondents informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.

* * *

* * * Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.

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.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

* * *

* * * [F]or reasons unexplained, the driver with the tickets entitling the passengers to travel had yielded his custody of the bus and its seated travelers to three police officers, whose authority apparently superseded the driver's own. The officers took control of the entire passenger compartment, one stationed at the door keeping surveillance of all the occupants, the others working forward from the back. With one officer right behind him and the other one forward, a third officer accosted each passenger at quarters extremely close and so cramped that as many as half the passengers could not even have stood to face the speaker. None was asked whether he was willing to converse with the police or to take part in the enquiry. Instead the officer said the police were "conducting bus interdiction," in the course of which they "would like . . . cooperation." The reasonable inference was that the "interdiction" was not a consensual exercise, but one the police would carry out whatever the circumstances; that they would prefer "cooperation" but would not let the lack of it stand in their way. There was no contrary indication that day, since no passenger had refused the cooperation requested, and there was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established by this introduction. Later requests to search prefaced with "Do you mind . . ." would naturally have been understood in the terms with which the encounter began.

It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one. * * *

NOTE ON BUS SWEEPS

Professor Nadler, in No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup.Ct. Rev. 153, argues that the Court's bus sweep cases, while understandable after 9/11, are out of line with social science evidence concerning coercion and consent. She concludes as follows:

> It may be the case that, on balance, it is desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons, especially with the current need to be vigilant about potential risks of terrorism. In this way, it is understandable that the *Drayton* Court scrupulously avoided announcing rules in drug cases that would restrict the ability of police to investigate terrorism and other serious threats to public security.
>
> On the other hand, in its effort to be sensitive to the order-maintenance needs of the government, the Court has promulgated a standard to determining the bounds of consensual police-citizen encounters and voluntary searches that struggles against a wealth of social science evidence, that subjects many innocent people to suspicionless searches and seizures against their will, and that produces disagreement and confusion in the lower courts. It may be that large-scale, suspicionless searches of passengers on common carriers is a price that we ought to be willing to pay to stem the flow of illegal narcotics transported on intercity buses and trains. If this is the determination that underlies the decision in *Drayton*, then the Court should have explicitly stated it and justified it—rather than relying on the implausible assertion that bus passengers, when they are individually confronted by armed police officers who want to search them, feel free to ignore the police or outright refuse their requests.

State of Mind Required for a Stop: Brower v. County of Inyo

Must an officer have a certain state of mind in order to seize a person? Justice Scalia wrote for the Court in Brower v. County of Inyo, 489 U.S. 593 (1989), where officers set up a "blind" roadblock in an attempt to apprehend a fleeing suspect. The suspect, approaching the roadblock from around a curve, was not able to stop before crashing into it. The suspect died in the crash and a wrongful death action was brought alleging that the suspect had been illegally "seized" by the roadblock.

Justice Scalia agreed with the plaintiff that a seizure had occurred. He declared that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement * * *, nor even whenever there is a governmentally *desired* termination of an individual's freedom of movement * * *, but only when there is a governmental termination of freedom of movement *through means intentionally applied*." In this case, the officers placed the roadblock with the intent to stop the suspect; and in fact the suspect was

stopped by means of the roadblock. Therefore, the suspect was seized, even though he was not stopped in precisely the way that the officers intended for him to stop. The means used to stop him were intentionally applied.[14]

Elaborating on this intent-based test, Justice Scalia posed the following hypothetical: suppose police officers park and leave their squad car on a hill, the parking brake accidentally disengages, the car rolls down the hill and just happens to pin a suspected criminal against a wall. Has the criminal been seized? Justice Scalia's answer was "no", because the officers never intentionally applied any means to stop the suspect's freedom of movement. They just got lucky.

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concurred in the judgment. He objected to Justice Scalia's emphasis on an intentional acquisition of physical control as marking the onset of a seizure, and suggested that, since it was clear in the instant case that the roadblock was intended to stop the deceased, "[d]ecision in the case before us is thus not advanced by pursuing a hypothetical inquiry concerning whether an unintentional act might also violate the Fourth Amendment."

How would the *Brower* test apply in the following circumstance? A gunman commandeers a school bus and takes a student as a hostage. A police standoff ensues, and a police officer fires into the bus in an attempt to kill the gunman. The bullet, however, hits the student instead. Has the student been seized under the Fourth Amendment? The court in Medeiros v. O'Connell, 150 F.3d 164 (2d Cir.1998), held that the police conduct did not constitute a seizure of the student, and therefore that summary judgment was properly granted to the officer in a section 1983 case. The court declared that a police officer's deliberate decision to shoot for the purpose of stopping the *gunman* "does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern." The court noted that the officer's intent was not to restrain the hostage's movement—far from it. The court also observed that the instant case was distinguishable "from those in which the police shoot an innocent victim mistakenly believing that he is the suspect whom they are pursuing." In such cases, a seizure occurs because "the victim was indeed the object of an intentional act of seizure, even if the police were mistaken as to the victim's identity." But where a hostage is hit by a bullet intended for the hostage-taker, there is no intentional seizure of the hostage within the meaning of *Brower*.

For an application of the *Brower* test, see Brendlin v. California, 551 U.S. 249 (2007), in which evidence was found on a passenger in a car that

[14] The Court in *Brower* remanded for a determination of whether the seizure was unreasonable under the circumstances.

was intentionally stopped by police. The government argued that the passenger was not seized by the mere stop of the car, because the intent of the police was to stop *the driver*. The Court rejected this argument, stating that the intent that counts under the Fourth Amendment "is the intent that has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." In this case, the officers intended to stop the car, and therefore, under *Brower* a stop occurred with respect to everyone in the car. The Court noted that a reasonable passenger would certainly think that he was not free to walk away when the officers intentionally stop the car in which he is sitting.

The Suspect Who Does Not Submit: California v. Hodari D.

In California v. Hodari D., 499 U.S. 621 (1991), the Court determined that the *Mendenhall* "freedom to walk away" test needed to be modified when applied to a suspect who refuses to submit to a show of authority. The case arose when officers encountered a group of youths who were huddled around a car and who fled when they saw the officers. Hodari, one of the group who ran, threw away a small rock as a pursuing officer was about to catch him. One officer tackled Hodari, handcuffed him and radioed for assistance. Subsequently, the officer discovered that the discarded rock was crack cocaine. Hodari claimed that the pursuit was a seizure, and because there was no legal cause for the pursuit there was a Fourth Amendment violation, requiring suppression of the fruits including the cocaine.

Justice Scalia, writing for the majority, "consulted the common law" and cited law dictionaries to support the notion that the word "seizure" has meant a "taking possession." Justice Scalia separated seizures into two types: those in which the officer has physically touched the citizen, and those in which the officer has used a non-physical show of authority. As to the former category, Justice Scalia noted that "[t]o constitute an arrest, * * *—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." However, although "an arrest is effected by the slightest application of physical force," Justice Scalia rejected the idea that "there is a *continuing* arrest during the period of fugitivity."

As to the latter category of *non-physical* displays of authority, at issue under the facts of *Hodari,* Justice Scalia framed the question before the Court as "whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield." The answer was "that it does not."

Justice Scalia observed that *Mendenhall* dealt with non-physical displays of authority, and focused only on whether a reasonable person would feel that he or she was free to leave, rather than on actual submission. Justice Scalia concluded, however, that the "free to leave" test was a necessary, but not sufficient, test for determining whether a seizure occurs. He stated that the *Mendenhall* test when "read carefully" says that a person has been seized "only if", not "whenever" the officer uses a show of authority. Thus, where the officer engages in a non-physical show of authority, it must be such that a reasonable person would not feel free to leave, *and* the citizen must actually submit. This is in contrast to physical touching or grasping, which if intentional is a seizure in any case.

As a matter of policy, Justice Scalia reasoned that the public should be encouraged to comply with police orders; therefore it would not do to reward suspects like Hodari for noncompliance by finding a seizure. Justice Scalia rejected the argument that police officers would abuse a rule that they may automatically chase non-complying suspects. The perceived risk of abuse was that officers, having no reasonable suspicion to support a stop, would routinely use non-physical displays of authority in the hope that suspects would disobey them and evidence would be found. Justice Scalia found this risk overrated. He reasoned that police do not issue orders expecting them to be ignored. Thus, officers would not take the risk that suspects would comply with their orders and render the seizure illegal in the absence of reasonable suspicion.

Justice Stevens, joined by Justice Marshall, dissented. He criticized the majority's "narrow construction" of the term "seizure" as meaning "that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target." The dissenters argued that the common law distinction between touching and a show of force was not determinative for Fourth Amendment purposes. Justice Stevens suggested that the common law ought not to govern analyses of current law enforcement practices.

Justice Stevens concluded that the majority erred in focusing on the citizen's reaction to an officer's conduct rather than on the officer's conduct itself. He noted that under the majority's test, police officers could take advantage of citizens by using all their conduct against them in the seconds before they actually submit to authority. For example, an officer could flash his lights to stop a car without adequate cause, and then use any observations made before the car comes to a complete stop. Similarly, a drug enforcement agent could approach a group of passengers in an airport with a drawn gun, announce a baggage search, and then rely on the passengers' reaction to justify a subsequent investigative stop.

Justice Stevens contended that it was "anomalous, at best" to establish different rules for seizures effected by touching and those effected by a show of force. He argued that it was important for an officer to know in advance whether certain conduct would constitute a seizure, and that the majority's test makes this impossible when the officer is using a non-physical show of force.

QUESTIONS AFTER HODARI

Suppose an officer fires a warning shot in the air and a fleeing suspect stops suddenly and a package falls from his pocket as a result of this sudden stop? Is the package the fruit of a seizure? See Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("Apparently, Justice Scalia would hold that if an officer shot at a suspect to stop him from fleeing, but the bullet missed the suspect because he lunged away to avoid being shot, there would be no seizure. There is little logic to the result that the touch of a finger that fails to restrain a suspect is a seizure, while an unsuccessful attempt to shoot a suspect is not."). See also Mettler v. Whitledge, 165 F.3d 1197 (8th Cir.1999) (sending in an attack dog to subdue the suspect did not constitute an unreasonable seizure, where the citizen shot the dog before the dog got to him).

It should be noted that Hodari was a young, African American, urban male. How suspicious is it for such a person to run when a number of uniformed police come around the corner? See generally Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 Val.U.L.Rev. 243 (1991) (arguing that the Court should take account of the race of the citizen in assessing the legality of a police-citizen confrontation under *Terry*).

When Does Submission Occur?

One of the problems left for police officers and the courts after *Hodari* is to determine when, precisely, a suspect has submitted to a non-physical show of authority—i.e., when does the seizure begin. This is important when a citizen tries to dispose of evidence in response to a show of authority. Exemplary is United States v. Lender, 985 F.2d 151 (4th Cir. 1993). The court set forth the pertinent facts as follows:

> At approximately 12:50 a.m., [Officers Hill and Thornell] were patrolling an area in Kinston, North Carolina. The officers knew the area to be one where heavy drug traffic occurred. As they crossed an intersection, the officers observed a group of four or five men, including the defendant, huddled on a corner. The defendant had his hand stuck out with his palm up, and the other men were looking down toward his palm.

> Suspecting a drug transaction, the officers stopped their car, got out, and approached the men. Although the officers wore plain clothes and drove an unmarked car, they were readily identifiable as police officers because of their firearms and badges worn at belt-level. As the officers approached, the group began to disperse, and the defendant walked away from the officers with his back to them. Officer Hill called out for the defendant to stop, but the defendant refused. As he walked, the defendant turned and told Hill, "You don't want me; you don't want me."
>
> While Lender continued to walk away, both officers observed him bring his hands to the front of his waist as though reaching for or fumbling with something in that area. Officer Hill again called for the defendant to stop. At this point, the defendant stopped, and a loaded semi-automatic pistol fell from his waist to the ground. [Lender was convicted of possession of a firearm by a felon.]

Lender moved to suppress the gun, arguing that he had been seized without reasonable suspicion by the time he dropped it. But the court disagreed.

> Lender argues * * * that he submitted to Officer Hill's second order to stop by coming to a complete halt, and that the gun fell to the ground only after he stopped. Therefore, according to the defendant, the gun fell into plain view after he had been seized.
>
> We do not believe, however, that Lender's momentary halt on the sidewalk with his back to the officers constituted a yielding to their authority. Between Officer Hill's first and second commands for the defendant to stop, both officers heard the defendant say, "You don't want me; you don't want me." They also observed him fumbling with his hands in the area of his waist as if reaching for or adjusting a weapon. Defendant asks us to characterize as capitulation conduct that is fully consistent with preparation to whirl and shoot the officers.
>
> The defendant's actions after he dropped the pistol indicate further that he had not yielded. Lender had stopped for at most an instant when the gun fell. Instead of stopping and standing still, the defendant quickly moved to pick up the weapon. Under the circumstances it cannot be said that the defendant had yielded, and therefore been seized, before the gun fell into the plain view of the officers.

See also United States v. Griffin, 652 F.3d 793 (7th Cir. 2011) (rejecting the defendant's argument that "a seizure does not necessarily occur at a discrete point in time but is better conceived of as a continuing event" that starts at the show of authority and ends when the subject submits; that analysis is directly contrary to *Hodari*; therefore the defendant had

not been seized when he refused to pull over when directed to do so by police, and evidence he threw out of the car in a subsequent ""low speed chase" was properly admitted).

Summary of Seizure Cases

Professor Sundby has set forth the following "Accidental Tourist's guidebook" on the state of the law concerning seizures of persons under *Terry*:

> Travel is a considerable problem. One should be aware that law enforcement officers may stop someone and ask permission to look in his luggage even if the traveler has not acted in a fashion that would provoke articulable suspicion of wrongdoing. This is true whether traveling by land, air, or sea. If approached, the innocent traveler should not be alarmed but should state to the officer that he or she has no desire to converse and has other, more important appointments to keep. Although this might strike the traveler at first as rude and abrupt, and perhaps a bit frightening if the questioner is armed, the Supreme Court has made clear that the Fourth Amendment is not for the timid. Consequently, the wise traveler should carry a copy of the Fourth Amendment and display it to the questioner and thus avoid any unnecessary discourse. It is this writer's fervent hope that travel agents soon shall issue copies of the Fourth Amendment as standard procedure when writing airplane, bus, or train tickets.

Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum.L.Rev. 1751, 1793 (1994). Is Professor Sundby's assessment overly critical, or just about right?

3. Grounds for a Stop: Reasonable Suspicion

The degree of suspicion required to make a stop is referred to as "reasonable suspicion" by the courts. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975). As with the higher standard of probable cause, two separate questions arise in determining whether reasonable suspicion exists. The court must investigate the *source* of information upon which reasonable suspicion is based; and the court must evaluate whether that information is *sufficiently suspicious* to justify a stop.

a. Source of Information

In Adams v. Williams, supra, the Court held that the informant's tip could be credited toward reasonable suspicion. *Adams* did not consider, however, whether reasonable suspicion could be based on a tip from an *anonymous* informant.

Anonymous Tips: Alabama v. White

The Court relied heavily on *Adams* and Illinois v. Gates (discussed in the material on probable cause) in Alabama v. White, 496 U.S. 325 (1990), and held that an anonymous informant's tip that was "significantly corroborated" by a police officer's investigation provided reasonable suspicion for a stop. Police received an anonymous tip that White would be leaving a particular apartment in a brown Plymouth station wagon with the right taillight broken, and would be driving to Dobey's Motel with a brown attache case containing cocaine. The officers went to the apartment, and saw White enter a brown Plymouth station wagon with a broken right taillight. She was not carrying an attache case. They followed the station wagon as it took the most direct route toward Dobey's Motel. White was stopped just short of Dobey's Motel, and consented to the search of a brown attache case that was in the car. The officers found marijuana in the attache case, and three milligrams of cocaine in White's purse, which was searched during processing at the station. White argued that the stop was illegal because the officers did not have reasonable suspicion, and the evidence should therefore have been excluded as a product of the illegal stop.

Justice White, writing for a six-person majority, held that the stop was supported by reasonable suspicion, derived from the informant's tip and the officers' corroboration of that tip. He noted that under the *Gates* "totality of the circumstances" approach to probable cause, an informant's veracity and basis of knowledge remain "highly relevant" in determining the value of the report of an informant. Justice White stated: "These factors are also relevant in the reasonable suspicion context, although allowance must be made in applying them for the lesser showing required to meet that standard."

Even given the lesser showing required, Justice White acknowledged that the anonymous tip did not itself provide reasonable suspicion, because it failed to show that the informant was reliable (given the fact that the informant was unknown), and it gave no indication of the informant's basis for concluding that White was involved in a drug transaction. But the majority stated: "As there was in *Gates*, however, in this case there is more than the tip itself."

Justice White determined that the corroboration in *White* (i.e., the car was accurately identified and White was going *toward* Dobey's Motel) was not as substantial as that in *Gates*. Yet this was not fatal, because reasonable suspicion is a less stringent standard than probable cause. Justice White explained as follows:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content

than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

The Court found that reasonable suspicion existed even though the corroboration of the tip was not complete, and even though the tip was not correct in some details. Justice White acknowledged that the officer's corroboration of the existence of the car was insignificant, since "anyone could have predicted that fact because it was a condition presumably existing at the time of the call." However, the caller's ability to predict White's future behavior (i.e., getting in the car and driving toward Dobey's Motel) was "important" because:

> [I]t demonstrated inside information—a special familiarity with respondent's affairs. The general public would have had no way of knowing that respondent would shortly leave the building, get in the described car, and drive the most direct route to Dobey's Motel. Because only a small number of people are generally privy to an individual's itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual's illegal activities. * * * When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.

Justice Stevens wrote a short dissenting opinion, joined by Justices Brennan and Marshall. The dissenters argued that the activity predicted by the informant and corroborated by the police (leaving an apartment and driving toward a motel) was completely innocent. Justice Stevens concluded as follows:

> Millions of people leave their apartments at about the same time every day carrying an attache case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attache case described by the tipster.

QUESTIONS AFTER WHITE

Does it make sense that the reasonable suspicion standard is less demanding than probable cause as to both quantity and *quality* of information? Does the Court mean that certain information may be too unreliable to credit toward probable cause, but reliable enough to credit

toward reasonable suspicion? How universal is the Court's premise that an informant's accurate prediction of future innocent activity makes it more likely that the informant is correct in his conclusion about the suspect's criminal activity? See generally Rudstein, White on *White:* Anonymous Tips, Reasonable Suspicion, and the Constitution, 79 Ky.L.J. 661 (1991).

Anonymous Tips Concerning Guns

In the following case, the Court considered whether an anonymous tip concerning possession of a gun constitutes reasonable suspicion when it is not corroborate by any predicted activity.

FLORIDA v. J.L.

Supreme Court of the United States, 2000.
529 U.S. 266.

JUSTICE GINSBURG delivered the opinion of the Court.

The question presented in this case is whether an anonymous tip that a person is carrying a gun is, without more, sufficient to justify a police officer's stop and frisk of that person. We hold that it is not.

* * *

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]." One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket. The second officer frisked the other two individuals, against whom no allegations had been made, and found nothing. J.L., who was at the time of the frisk 10 days shy of his 16th birthday, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. He moved to suppress the gun as the fruit of an unlawful search, and the trial court granted his motion. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Anonymous tips, the Florida Supreme Court stated, are generally less reliable than tips from known informants and can form the basis for

reasonable suspicion only if accompanied by specific indicia of reliability, for example, the correct forecast of a subject's "not easily predicted" movements. The tip leading to the frisk of J.L., the court observed, provided no such predictions, nor did it contain any other qualifying indicia of reliability. Two justices dissented. The safety of the police and the public, they maintained, justifies a "firearm exception" to the general rule barring investigatory stops and frisks on the basis of bare-boned anonymous tips.

* * * We granted certiorari, and now affirm the judgment of the Florida Supreme Court.

* * *

In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White, 496 U.S., at 329. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." The question we here confront is whether the tip pointing to J.L. had those indicia of reliability.

[Justice Ginsburg points out that in *White*, the Court said it was a "close case."]

The tip in the instant case lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. If *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line.

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. * * * These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

A second major argument advanced by Florida and the United States as amicus is, in essence, that the standard *Terry* analysis should be modified to license a "firearm exception." Under such an exception, a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. We decline to adopt this position.

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. Several Courts of Appeals have held it per se foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. If police officers may properly conduct *Terry* frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in *Adams* and *White*, the Fourth Amendment is not so easily satisfied.

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, and schools, see New Jersey v. T.L.O., 469 U.S. 325 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

* * *

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

On the record created at the suppression hearing, the Court's decision is correct. The Court says all that is necessary to resolve this case, and I join the opinion in all respects. It might be noted, however, that there are many indicia of reliability respecting anonymous tips that we have yet to explore in our cases.

* * *

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. * * *

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. * * *

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

Tips and Corroboration After J.L.

One court has distilled the following factors for determining whether reasonable suspicion can be found from an informant's tip after *J.L.*:

> Although no single factor is dispositive, relevant factors include: (1) whether the informant lacked "true anonymity" (i.e., whether the police knew some details about the informant or had the means to discover them); (2) whether the informant reported contemporaneous, firsthand knowledge; (3) whether the informant provided detailed information about the events observed; (4) the informant's stated motivation for reporting the information; and (5) whether the police were able to corroborate information provided by the informant.

United States v. Chavez, 660 F.3d 1215 (10th Cir. 2011).

J.L. and a Tip About Reckless Driving

How does the Court's analysis in *J.L.* apply if police receive an anonymous tip that a car is engaged in reckless driving and, when police officers observe the car on the road the driver is not at that point driving recklessly? Can the officers stop the car despite the lack of corroboration of any predictive activity? The court in United States v. Wheat, 278 F.3d 722 (8th Cir. 2001) considered this question and upheld the stop of the identified car. It relied on the language in *J.L.*, implying that the decision would be different if public safety were in imminent risk:

> An erratic and possibly drunk driver poses an imminent threat to public safety. Of course, arguably so too does a citizen armed with a gun, yet the Supreme Court firmly declined to adopt an automatic firearm exception to the reliability requirement on that basis. However, there is a critical distinction between gun possession cases and potential drunk driving cases. In the possessory offense cases, law enforcement officers have two less invasive options not available to officers responding to a tip about a drunk driver. First, they may initiate a simple consensual encounter, for which no articulable suspicion is required. Needless to say, that is not possible when the suspect is driving a moving vehicle.
>
> Alternatively, officers responding to a tip about a possessory violation may quietly observe the suspect for a considerable length of time, watching for other indications of incipient criminality that would give them reasonable suspicion to make an investigatory stop—as, for example, in *Terry*, where an experienced officer witnessed several men casing a joint. By contrast, where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice. * * * [H]e can intercept the vehicle immediately and ascertain whether its driver is operating

under the influence of drugs or alcohol. Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. In contradistinction to *J.L.*, where the suspect was merely standing at the bus stop, in this context the suspect is extremely mobile, and potentially highly dangerous. A drunk driver is not at all unlike a "bomb," and a mobile one at that. Thus, we think that there is a substantial government interest in effecting a stop as quickly as possible.

J.L. and a Tip About Domestic Violence

For similar reasons, tips by anonymous informants about domestic violence and related emergencies have been found to be sufficient for a stop even without corroboration through predictive activity. Thus, in United States v. Hicks, 531 F.3d 555 (7th Cir. 2008), a 911 caller reported that "a guy is beating up a woman" and was threatening to shoot her. The caller gave an address, police responded, and they stopped and eventually found a gun on Hicks. Hicks relied on *J.L.*, arguing that the tip was not reliable because it lacked predictive information that would have allowed the officer to test it. But the court distinguished *J.L.* and declared that "police delay while attempting to verify an identity or seek corroboration of a reported emergency may prove costly to public safety and undermine the 911 system's usefulness." The court elaborated as follows:

> A rule requiring a lower level of corroboration before conducting a stop on the basis of an emergency report is not simply an emergency exception to the rule of *J.L.* It is better understood as rooted in the special reliability inherent in reports of ongoing emergencies. * * * Surely, anonymous tips about emergencies cannot always be trusted—although frequency data does not exist, fraudulent 911 calls are agreed to be a dangerous problem. See Rana Simpson, Misuse and Abuse of 911 at 5–7 (U.S. Dept. of Justice, Problem-Oriented Guides for Police Series, No. 19, 2002). But any body of law requiring 911 operators to carefully make credibility determinations would unacceptably delay the necessary responses to *all* emergency calls, including genuine ones.

See also United States v. Wooden, 551 F.3d 647 (7th Cir. 2008) (anonymous tip about domestic violence was sufficient to seize the defendant even though when officers arrived, the couple was chatting amicably; there was a "need for dispatch" that excused any requirement for corroborative evidence, and "domestic violence comes and goes—a man

who pulls gun on his wife or girlfriend may do it again at any moment" or may have threatened the woman to "act naturally").

J.L. and "Anonymity"

The Court in *J.L.* distinguishes between known informants (whose tips can be sufficient without corroboration) and anonymous ones. Justice Kennedy points out, however, that under certain circumstances the identity of a tipster may be unknown but the informant is not really "anonymous." For example, in United States v. Heard, 367 F.3d 1275 (11th Cir. 2004), an officer saw Heard and a woman having a loud argument at a train station. The woman accused Heard of owing her money. The officer intervened; Heard admitted owing the woman money, and the officer encouraged Heard to pay her. Heard did so and walked away. The officer walked off in the same direction as the woman. The woman then told the officer that Heard was carrying a weapon. The officer then proceeded back toward Heard, and told the woman to remain at the station to make a statement. But the woman jumped on a waiting train and was never seen again. The officer proceeded to frisk Heard, and found a weapon.

Appealing his conviction for possession of a firearm by a felon, Heard argued that under *J.L.*, there was no reasonable suspicion for the officer to stop and frisk him. The government argued that the woman's tip was more reliable than the purely anonymous tip in *J.L.*, because she spoke face-to-face with the officer.

The court agreed with the government and affirmed the conviction. It explained as follows:

> A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant.
>
> In this case, [Officer] Gore had an opportunity to judge the demeanor and credibility of the unknown woman. Gore stated that the woman seemed frightened when she reported Heard's weapon, and Gore reasonably presumed that Heard and the unidentified woman had some sort of relationship—they were arguing over money and Heard paid the woman the amount she demanded. Thus, reasoning that Heard knew the woman, Gore could reasonably conclude that she would have reliable information about whether Heard possessed a weapon.

Heard argued that whatever assurance of reliability was obtained by a face-to-face report, it was lost when the informant jumped on the train and fled the scene. But the court rejected this argument as well:

> The reliability of a tip is considered in light of all relevant circumstances, which include—but is not limited to—a consideration of whether the officer can track down the tipster again. In this case, although the unknown woman fled the MARTA station, because she and Heard apparently knew each other, she may have subjected herself to reprisal from Heard based on the tip she gave to Gore—which makes her more reliable. Considering the totality of the circumstances in this case, Gore reasonably concluded that the unknown woman's tip was reliable.

See also United States v. Brown, 496 F.3d 1070 (10th Cir. 2007) (911 caller was not anonymous, and therefore the caller's tip could suffice for reasonable suspicion: "The officers in this case knew the caller was a friend of the alleged victim and was present when the armed man entered her apartment. * * * An unnamed individual who divulges enough distinguishing characteristics to limit his possible identity to only a handful of people may be nameless, but he is capable of being identified and thus is not anonymous."); United States v. Chavez, 660 F.3d 1215 (10th Cir. 2011) (caller was not anonymous even though he refused to provide the police his name: "he stated that he was a Wal-Mart employee at a specific Wal-Mart store and thereby provided the police with information to discover his identity"); United States v. Copening, 506 F.3d 1241 (10th Cir. 2007) (where 911 calls were made from an unblocked number, the caller was not anonymous).

b. Quantum of Suspicion

The Supreme Court in United States v. Cortez, 449 U.S. 411 (1981), set forth the following oft-cited test for determining whether reasonable suspicion exists in a given set of circumstances:

> [T]he totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. * * * [P]articularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and considerations of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; * * *.

The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.

Comparison to Probable Cause

The Court in *Terry* reasoned that, because a stop was less intrusive than an arrest, it could be justified upon a lesser showing of proof than the probable cause required for an arrest. Courts have struggled with the meaning of reasonable suspicion and with how the reasonable suspicion standard differs from that of probable cause. It is clear, however, that the standards are materially different. There are many cases in which the courts have held that reasonable suspicion existed but probable cause did not. See Florida v. Royer, 460 U.S. 491 (1983) (consent tainted where it was obtained while Royer was under arrest and officers had only reasonable suspicion and not probable cause to believe that Royer was involved in drug activity); United States v. Anderson, 981 F.2d 1560 (10th Cir.1992) (reasonable suspicion but not probable cause existed, where the defendant was twice seen leaving a house in which narcotics were sold, and parked his car a few blocks from the house, near a truck where narcotics were stored; because the defendant was arrested rather than stopped, the evidence obtained as a result of the detention should have been suppressed).

The analytical framework used by the courts in assessing reasonable suspicion is similar to that employed in assessing probable cause. Thus, a court will undertake a common sense analysis of the facts presented; it will give deference to the expertise of law enforcement officers, who may know through experience that certain facts are indicative of criminal activity (e.g., that drug dealers often carry beepers or cellular phones, or speak in code); and it will consider the totality of the circumstances because, while each fact may seem innocent if considered individually, the factors considered in their totality may not be so easily explained away; and it will not expect the officers to be infallible.

The most important difference between reasonable suspicion and probable cause is that reasonable suspicion is a *less demanding standard of proof*—a stop is permissible upon something less than the fair probability standard that defines probable cause. Some courts have defined reasonable suspicion as a fair *possibility* (as opposed to probability) of criminal activity. It is appropriate to think of reasonable suspicion as "possible cause."

A probability-based example of the difference between reasonable suspicion and probable cause is presented by the facts of United States v. Winsor, 846 F.2d 1569 (9th Cir.1988). Officers chased suspected bank

robbers fleeing from the bank into a hotel. The hotel had approximately 40 guest rooms, and the officers had no idea where in the hotel the robbers were hiding. The question was whether there was probable cause to search each of the hotel rooms for the suspects. The court found that a one-in-forty probability was too small to support probable cause, but that the low probability did amount to reasonable suspicion: "The odds on discovering the suspect in the first room upon whose door the police knocked were high enough to support a founded suspicion. The odds favoring discovery increase as rooms are searched. At some point, perhaps at the last two or three unsearched rooms, probable cause may be said to exist." Conversely, at some point of improbability, reasonable suspicion would not have existed—for example, if the hotel had 600 rooms, there would not have been reasonable suspicion to believe that the suspects were in any particular room. Because there was only reasonable suspicion and not probable cause in *Winsor*, the court held that the search of the hotel room in which the suspects were actually found was illegal. A search for law enforcement purposes requires probable cause and cannot be justified under *Terry*. What should the police do in a case like Winsor where suspects might be in any of 40 rooms?

Assessment of Probabilities

The Court applied the *Cortez* totality of circumstances test in United States v. Arvizu, 534 U.S. 266 (2002), which involved the stopping of a minivan by a border patrol agent. After stopping the minivan, the agent asked for and obtained permission to search. He found drugs and arrested the driver. The district court denied a motion to suppress evidence, but the Ninth Circuit reversed.

The court of appeals analyzed 10 factors that the district court had considered in denying the motion. Of these, it held that 7 factors—including the driver's slowing down, his failure to acknowledge the agent, the raised position of children's knees in the car, and their odd waving—were entitled to little or no weight in assessing reasonable suspicion. The court of appeals found that other factors—use of the road by smugglers, the temporal proximity between the timing of the trip and the agents' shift change, and the use of minivans by smugglers—were not enough to render the stop permissible.

The Supreme Court reversed in an opinion by Chief Justice Rehnquist, who wrote:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. This process allows officers to draw on

their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." Although an officer's reliance on a mere "hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. But we have deliberately avoided reducing it to a neat set of legal rules. * * *

We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard [the agent] that was by itself readily susceptible to an innocent explanation was entitled to "no weight." *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."

The Court of Appeals' view that it was necessary to "clearly delimit" an officer's consideration of certain factors to reduce "troubling . . . uncertainty," also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field.

* * * Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no special circumstances rendering innocent avoidance . . . improbable." We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). * * * Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. To the extent that a totality of the circumstances approach may render appellate review less

circumscribed by precedent than otherwise, it is the nature of the totality rule.

Having considered the totality of the circumstances and given due weight to the factual inferences drawn by the law enforcement officer and District Court Judge, we hold that Stoddard had reasonable suspicion to believe that respondent was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally * * * Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

Examples of Reasonable Suspicion

Here are the facts of a case in which reasonable suspicion was found:

At 1:00 p.m. two Boston police detectives in an unmarked car were patrolling that portion of Boston known as the "Combat Zone." The Combat Zone is a high crime area known for prostitution and drug-dealing. As the officers were stopped at a light, they noticed a grey Thunderbird automobile stopped on the curb of Washington Street with a man at the wheel. As the officers watched, a second man approached the Thunderbird from the sidewalk and engaged the driver in a twenty second conversation through the open passenger-side window. The second man got into the car and had an additional five or ten second conversation with the driver. The car then pulled out and proceeded for two blocks until it made a right turn onto Hayward Place, a short street which connects Washington Street and Harrison Avenue. The officers followed in their unmarked car. Hayward Place was deserted. The Thunderbird parked on Hayward Place, and the officers parked well behind it with an unobstructed view. The officers observed the driver and passenger engaged in a

thirty second discussion with their heads inclined toward each other. The passenger then got out of the car and walked back toward Washington Street. One officer approached the car, ordered the driver out, noticed a bulge, and pursuant to a pat-down frisk uncovered a spring-activated knife. The officer arrested the driver for carrying an illegal weapon, and in a search incident to arrest eleven grams of cocaine were uncovered.

The court confronted with these facts in United States v. Trullo, 809 F.2d 108 (1st Cir.1987), stated that the officer's seizure of the driver went to the "outermost reaches of a permissible *Terry* stop," and that "today's satisfactory explanation may very well be tomorrow's lame excuse." But the court did uphold the police conduct, relying on the high crime area, the officers' expertise in determining whether drug activity was afoot, the short nature of the conversation between the driver and passenger, and the fact that the passenger walked back toward the place where he had met the car. This latter factor meant that it was "unlikely that the man was seeking transportation." The court concluded that while it would be possible to "hypothesize some innocent explanation" for the conduct, the test for a stop is whether there is reasonable suspicion of criminal activity, and not whether the facts can be construed as innocent. Judge Bownes, in dissent, asked the following question: "If a citizen lets another person into his car on Washington Street, where must he let him off to avoid an armed stop by the police?" Judge Bownes claimed that the majority "seems to allow armed stops of individuals who meet in the Combat Zone on the basis of unlimited deference to police discretion." Who has the better of the argument? Who has more accurately applied the *Cortez* test? See also United States v. Green, 691 F.3d 960 (8th Cir. 2012) (Bank robber described as a black male with a medium build and facial hair wearing white Nike tennis shoes, and Green, who fit the description was found walking two blocks from the bank shortly after the robbery; reasonable suspicion for a stop was found "[g]iven Green's similarities to the description of the suspected robber and his proximity in both time and place to the crime.").

Example of Reasonable Suspicion Lacking

While most of the reported cases assessing reasonable suspicion have found that the officers in question had sufficient proof to justify a stop, there are a few cases in which the facts are so innocent that the reviewing court finds the stop invalid. An example is United States v. Rodriguez, 976 F.2d 592 (9th Cir.1992). Officers sitting in a marked car alongside Interstate 8 in California saw Rodriguez drive toward them in a 1976 Ford Ranchero. They noticed that he looked Hispanic, sat up straight, kept both hands on the wheel, and looked straight ahead. He did not "acknowledge" the agents' presence, which they thought suspicious

because all the other traffic passing by had acknowledged the presence of the officers. The agents testified that Interstate 8 is a "notorious route for alien smugglers" and that Ford Rancheros have a space behind the seat where illegal aliens can be concealed. The agents followed Rodriguez. They testified that his car responded sluggishly when it went over a bump, as if heavily loaded, rather than with a "crisp, light movement" that was typical of a Ford Ranchero. They also noted that, while being followed, Rodriguez looked often into his rear view mirror and swerved slightly within his lane. On the basis of this information, the officers stopped Rodriguez's vehicle. A subsequent search pursuant to consent yielded 168 pounds of marijuana. Rodriguez argued that the consent was tainted as a product of an unlawful stop.

The court held that reasonable suspicion did not exist to stop Rodriguez, and therefore the evidence was illegally obtained. It first noted that the testimony of the officers at the suppression hearing was eerily similar to that provided in other cases, so similar that "an inquiring mind may wonder about the recurrence of such fortunate parallelism in the experiences of the arresting agents." The court stated that it could not accept "what has come to appear to be a prefabricated or recycled profile of suspicious behavior very likely to sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." According to the court, the factors cited by the agents "describe too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity." The court concluded as follows:

> In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16 year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California.

Is the court's finding of no reasonable suspicion sustainable after *Arvizu*? Are the facts of *Arvizu*, in their totality, more suspicious? See also United States v. Peters, 10 F.3d 1517 (10th Cir.1993) (where two Nigerians in a Ryder truck were pulled over for a traffic violation, and consented to a search that uncovered no evidence, they could not be stopped later down the road on the basis that they appeared nervous when being followed by another marked police car).

In United States v. Manzo-Jurado, 457 F.3d 928 (9th Cir. 2006), the officer saw a group of six Hispanic men and became suspicious that they were illegal aliens. The men were attending a high school football game. The officer testified that he was suspicious because "the group members appeared out of place at the football game." Specifically, "they did not mingle with other attendees, did not appear associated with either high

school, and were not familiar to" the officer. The court found that the officer's "unsupported intuition that a group of men keeping to themselves at a football game is indicative of the men's illegal status in this country is not a rational inference that helps establish reasonable suspicion." Is it ever suspicious that a person or group appears "out of place"? What if an obviously destitute person is walking on the street in a wealthy neighborhood?

Reasonable Suspicion of a Completed Crime: United States v. Hensley

Most of the cases discussed above evaluated whether the officer had reasonable suspicion that the suspect was either committing a crime or about to commit a crime. Can a *Terry* stop be made on the basis of reasonable suspicion to believe that the suspect has *already* committed a crime? The Court in United States v. Hensley, 469 U.S. 221 (1985), confronted these facts:

> Several days after a tavern robbery in St. Bernard, Ohio (a Cincinnati suburb), a St. Bernard police officer interviewed an informant who stated that Hensley drove the getaway car. The officer obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the metropolitan area. The flyer stated that Hensley was wanted for investigation of an aggravated robbery, described Hensley and the date and location of the robbery, warned that Hensley should be considered armed and dangerous, and asked other departments to pick up and hold Hensley for the St. Bernard police.
>
> In a Kentucky suburb of Cincinnati, an officer who had heard the flyer read aloud several times stopped a car driven by Hensley. Although the officer let Hensley drive away, he inquired whether there was an outstanding warrant for his arrest. Two other officers in separate patrol cars interrupted to say that there might be an Ohio warrant on Hensley. The three officers then looked for Hensley while the dispatcher looked for the flyer and mistakenly telephoned Cincinnati to inquire about the flyer. One of the officers spotted Hensley's car and, after being advised by the dispatcher that Cincinnati was hunting for a warrant, he pulled the car over and approached with a drawn service revolver. A second officer arrived at the scene, saw a gun under the seat of a passenger known to be a convicted felon, arrested the passenger, and searched the car. When another gun was found, Hensley was arrested for illegal handgun possession.

Justice O'Connor, writing for a unanimous Court, held that *Terry* was not confined to prospective crimes; the power granted by *Terry* may

also be exercised to investigate completed crimes. Her opinion approved stops where "police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony." Relying on the "collective knowledge" doctrine established in Whiteley v. Warden, [discussed in the materials on probable cause], Justice O'Connor concluded that one department or officer could act to make a stop if another officer or department had reasonable suspicion to stop the defendant and asked for assistance. She applied her analysis to the facts and concluded that the St. Bernard police had a reasonable suspicion that Hensley committed a crime, that the Kentucky officers properly relied on the flyer, and that the stop was carried out in compliance with *Terry*.

Relevance of the Race of the Suspect

The court in *Rodriguez, supra,* expressed concern that an overly broad test of reasonable suspicion could result in a dragnet for Hispanics. Can the suspect's race *ever* be taken into account explicitly in determining whether reasonable suspicion exists?

When the question is whether the suspect sufficiently matches the description of a perpetrator of a completed crime, the suspect's race must obviously be considered relevant. For example, if a bank teller describes a robber as an Asian male in his 40's, an officer assessing reasonable suspicion must necessarily consider a person's race in determining whether to stop a person for that crime.

More difficult questions arise, however, when an officer considers a person suspicious simply because he is found in an area ordinarily not frequented by members of the suspect's racial group. Is it appropriate to consider it suspicious that an African-American male is walking down the street of an affluent suburb at 11 p.m., where the same conduct from a white male would not be suspicious in the least? Similarly, difficult questions exist when officers argue that certain crimes are more commonly committed by certain races (such as men of Arab descent and crimes of terrorism). In these cases, police officers essentially argue that activity of a member of a certain race is more suspicious than the same activity by a member of a different race.

The following facts present an example of an officer finding a person's race to be a suspicious factor:

> A St. Paul police officer observed Uber's vehicle at about 2:15 a.m. The officer saw the vehicle again about 30 minutes later in the same area. At that time the officer ran a check on the license number and determined that the vehicle was registered to a person in Moundsview, Minnesota, a suburb about 20 miles from St. Paul. Upon learning this information, the officer decided to stop the

vehicle, because he thought the driver was seeking to solicit a prostitute. The Summit-University area, in which Uber's car was spotted, is well known as one where prostitution flourishes. The officer did not at that time see prostitutes in the area, nor had Uber slowed down or talked to anyone.

The court in City of St. Paul v. Uber, 450 N.W.2d 623 (Minn.App.1990), held that this information did not create reasonable suspicion to support a stop. The court stated as follows:

> We know of no authority that requires a resident of the State of Minnesota to have any reason to be on the public streets of another town * * *. No one from any suburb needs to justify his or her lawful presence on a public street in Minneapolis or St. Paul. * * * The officer's assumption that [Uber] was seeking prostitution was an inadvertent, but nevertheless invidious, form of discrimination. We would not tolerate the blatant discriminatory proposition that any member of a minority group found on a public street in Edina [an affluent suburb] had better live there, or be required to stop and justify his or her presence to the authorities. * * * Once we clear away the smoke from this case, it is clear that the stop of [Uber] is premised on the belief that after midnight, Caucasian males from the suburbs are only in the Summit-University area for no good, and that after midnight, no good is all the Summit-University area has to offer. Neither the residents of Summit-University nor the residents of Moundsview deserve the implications of this case. * * * Simply being on a public street in an area where one "might" find a prostitute or a drug dealer does not, without more, meet any constitutional standard for a stop by the authorities. See e.g. Brown v. Texas, 443 U.S. 47 (1979) (defendant's mere presence in a neighborhood frequented by drug users held insufficient to justify a stop).

While a person's race, or the existence of a high crime area, may not "without more" constitute reasonable suspicion, how much more is required? What if Uber had been driving ten miles below the speed limit and looking out along the street? Would such conduct be sufficiently suspicious, given the neighborhood, regardless of the suspect's race?[15] For a case consistent with *Uber*, see State v. Barber, 118 Wn.2d 335, 823 P.2d 1068 (1992) ("racial incongruity, i.e., a person of any race being allegedly out of place in a particular geographic area," could not be considered in the reasonable suspicion inquiry).

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[15] Professor Harris, in Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind.L.J.659 (1994), argues that *Terry* stops have a disproportionate effect on minorities, even if race is not explicitly taken into account in determining reasonable suspicion. This is because in many courts "an individual's presence in a high crime location plus evasion of the police equals suspicion reasonable enough to allow a stop under *Terry*." Professor Harris argues that minorities, because of where they usually live and how they understandably react toward police, are more likely to trigger these two "suspicious" factors.

Some courts, in contrast to *Uber*, have found it permissible for an officer to consider the race of a person in determining whether the person's conduct is suspicious. These courts hold that while the suspect's race cannot be the *only* factor supporting a stop, it can be considered together with other suspicious factors. In other words, these courts appear to permit a form of racial profiling, so long as race is not the only basis for the stop. As the court put it in United States v. Weaver, 966 F.2d 391 (8th Cir.1992), a case in which the defendant, the only African-American male on a flight from Los Angeles to Kansas City, was stopped on suspicion of drug trafficking:

> Had [Officer] Hicks relied solely on Weaver's race as a basis for his suspicions, we would have a different case before us. As it is, however, facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that Hicks had knowledge * * * that young black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, [i.e., that Weaver came from a source city for drugs, had no identification, and appeared unusually nervous when encountered by police officers] was a factor in the decision to approach and ultimately detain Weaver. We wish it were otherwise, but we take the facts as they are presented to us, and not as we would like them to be.

Should the court in *Weaver* have taken the facts as they would have liked them to be, instead of how they were presented? Would it be worth it to hold a person's race to be non-suspicious as a matter of law, regardless of "reality"? Would that encourage the police to be more "race-blind" in their use of the *Terry* power?

What about considering a suspect's Middle Eastern appearance as relevant to terrorism? The court in United States v. Ramos, 629 F.3d 60 (1st Cir. 2010), a case in which the defendants were seized while parked in a van outside a Boston train station, held that officers could take into account that the occupants of the van appeared to be Middle Eastern. The stop was made shortly after bombing attacks on trains in Madrid. The court reasoned as follows:

> While in other situations there may be merit to the argument that a description of ethnic appearance is irrelevant and nothing more than impermissible profiling, the argument fails on the facts here. The MBTA attempted to learn from the lessons of Madrid and had so trained its employees. * * * [E]xplicit warnings * * * of future strikes by the same groups in the United States, meant it was material for the officers to consider, among other facts, the risk of terrorist attacks on train stations in major urban centers and that the persons they were investigating had a Middle Eastern

appearance. This is not a case about stereotyping or selective prosecution.

The *Ramos* court emphasized that its holding on ethnic-based stops could not be taken too far:

> We wish to be very clear. Just as it cannot be said that the appearance, even ethnic appearance, of a suspect is never relevant, it certainly cannot be said that it is always or even generally relevant. If the events in this case took place at a different time or place or under other circumstances, an attribution of "Middle Eastern" appearance may not necessarily be as relevant a fact.

The *Ramos* court also emphasized that the van occupants' Middle Eastern appearance was not the only basis for suspicion. Other factors included the fact that they were in a van, that they were in a commuter parking lot for an extended period of time without dropping anyone off or picking anyone up, that the van had tinted windows, and that it had a temporary, paper license plate from Texas. Would you have found reasonable suspicion on the basis of the facts independent of ethnicity?

Can an officer stop a Hispanic person on suspicion that he is undocumented? In Melendres v. Arpaio, 695 F.3d 990 (9th Cir.2012), the court found that Latino motorists were entitled to a preliminary injunction prohibiting Arizona police officers from detaining individuals based solely on reasonable suspicion that an individual was unlawfully present in the United States. The court noted that "unlike illegal reentry, mere unauthorized presence in the United States is not a crime." Because *Terry* is based on reasonable suspicion of crime, it followed that officers could not conduct a *Terry* stop solely on the basis of suspicion that a Hispanic person is an undocumented alien.

Use of Profiles

In several of the cases above it is apparent that the officers were comparing the activity of the suspect to a profile of a person engaged in certain criminal activity. Officers often use profiles to determine whether the conduct of citizens is sufficiently suspicious to justify a stop. A profile is a list of characteristics compiled by a law enforcement agency, which have been found through experience to be common characteristics of those engaged in a certain type of criminal activity. The most common example is a drug courier profile, but officers also employ other profiles for specific criminal activity, including terrorism. See United States v. Malone, 886 F.2d 1162 (9th Cir.1989) (officer stops the defendant on the basis of a gang member profile).

The use of drug courier profiles was discussed extensively in United States v. Berry, 670 F.2d 583 (5th Cir.1982) (en banc):

* * * We conclude that the profile is nothing more than an administrative tool of the police. The presence or absence of a particular characteristic on any particular profile is of *no* legal significance in the determination of reasonable suspicion.

Two consequences stem from this holding. First, a match between certain characteristics listed on the profile and characteristics exhibited by a defendant does not automatically establish reasonable suspicion. * * * Any checklist of suspicious characteristics cannot be mechanically applied by a court to determine whether a particular search or seizure meets the Supreme Court's standards. A profile does not focus on the particular circumstances at issue. Nor does such a profile indicate in every case that a specific individual who happens to match some of the profile's vague characteristics is involved in actions sufficiently suspicious as to justify a stop.

The second consequence of our holding flows from the first. Although a match between a defendant's characteristics and some of the characteristics on a drug courier profile does not automatically support a finding of reasonable suspicion, the fact that a characteristic of a defendant also happens to appear on the profile does not preclude its use as a justification providing reasonable suspicion for a stop. * * * Our holding is only that we will assign no characteristic greater or lesser weight merely because the characteristic happens to be present on, or absent from, the profile.

The Supreme Court has essentially adopted the *Berry* approach toward profiles. Thus, in United States v. Sokolow, 490 U.S. 1 (1989). DEA agents stopped Sokolow after they learned that he paid $2100 for two airplane tickets from a roll of $20 bills, he traveled under a name that did not match the name under which his telephone was listed, he traveled to Honolulu from Miami and stayed only 48 hours even though a round-trip flight takes 20 hours, he appeared nervous during the trip, and he checked no luggage. Chief Justice Rehnquist wrote for the majority, which found that the above facts, taken together, amounted to reasonable suspicion. The Chief Justice reviewed the facts known to the officers concerning Sokolow, and recognized that "any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel." But he stated that the relevant inquiry "is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts."

The Chief Justice rejected Sokolow's argument that the officer's use of a drug courier profile tainted the stop:

A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that

> conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.

The Chief Justice also rejected Sokolow's argument that agents were obligated to use the least intrusive means available to verify or dispel their suspicions—in this case by engaging in an encounter rather than a stop. The majority reasoned that any rule requiring a least intrusive alternative approach would hamper the police in making on-the-spot decisions.

Justice Marshall, joined by Justice Brennan, dissented and complained about the officers' use of the drug courier profile.

> Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's chameleon-like way of adapting to any particular set of observations.

Overbroad Profile Factors

It is clear that some profile factors relied on by police are far too broad to support reasonable suspicion in the courts. For example, in United States v. Beck, 140 F.3d 1129 (8th Cir.1998), an officer sought to justify the stop of a motorist in part because he was driving through Arkansas in a car from California, and California was a "source state" for drugs. The criteria for considering the entire state of California to be a profile factor was unexplained. Indeed, the officer testified that he considered not only California to be a drug source state, but also Arizona, Texas, New Mexico, Florida, and Louisiana. The court held that the profile factor was far too broad to be useful in a consideration of reasonable suspicion.

> While we do not suggest that geography is an entirely irrelevant factor, we do not think that the entire state of California, the most populous state in the union, can properly be deemed a source of illegal narcotics such that mere residency in that state constitutes a factor supporting reasonable suspicion. * * * We conclude, in the circumstances of this case, that no specific, articulable basis warranting a reasonable belief that Beck's Buick contained contraband can be gleaned from the mere fact that Beck's Buick was registered and licensed in California.

Note that the *Beck* court does not prevent the officer from using the California profile factor in *deciding* whether to stop a motorist. He simply cannot justify the stop by this factor. If the officer had reasonable

suspicion to stop the car on other grounds, the use of the California profile factor would not raise a Fourth Amendment issue.

Reasonable Suspicion and Flight from the Police

If a person runs upon seeing the police, is this enough to justify a stop of that person? This was a question presented in Illinois v. Wardlow, 528 U.S. 119 (2000). Wardlow fled upon seeing a caravan of police vehicles converge on an area of Chicago known for heavy narcotics trafficking. When Officers Nolan and Harvey caught up with him on the street, Nolan stopped him and conducted a protective pat-down search for weapons because in his experience there were usually weapons in the vicinity of narcotics transactions. Discovering a handgun, the officers arrested Wardlow. The Illinois appellate courts reversed Wardlow's conviction for a firearm violation, reasoning that his flight from the police in a high crime area did not constitute reasonable suspicion. The Supreme Court, in an opinion by Chief Justice Rehnquist for five Justices, found that the officers did have reasonable suspicion under the circumstances, and reinstated Wardlow's conviction.

The Chief Justice analyzed the relevance of Wardlow's flight in a high crime area in the following passage:

> An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a high crime area among the relevant contextual considerations in a Terry analysis. Adams v. Williams.
>
> In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police. * * * Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

> Such a holding is entirely consistent with our decision in Florida v. Royer, where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not going about one's business; in fact, it is just the opposite. * * * Respondent and amici also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. * * * *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. But in this case the officers found respondent in possession of a handgun, and arrested him for violation of an Illinois firearms statute.

Justice Stevens concurred in part and dissented in part in an opinion joined by Justices Souter, Ginsburg and Breyer. Justice Stevens stated that the defendant was pressing for a rule that flight from police officers would *never* equal reasonable suspicion, while the State was pressing for a rule that flight from police officers would *always* equal reasonable suspicion. He agreed with the majority that neither per se rule was appropriate, and that the relevance of flight in the reasonable suspicion inquiry depends on the circumstances. He dissented, however, from the Court's ruling that Wardlow's flight in a high crime area was sufficiently suspicious to justify a *Terry* stop under the circumstances. Justice Stevens emphasized why flight from the police might not be suspicious, particularly in minority communities and high crime neighborhoods:

> Among some citizens, particularly minorities and those residing in high crime areas, there is * * * the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither "aberrant" nor "abnormal." * * *

4. Limited Searches for Police Protection Under the *Terry* Doctrine

Terry and *Adams* indicate that an officer can frisk a suspect, and pull out objects found on the suspect, if there is reasonable suspicion to believe that the search is necessary to protect the officer or others from bodily harm during the course of an otherwise legal stop. See United States v. Preston, 685 F.3d 685 (8th Cir. 2012) ("Officers may conduct a protective pat-down search for weapons during a valid stop when they have objectively reasonable suspicion that a person with whom they are dealing might be armed and presently dangerous."). One obvious concern is that an officer may use the *Terry* frisk doctrine as a pretext to search for evidence of a crime. Thus, the officer may testify that he felt a fear of bodily harm, when in fact he was looking for evidence without having probable cause. Is there an easy way to distinguish *Terry* frisks from impermissible searches for evidence?

Frisk Cannot Be Used to Search for Evidence: Minnesota v. Dickerson

In Minnesota v. Dickerson, 508 U.S. 366 (1993), the Court reaffirmed the principle that *Terry* frisks are justified only for protective purposes and that a search for evidence is not permitted under *Terry*. The officer in *Dickerson*, suspecting drug activity, conducted a lawful stop and patdown, and felt a small, hard object in Dickerson's pocket. The officer determined that it was not a weapon, but nonetheless continued to squeeze and prod the object. This additional investigation led him to the conclusion that the object was crack cocaine. The officer then pulled the object out from Dickerson's pocket, and found that his conclusion was correct. Justice White, writing for the Court, declared that "the police officer in this case overstepped the bounds of the strictly circumscribed search for weapons allowed under *Terry*." He concluded as follows:

> Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, and that we have condemned in subsequent cases.

See also United States v. Miles, 247 F.3d 1009 (9th Cir. 2001) (officer exceeded scope of *Terry* frisk by shaking a small box found in the outer pocket of the suspect's clothing, where the box clearly could not have contained a weapon); United States v. Askew, 529 F.3d 1119 (D.C. Cir. 2008) (en banc) (unzipping a suspect's jacket, in order to facilitate of showup identification, was not justified by *Terry* because it was not a search for self-protection but rather was done to obtain information about

a crime; therefore the gun found inside the suspect's jacket was illegally obtained).

Suspicion Required to Support the Right to Frisk

Evaluate the following facts in light of *Terry* and *Adams*.

> The officer received a radio report of an anonymous 911 call in which the informant stated that he had seen a woman in a blue car with a white top parked in front of 123 West 112th Street, a high crime area in New York City. The woman had passed a handgun to a man seated in the car with her. Finding defendant in a car meeting the description at the specific location indicated by the informant, the officer ordered the defendant out of the car, frisked her, and took a pistol from the area of her waistband.

The New York Court of Appeals held that while the stop was permissible, the frisk was not. The court reasoned as follows:

> A frisk requires reliable knowledge of facts providing reasonable basis for suspecting that the individual to be subjected to that intrusion is armed and may be dangerous. Here, there was no such predicate either in the information received, which indicated that defendant had given a gun to the man but provided no basis for inferring that she had another or that it had been returned to her, or in what occurred during the officer's encounter with defendant. No inquiry was made of defendant so she neither refused to answer nor answered evasively; no suspicious bulge was perceived in her clothing; no furtive movements were made by her; her appearance and movements were not concealed by darkness.

People v. Russ, 61 N.Y.2d 693, 472 N.Y.S.2d 601 (1984). If you were a police officer, would you have found it superfluous to frisk Russ for a gun, after she had already passed a gun in a high crime area?

Most courts have given considerably more deference to police concerns about the risk of harm involved in making a stop. Consider United States v. Rideau, 969 F.2d 1572 (5th Cir.1992) (en banc). Two officers were on patrol in a high crime area of Beaumont, Texas, "where people often carried weapons and transacted drug deals on the street, and where public drunkenness was a recurrent problem." The officers saw a man standing in the road. They flashed a bright light at him. The man turned to step up to the curb, and he stumbled. Officer Ellison, suspecting that the man was drunk, got out of his car and approached. Ellison asked the man his name. The man appeared nervous, did not answer, and began to back away. Ellison "immediately closed the gap and reached out to pat the man's outer clothing." The first place he touched was the man's right front pants pocket, where he felt a gun. The officer put the man up

against the patrol car, removed the gun, and arrested him. The man, subsequently identified as Rideau, was convicted for felon firearm possession.

Judge Higginbotham, writing for the majority of the en banc court of appeals, held that the frisk was justified because Officer Ellison had reasonable cause to believe that Rideau posed a threat of harm:

> Rideau's specific moves took place after a detention, at night, in a high crime area where the carrying of weapons is common. * * * Stripped from their context, the backward steps offer no threat, but to a police officer in Ellison's situation, they become very significant in the matrix of the general facts. * * * Of course, that an individual is in a high crime neighborhood at night is not in and of itself enough to support an officer's decision to stop and frisk him. But when someone engages in suspicious activity in a high crime area, where weapons and violence abound, police officers must be particularly cautious in approaching and questioning him.

Judge Smith, together with four other judges of the en banc panel, dissented in *Rideau*. He argued that under the majority's permissive approach, Rideau could have been frisked no matter what he did when Officer Ellison approached: if he had moved forward, this would have been deemed threatening as well; if he had moved to the side, this would have been deemed nervousness or flight; if he had remained motionless, it would have been viewed as "abnormal behavior caused by drugs or alcohol." Judge Smith concluded as follows:

> Perhaps if Rideau had graduated from charm school and had been taught how to look "cool and collected" in the face of approaching uniformed officers, he could have managed to avoid the patdown. Otherwise, he was doomed to the intrusion that in fact occurred. * * *
>
> * * * Rideau was searched not because of anything he did but because of his *status*—a person in a "bad part of town" where, presumably, people do not belong late at night, on the street, unless they are "up to no good." By that measure, almost any person in the vicinity of Martin Luther King Boulevard and Bonham Street that night could have been stopped and frisked.

Arguably, the New York court in *Russ* gave too little credence to an officer's concern for his safety in making a stop explicitly on a weapons charge. Did the majority in *Rideau* give too much credence to an officer's concern for his safety where the stop had nothing to do with weapons and was at least purportedly an attempt to help Rideau, who appeared drunk?

Frisking Based on the Type of Crime for Which the Person Is Suspected

Note that reasonable suspicion to conduct a frisk will depend in part on the nature of the crime for which the citizen is suspected. Thus, if there is reasonable suspicion to believe that a person is going to commit a crime of violence with a weapon, there will automatically be reasonable suspicion to frisk that person. On the other hand, if the citizen is suspected of a financial crime, it is less likely that reasonable suspicion to frisk will be found. See Leveto v. Lapina, 258 F.3d 156 (3rd Cir. 2001) (frisk of person suspected of tax offense was illegal, as there was no reason to think that the person was armed and dangerous); United States v. McKoy, 428 F.3d 38 (1st Cir. 2005) (no reasonable suspicion for a pat-down, even though the defendant was in a high crime area, where the basis for the stop was a parking and license plate violation: "this is not a case where the police had reason to suspect the presence of firearms based on the type of crime suspected.").

Courts have expanded the assumption that certain crimes are weapons-related, beyond those crimes that by definition require a weapon (like armed robbery). Thus, in United States v. Snow, 656 F.3d 498 (7th Cir. 2011), officers frisked a person suspected of burglary, even though the person was completely cooperative during the stop and even though the stop occurred during the day in a low-crime area. The court stated that "[b]ecause the facts known to the officers supported a *Terry* stop to investigate whether he in fact had attempted a residential burglary, and because burglary is the type of offense that likely involves a weapon, Andrews' decision to order Snow out of the truck for purposes of a protective frisk was reasonable despite the absence of additional facts suggesting that Snow in particular might be armed." Snow argued that because he was being cooperative, the officers could have simply questioned him about whether he was carrying anything, rather than resorting to a frisk. But the court rejected that suggestion, stating that there was no requirement that officers must take a less onerous alternative in conducting a stop when they have reasonable suspicion that the suspect is armed and dangerous in light of the crime for which he is suspected.

Protective Searches Beyond the Suspect's Person: Michigan v. Long

The Court held in Michigan v. Long, 463 U.S. 1032 (1983), that the power to search under *Terry* can extend to protective examinations of areas beyond the person of the suspect. Long was stopped by officers who saw him driving erratically before he swerved into a ditch. When the officers stopped him, Long was out of his car and he appeared to be under

the influence of drugs or alcohol. Long failed to respond to initial requests that he produce a license and registration and then began to walk toward the passenger compartment of his car. An officer flashed a light into the car and saw a hunting knife. A protective search for weapons was conducted in the passenger compartment and marijuana was found and seized.

Justice O'Connor's opinion for the Court reasoned that *Terry* permits a limited examination of an area from which a person, who police reasonably believe is dangerous, might gain control of a weapon. While Long may not have been able to reach a weapon *during* the stop, Justice O'Connor explained that because a stop is only a temporary intrusion, the suspect "will be permitted to reenter his automobile, and he will then have access to any weapons inside." Thus the officers had a legitimate concern that Long might gain access to a weapon, and use it on the officers, *once he returned to his car after the stop was completed.* Accordingly, it was permissible under the circumstances for the officers to do a cursory inspection of areas in the car from which a weapon could be quickly obtained after the stop was over.[16] Thus while the doctrine is called "stop and frisk", *Long* permits a protective search beyond the suspect's person. After *Long* the more accurate description of *Terry* is "stop and protective search."

The New York Court of Appeals, in People v. Torres, 74 N.Y.2d 224, 544 N.Y.S.2d 796 (1989), rejected the reasoning in *Long* as a matter of state constitutional law. The *Torres* court declared:

> [I]t is unrealistic to assume, as the Supreme Court did in Michigan v. Long, that having been stopped and questioned without incident, a suspect who is about to be released and permitted to proceed on his way would, upon reentry into his vehicle, reach for a concealed weapon and threaten the departing police officer's safety. Certainly, such a far-fetched scenario is an insufficient basis upon which to predicate the substantial intrusion that occurred here.

Is it "far-fetched" to believe that a suspect could present a risk of harm to the officer in a post-stop situation? Would you think it far-fetched if you were a police officer?

Applying Michigan v. Long

Is it reasonable to assume that those suspected of drug dealing *always* present a risk of harm to the officer when stopped—justifying a protective search of areas that the suspect could reach after a stop? In United States v. Brown, 913 F.2d 570 (8th Cir.1990), the court relied on

[16] Justice Blackmun concurred in part and in the judgment. Justice Brennan, joined by Justice Marshall, and Justice Stevens filed dissenting opinions.

Long to uphold a search of a locked glove compartment, when the officers had reasonable suspicion of drug activity. The court concluded that "since weapons and violence are frequently associated with drug transactions, the officers reasonably believed that the individuals with whom they were dealing were armed and dangerous." Is there now a per se rule that a search of a passenger compartment for weapons can be conducted upon reasonable suspicion to believe the driver is a drug dealer? See also United States v. Sakyi, 160 F.3d 164 (4th Cir.1998) (finding it permissible to frisk all occupants of a car after a cigar box of marijuana was found in the car; court reasons that "guns often accompany drugs").

For interesting questions about the scope of a search under *Long*, see United States v. McGregor, 650 F.3d 813 (1st Cir. 2011). Officers had reasonable suspicion that gang members in a car were going to commit an act of reprisal after one of their members was shot. They pulled the car over and frisked the suspects and found nothing. Nor was there any weapon laying about in the car. But officer Feeney saw a magnet that he had been trained to suspect as part of a weapons "hide"—which is a series of programmed signals that will open up a secret compartment where a weapon was hidden. The officer, using his expertise, figured out how the "hide" worked, described by the court as follows:

> Put the key in the ignition, fasten a seatbelt, switch on the cruise control, turn on the rear-window defroster, tug on the emergency brake, move the ceiling-light switch to the middle position, move a magnet around a spot on the dashboard (which would trigger a magnetic switch behind the dashboard), and press the sunroof button—doing this activates a series of switches, which starts up a motor under the center console, which opens up the hide so one can reach right through the bottom of the console and into a secret compartment. Feeney did the steps and found [a] round of ammo tucked inside the hide.

The court found that Officer Feeney's inspection of the car, and finding of the "hide" was permissible under *Long* because "McGregor and his buddies could have grabbed the weapon from the console hide in a flash had they gotten back into the car." Feeney had testified that the process took about 20 seconds. Is that within the post-stop parameters of *Long*?

The *Long* rationale is not limited to protective searches of cars. Thus, in United States v. Johnson, 932 F.2d 1068 (5th Cir.1991), the court upheld a cursory inspection of a pair of overalls located a few feet away from a suspect who appeared to be attempting to burglarize a house. The court found that merely separating the suspect from his effects during the stop would not provide sufficient protection to the officers, because if the

stop was terminated without an arrest, the officers would have to return the property to the suspect.

Protective Searches of Persons Other Than the Suspect

In the course of detaining suspects either by a stop or an arrest, officers are often confronted with whether they can frisk persons other than the suspect. In Ybarra v. Illinois, 444 U.S. 85 (1979), the Court refused to uphold the frisk of a patron of a bar who happened to be present when the police arrived to conduct a search of the bar pursuant to a valid search warrant. The Court noted that the patron's mere presence in the bar was not enough to provide a reasonable belief that he posed a risk of harm to the officers, and that no specific facts were shown to indicate that Ybarra was armed and dangerous.

How much information does an officer need, other than mere presence, to support a frisk of a person in the vicinity of an arrest? See United States v. Reid, 997 F.2d 1576 (D.C.Cir.1993) (defendant could be frisked after officers saw him exit from a suspected crack house that they were about to search: "Common sense suggests that there is a much greater likelihood that a person found in a small private residence containing drugs will be involved in the drug activity occurring there than an individual who happens to be in a public tavern where the bartender is suspected of possessing drugs.").

Inspecting Objects During the Course of a Protective Frisk

Assume that an officer has properly stopped a person and has reasonable suspicion to believe that the person presents a safety risk. The officer then conducts a pat-down and feels an object inside the suspect's coat. Can the officer pull the object out and inspect it? Under *Dickerson*, the answer is that the officer can inspect the object only if it is reasonably likely to be a weapon—*Terry* does not justify a search for evidence. But sometimes there is a dispute about whether an object felt by the officer during a pat-down could reasonably be a weapon.

A case in point is United States v. Swann, 149 F.3d 271 (4th Cir.1998). Officers responded to a report of a theft of a wallet in an office building. Witness reports indicated that the thief had been detained by employees, but broke free and tossed the wallet in the direction of three black males standing near the elevator. One of the men retrieved the wallet and all three men fled the scene. An officer spotted two black males in the basement parking garage. According to the officer, they appeared "really nervous and uneasy and kind of edgy; didn't want to hang around." When the officer told them that he needed to speak with them, one of them tried to circle around him to get behind his back. The officer felt threatened by this action and called for back-up. When another

officer arrived, the men were patted down. The officer patting down Swann found a hard object in Swann's left sock. The officer pulled it out and it turned out to be five credit cards belonging to the victim of the theft.

Swann moved to suppress the credit cards on the ground that *Terry* did not permit the officer to inspect the object found in his sock. But the court disagreed, concluding that a reasonable officer "could justifiably have believed that the item was a weapon." The court elaborated:

> [T]he object in Swann's sock was approximately the same size and shape as a box cutter with a sharp blade, which is often used as a weapon.
>
> The location of the object in the sock, as well as its hard character and its shape, made it suspicious. A similarly shaped hard object in Swann's pocket surely would have raised no alarms, as there could be innumerable innocent explanations for it. And a hard rectangular object in one's sock might not be suspicious on a jogger or someone similarly dressed. But these men were both fully dressed, and Swann's pants had pockets that could have contained an item of that size and shape.
>
> Given all the circumstances, it was objectively reasonable for the officer to believe that this particular hard object could likely be a weapon and to seize the item to satisfy himself that it was not something that could be used to inflict harm. Officers making *Terry* stops must make quick decisions as to how to protect themselves and others from possible danger. Were we to disapprove of Officer Martin's actions, we would require an officer to allow a suspicious object to remain within easy reach of demonstrably nervous and potentially aggressive subjects. Our respect for the privacy rights of citizens does not require such an increase in the danger that police officers must face.

Why is it relevant that Swann had pockets and yet decided to use his sock as a storage space? Does that fact indicate that he was trying to hide a weapon? Or rather that he was trying to hide evidence of a crime? Would the result in *Swann* change if the object in Swann's sock was soft to the touch?

Protective Sweeps: Maryland v. Buie

In Maryland v. Buie, 494 U.S. 325 (1990), the Court considered the legality of a "protective sweep," which it defined as a "quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others." Officers had probable cause to believe that Buie and an associate committed an armed robbery. They arrested

Buie at his home, and conducted a protective sweep of the premises. During the sweep, the officers discovered clothing that tied Buie to the robbery. At the time of the sweep, the officers had reasonable suspicion, but not probable cause, to believe that a dangerous person such as Buie's associate might be hiding in the premises. Buie argued that a protective sweep could not be conducted in the absence of probable cause to believe that there were individuals on the premises who would harm the officers or others. But the Court, by a 7–2 vote, rejected Buie's argument. Justice White, writing for the majority, relied heavily on *Terry* and *Long* to find that a protective sweep could be justified by an officer's reasonable suspicion "that the area swept harbored an individual posing danger to the officer or others." According to Justice White, the reasonable suspicion standard was an appropriate balance between the arrestee's remaining privacy interest in the home and the officer's interest in safety. Justice White emphasized that a protective sweep is a relatively limited intrusion because it "may extend only to a cursory inspection of those spaces where a person may be found," and the sweep can last "no longer than is necessary to dispel the reasonable suspicion of danger." Justice Stevens concurred to emphasize that a protective sweep could only be conducted for safety purposes, not to prevent destruction of evidence.[17] Justice Brennan, joined by Justice Marshall, dissented and noted his continuing criticism "of the emerging tendency on the part of the Court to convert the *Terry* decision from a narrow exception into one that swallows the general rule that searches are 'reasonable' only if based upon probable cause."

Compare *Buie* with United States v. Colbert, 76 F.3d 773 (6th Cir.1996), where the court found that a protective sweep after an arrest was not permitted where there was no indication that anyone other than the arrestee was on the premises: "The facts upon which officers may justify a *Buie* protective sweep are those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual."

Protective Sweep Other Than During an Arrest

Courts have held that the self-protective principles of *Buie* and *Terry* can permit a protective sweep *even when no arrest is involved.* That is, if the officers are acting in the course of legal activity, and they have reasonable suspicion to believe that a person in the area can obtain access to a weapon and use it on the officers or others, the officers are permitted to conduct a protective sweep for weapons. See, e.g., United States v. Gould, 364 F.3d 578 (5th Cir. 2004) (en banc), in which officers were given

[17] See United States v. Hogan, 38 F.3d 1148 (10th Cir.1994) ("[I]t appears that once inside Hogan's property, officers went on a fishing expedition for evidence linking Hogan to the murder. This greatly exceeded the permissible scope of a protective sweep.").

consent to search a particular room in a home. They were concerned, under the circumstances, that they might be walking into a trap, and so conducted a cursory inspection of the entire house. The court found the inspection to be a permissible protective sweep.

> We decline to adopt any across-the-board rule that a protective sweep can never be valid where the initial entry to the home is pursuant to consent, even where the consent does not of itself legally authorize the entry into the area swept. Any such rule either would require officers to forego any and all consent entries or would prevent them, once having so entered, from taking reasonable, minimally intrusive, means for self-protection when reasonable suspicion of danger of ambush arises. * * * [W]e hold that the Fourth Amendment imposes no such Hobson's choice.

5. Brief and Limited Detentions: The Line Between "Stop" and "Arrest"

Terry allows a stop upon a standard of proof less than probable cause, in part because a stop is less intrusive than an arrest. But it is often difficult to determine when an intrusion crosses over from a stop to an arrest requiring probable cause. What is it about an arrest that makes it different from a stop? Is it that the officers force the suspect to move to a detention area? Is it that the officers draw their guns or use handcuffs? Is it the length of the detention? This section considers the factors found relevant by the courts.

a. Forced Movement of the Suspect to a Custodial Area

In Florida v. Royer, supra, Royer was taken from the public area of an airport into a small room, where the officers sought and obtained Royer's consent to a search of his luggage. The plurality in *Royer* held that the consent was invalid because it was obtained as the result of an arrest without probable cause. Justice White, writing for the plurality, explained as follows:

> [A]t the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity.
>
> By the time Royer was informed that the officers wished to examine his luggage, he had identified himself when approached by the officers and had attempted to explain the discrepancy between the name shown on his identification and the name under which he had purchased his ticket and identified his luggage. The officers were not satisfied, for they informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs. They

requested him to accompany them to the police room. Royer went with them. He found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airlines. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. * * * As a practical matter, Royer was under arrest. * * *

Justice White noted that some forced movements of a suspect might be justifiable during a *Terry* stop; he emphasized, however, that probable cause is required if the officer forces the suspect to move in order to further the investigation or to place more pressure on the suspect:

[T]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area. There is no indication in this case that such reasons prompted the officers to transfer the site of the encounter from the concourse to the interrogation room. It appears, rather, that the primary interest of the officers was not in having an extended conversation with Royer but in the contents of his luggage, a matter which the officers did not pursue orally with Royer until after the encounter was relocated to the police room.

Justice Blackmun dissented in *Royer* and argued that Royer was only detained for 15 minutes, the officers were polite, and the intrusion was minimal. He concluded that Royer was only stopped, not arrested, when he gave consent to the luggage search.

Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, also dissented, arguing as follows:

Would it have been more "reasonable" to interrogate Royer about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved, in the busy main concourse of the Miami Airport, rather than to find a room off the concourse where the confrontation would surely be less embarrassing to Royer? If the room had been large and spacious, rather than small, if it had possessed three chairs rather than two, would the officers' conduct have been made reasonable by these facts?

See also United States v. Ricardo D., 912 F.2d 337 (9th Cir.1990) (taking person by the arm and placing him in squad car for questioning held impermissible under *Terry*, where there was no showing that the police procedure was "necessary for safety or security reasons").

b. Forced Movement for Identification Purposes

In *Royer*, the Court held that an arrest occurred when Royer was forcibly moved to a custodial atmosphere, for purposes of extracting consent to search. The Court noted, however, that an officer can, within the confines of a *Terry* stop, force the suspect to move for purposes of safety and security. Are there any other legitimate reasons to force a suspect to move without probable cause to arrest? Many courts have found that if reasonable suspicion exists, it is permissible to transport the suspect a short distance for purposes of identification by witnesses. In People v. Hicks, 68 N.Y.2d 234, 508 N.Y.S.2d 163 (1986), the New York Court of Appeals found that coercive movement to the crime scene for purposes of identification was within the confines of a permissible *Terry* stop. It explained as follows:

> There were witnesses within a quarter mile of the place of inquiry—approximately one minute away by car—who had just seen the perpetrators and would either identify defendant (in which event he would be arrested) or not identify him (in which event he would be released). A speedy on-the-scene viewing thus was of value both to law enforcement authorities and to defendant, and was appropriate here. The transportation did not unduly prolong the detention. Defendant might, alternatively, have been momentarily detained where he had been stopped and the witnesses brought there, but such a procedure would have entailed first securing defendant and his companion and then arranging transportation for the witnesses, possibly even a more time-consuming process than that chosen. At all events, given the time and distance involved this is a difference without constitutional significance.

See also United States v. Benson, 686 F.3d 498 (8th Cir. 2012) ("The exigencies were such that the officers could not dispel their suspicions that had prompted the *Terry* stop until they transported [the suspect] to the bank for the show-up identification.").

c. Investigative Techniques That Are Permissible Within the Confines of a Terry Stop

The purpose of a *Terry* stop is to permit an officer to investigate the facts on which reasonable suspicion is based, in order to determine whether the suspect is involved in criminal activity. It therefore follows that some preliminary investigation, designed to clear up or develop reasonable suspicion, is permissible within the confines of a stop.

However, probable cause will be required if the officers are using the stop for some purpose beyond that which justified the stop.

The most common investigative techniques permitted pursuant to a *Terry* stop are 1) preliminary investigation of the suspect's identity, and 2) questioning concerning the suspicious circumstances giving rise to the stop. See United States v. Guzman, 864 F.2d 1512 (10th Cir.1988) ("An officer conducting a routine traffic stop may request a driver's license and vehicle identification."). The officer may also verify the information obtained from the suspect by communicating with others, or by conducting preliminary investigations such as a vehicle registration check, license check, or a computer search for outstanding warrants. See United States v. Mendez, 118 F.3d 1426 (10th Cir.1997) ("An officer conducting a routine traffic stop may run computer checks on the driver's license, the vehicle registration papers, and on whether the driver has any outstanding warrants or the vehicle has been reported stolen").

Courts have also permitted officers to detain suspects on reasonable suspicion in order to conduct a canine sniff or to conduct a preliminary investigation of other suspicious circumstances. See United States v. Bloomfield, 40 F.3d 910 (8th Cir.1994) (where officers had reasonable suspicion that drugs were in a car, it was proper to detain the suspects while a dog was brought to the scene to sniff the vehicle, because the investigation was "reasonably related in scope to the circumstances that justified the interference in the first place").

Criminalizing the Refusal to Provide Identification During a Terry Stop: Hiibel v. Sixth Judicial District Court of Nevada

In Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177 (2004), Hiibel was stopped on reasonable suspicion of being involved in a domestic assault. He refused to provide identification. He did not contest the stop, but contended that the state had no power to criminalize his refusal to provide identification during the stop. The Court, in an opinion by Justice Kennedy, upheld the conviction and stressed that an officer has a right to demand identification as part on an investigation during a *Terry* stop. Justice Kennedy explained as follows:

> Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. * * *

> The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration, or its location.

Justice Breyer, joined by Justices Souter and Ginsburg, dissented in *Hiibel,* arguing that while the officer can legitimately demand identification during a *Terry* stop, it is unreasonable to criminalize the suspect's refusal.

d. Overly Intrusive Investigation Techniques

Some investigative techniques are themselves so intrusive or extensive as to require probable cause. The most obvious example is a search for evidence, which, as stated above, goes beyond the scope of a *Terry* stop. Also, some courts have held that probable cause is required before a suspect can be subjected to a series of demanding physical tests to determine whether he is intoxicated. See People v. Carlson, 677 P.2d 310 (Colo.1984) (holding that the full battery of tests employed was so intrusive as to constitute an arrest). Roadside sobriety tests that are less demanding may be permissible under *Terry*, however. See State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984) (limited field sobriety test permissible on reasonable suspicion).

e. Investigation of Matters Other Than the Reasonable Suspicion That Supported the Stop: Stop After a Stop

Many courts have held that a *Terry* stop must end when the reason for the stop has come to an end. If the reasonable suspicion supporting the stop has been cleared up (e.g., an identification checks out) or the person has been processed (e.g., the traffic ticket has been issued), then the stop is at an end and the suspect must be released. So for example, an officer who stops someone for a traffic violation cannot continue the stop in order to investigate for drug or gun crimes, in the absence of reasonable suspicion to support such an independent inquiry. A *Terry* stop cannot be used as an excuse for a fishing expedition. United States v. Santiago, 310 F.3d 336 (5th Cir. 2002) (detention after a valid traffic stop was impermissible: "Once a computer check is completed and the officer either issues a citation or determines that no citation should be issued, the detention should end and the driver should be free to leave. In order to continue a detention after such a point, the officer must have a reasonable suspicion supported by articulable facts that a crime has been or is being committed.").

See also United States v. Jenson, 462 F.3d 399 (5th Cir. 2006) (when a traffic stop was completed, an officer was not permitted to ask the defendant where he worked, and then rely on an implausible answer to justify continuing the stop).

Reasonable Suspicion as to Another Crime

Note that the rulings in the above cases are based on the fact that the officers had no reasonable suspicion to investigate any matter other than the one for which the suspect was stopped. If, however, in the course of a stop to investigate crime "A", the officer obtains reasonable suspicion to investigate crime "B", then the detention can be extended to investigate crime "B" even though the initial justification for the stop no longer exists. There will then be a permissible "stop after a stop." Thus, in United States v. Erwin, 155 F.3d 818 (6th Cir.1998) (en banc), officers pulled Ervin over because they had reasonable suspicion to believe that he was driving while intoxicated. While going through the drill of the traffic stop, it became apparent that Ervin was not intoxicated. But this investigation also uncovered evidence indicating that Ervin was a drug dealer. The court analyzed the situation as follows:

> After the deputies satisfied themselves that Erwin was not drunk or otherwise impaired, they were justified in continuing to detain Erwin if, by then, they had reasonable and articulable suspicion that Erwin was engaged in other criminal activity. We think, as the district court did, that the deputies were reasonably entitled to conclude that Erwin may have been a drug dealer, based on the facts that he (1) was nervous, (2) seemed to try to avoid being questioned by attempting to leave, (3) seemed to have used or was preparing to use a pay telephone to make a call when a cellular telephone was available, (4) seemed to have drug paraphernalia in his vehicle, (5) had a large amount of cash, (6) had no registration or proof of insurance, (7) had a criminal record of drug violations, and (8) had an out-of-place backseat cushion. Although many of these facts are consistent with innocence, all that is required is that the deputies' suspicion be "reasonable" and "articulable," as determined by the totality of the circumstances. We find this standard was met.

See also United States v. Estrada, 459 F.3d 627 (5th Cir. 2006) (continued detention of occupants of a vehicle stopped for a traffic violation was permissible; while waiting for the license check to clear, the officer noticed fresh marks and scratches around the fuel tank, as well as other information raising a reasonable suspicion to believe that the gas tank had a hidden compartment).

Consensual Encounters After a Stop Has Ended: Ohio v. Robinette

As discussed above, a suspect cannot be detained for investigation of matters different from those which support a stop, in the absence of reasonable suspicion as to those other matters. But what if the suspect is simply *asked* about another crime while the initial stop is ending? Can there be a permissible *encounter* after a stop? The Supreme Court addressed this question in Ohio v. Robinette, 519 U.S. 33 (1996). Robinette was legally stopped for speeding and given a verbal warning. When the officer returned Robinette's license, he said: "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 "no" to these questions, after which the officer asked if he could search the car. Robinette consented. The officer found drugs and arrested Robinette.

Robinette argued that before valid consent could be obtained, the officer had to tell him that he was free to leave. Otherwise, the detention would still be continuing, and would amount to an illegal arrest as it was a continuing investigation on a matter other than that which gave rise to the initial stop. But Chief Justice Rehnquist, in an opinion for seven members of the Court, disagreed. The Court held that Robinette voluntarily consented to the search, and rejected any bright-line requirement that the suspect be told that the stop is over and he is free to go. The test for whether the continuing discussion was a consensual encounter was based on a totality of the circumstances and not on any one factor—therefore it was not dispositive that Robinette was never specifically told that the stop was over and he was free to go. Justice Ginsburg concurred in the judgment. Justice Stevens dissented.

f. Interrogations and Fingerprinting

Interrogation Beyond the Confines of Terry

In Dunaway v. New York, 442 U.S. 200 (1979), the Court distinguished *Terry* stops from cases in which the police detain a suspect for sustained interrogation. The Court emphasized that *Terry* was a narrow decision and concluded that police cannot detain a suspect and transport him to the stationhouse for questioning without probable cause, even if the detention is not deemed to be an arrest under state law (and there would be no arrest record or formal booking procedure). Justice Brennan, writing for the Court, concluded that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." He noted that "any

'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are reasonable only if based upon probable cause."[18]

Fingerprinting

In Davis v. Mississippi, 394 U.S. 721 (1969), the Court held that a round-up of twenty-five African-American youths for questioning and fingerprinting—in an effort to match prints found around a window entered by a rape suspect—violated the Fourth Amendment. Justice Brennan wrote for the Court that "[i]t is arguable * * * that because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." He explained that fingerprinting is less serious an intrusion on liberty than other searches, and that it can be done at a convenient time and does not offer opportunities for harassment. In this case, however, the fingerprinting did not comply with the Fourth Amendment because, among other things, "petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted * * * but also subjected to interrogation." And officers did not have probable cause for the fingerprinting dragnet.

Isn't fingerprinting simply a means of identification, and isn't investigation of the suspect's identity permitted in a *Terry* stop? If there is reasonable suspicion but not probable cause, and the officer who makes a stop knows that there were fingerprints found at the scene of a crime, is it impermissible for the officer to take fingerprints and delay the suspect long enough to obtain a match?

Justice White addressed some of these questions as he wrote for the Court in Hayes v. Florida, 470 U.S. 811 (1985). Police officers who were investigating a series of rapes had reasonable suspicion but not probable cause to believe that Hayes was the perpetrator. The officers took Hayes to the stationhouse, without his consent, to be fingerprinted. Justice White concluded that this procedure amounted to an arrest. He indicated that the Court adhered to the view that when police forcibly remove a person to the stationhouse, they are making a seizure that must be considered an arrest, requiring probable cause. Justice White added, however, that the Court's reasoning did not imply "that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." He relied on *Davis* and noted that fingerprinting in itself is a relatively minimal intrusion and a

[18] Justice White wrote a short opinion concurring in the judgment. Justice Stevens also wrote a brief concurring opinion. Justice Rehnquist, joined by Chief Justice Burger, dissented.

means of identification not unlike other methods of identification permitted under *Terry*.[19]

Would you permit fingerprinting as part of a *Terry* stop? Would you permit the police to photograph persons who are stopped? What about taking DNA samples of persons who are stopped?

g. Time Limits on Terry Stops

The Supreme Court rejected an absolute time limit for *Terry* stops in United States v. Sharpe, 470 U.S. 675 (1985). The facts are described in the next two paragraphs.

> A Drug Enforcement agent was on patrol in an unmarked car on a coastal road in North Carolina at approximately 6:30 a.m. when he saw a blue pickup truck with an attached camper "traveling in tandem with a blue Pontiac Bonneville." The agent saw that the truck was riding low, the camper did not bounce or sway appreciably around turns, and that a quilted material covered the rear and side windows of the camper. The agent followed the vehicles for 20 miles into South Carolina where he decided to make an "investigative stop." He radioed the highway patrol for help and a trooper in a marked patrol car responded to the call. Almost immediately after the trooper caught up with the vehicles, the Pontiac and the pickup turned off the highway onto a campground road. The agent and trooper followed the two vehicles as they sped along the road at double the legal speed until they returned to the main road. The trooper pulled alongside the Pontiac, which was in the lead, turned on his flashing light and motioned for the driver to pull over. As the Pontiac moved to the side, the pickup truck cut between it and the trooper's car, nearly hitting the latter. The trooper pursued the truck while the agent approached the Pontiac and requested identification.
>
> The agent examined the driver's license. After unsuccessfully attempting to radio the trooper, he radioed the local police for assistance. Two local officers arrived and the agent asked them to "maintain the situation" while he went to find the trooper. The trooper had stopped the pickup, removed the driver from the truck, examined his license and a bill of sale for the truck, and patted him down. When the trooper told the driver that he would be held until a DEA agent arrived, the driver became nervous, stated that he wanted to leave, and asked for the return of the driver's license. Approximately 15 minutes after the truck was stopped, the DEA agent arrived and learned that the name on the registration was the

[19] Justice Brennan, joined by Justice Marshall, concurred in the judgment. He objected to "the Court's strained effort to reach the question" of "[t]he validity of on-site fingerprinting." Justice Blackmun concurred in the judgment without opinion. Justice Powell did not participate in the case.

same as the name on the driver's license of the Pontiac's driver. The driver of the pickup denied two requests for permission to search the truck before the agent examined the truck and stated that he could smell marijuana. Without asking again for permission, he removed the keys from the ignition, opened the rear of the camper, and observed a large number of burlap-wrapped bales resembling marijuana. The agent arrested the driver and returned to the Pontiac to arrest its occupants. The total time between his initial stop of the Pontiac and the arrests of its occupants was between 30 and 40 minutes.

The defendants in *Sharpe* argued that the evidence was illegally obtained, because the officers had only reasonable suspicion and not probable cause and by the time of the search of the camper, the defendants had been detained beyond the time limit of a *Terry* stop.

Chief Justice Burger wrote for the Court and held that the detention did not exceed the time limits of a permissible *Terry* stop; therefore the search of the camper was permissible because by that time the officer had smelled the marijuana. The Chief Justice noted the "difficult linedrawing problems in distinguishing an investigative stop from a de facto arrest". He recognized that "if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." Defendants suggested a bright-line time limit on *Terry* stops of 20 minutes. But the Court rejected a "hard-and-fast time limit" and concluded that it was "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." The officers satisfied that test, because there was no delay that was "unnecessary to the legitimate investigation of the law enforcement officers"; in part this was because the suspects contributed to the delay through their own actions, by refusing to pull over.

Justice Marshall concurred in the judgment because the evasive actions of the suspects turned a brief encounter with the officers into an extended one. He emphasized, however, that *Terry* stops must be brief "no matter what the needs of law enforcement in the particular case."

Justice Brennan dissented. He objected to treating the brevity limitation upon a stop as an "accordion-like concept that may be expanded outward depending on the law enforcement purposes to be served by the stop." He criticized the officers' handling of the investigation and found that the stop was unduly and unnecessarily lengthy. Justice Stevens dissented without reaching the merits.

QUESTIONS AFTER SHARPE

After *Sharpe* what kind of conduct, if any, will be considered impermissible delay, as opposed to diligent investigation? See United States v. Davies, 768 F.2d 893 (7th Cir.1985) (reasonable to detain suspects for an additional thirty minutes to await advice from superiors, where detaining officers were inexperienced); United States v. Bloomfield, 40 F.3d 910 (8th Cir.1994) (en banc) ("The one-hour period between the time Roberts pulled Bloomfield over and the time Roberts arrested Bloomfield was not an unreasonable period to wait for a drug dog to verify Roberts' suspicion."); Embody v. Ward, 695 F.3d 577 (6th Cir. 2012) (after Embody was found with a loaded gun in a state park, a two-and-a-half hour detention was not unreasonable under *Terry;* Embody "points to no lack of diligence by [the officer] in trying to confirm (or allay) his suspicions. The officers took the time they needed to determine whether the AK-47 was a handgun, whether Embody had a permit for it, whether he had illegally modified it and whether he posed any other safety threats. A good part of the detention, moreover, came at the beck and call of Embody, who asked to speak to the police supervisor, even after being told it would delay his release.").

h. Show of Force During a Terry Stop

A traditional arrest is sometimes accompanied by the officer's use of handcuffs and drawn gun. Can the officer use such coercive tactics within the confines of a *Terry* stop? Courts have routinely relied on *Terry* and *Adams* to uphold the use of handcuffs and guns where there is reasonable suspicion to believe that they are necessary to protect the officer from harm during the course of a stop. See People v. Allen, 73 N.Y.2d 378, 540 N.Y.S.2d 971 (1989) (officers handcuffed suspect who matched the description of an armed bank robber, after chasing him down a dark alley in a high crime area); United States v. Merkley, 988 F.2d 1062 (10th Cir.1993) ("because safety may require the police to freeze temporarily a potentially dangerous situation, both the display of firearms and the use of handcuffs may be part of a reasonable *Terry* stop"; use of such tactics was found permissible in this case where the defendant was suspected of threatening to kill someone).

In United States v. Alexander, 907 F.2d 269 (2d Cir.1990), the court held that officers acted properly when they unholstered their guns to detain two men suspected of purchasing drugs. The two men were in a Jaguar at 6:00 p.m., parked in an area known for drug activity. The court emphasized the "dangerous nature of the drug trade and the genuine need of law enforcement agents to protect themselves from the deadly threat it may pose." Has the court established a per se rule for those who are reasonably suspected of drug activity? Compare United States v. Novak, 870 F.2d 1345 (7th Cir.1989), where nine law enforcement officers working in an airport stopped two suspected drug couriers. One officer

drew her gun and pointed it directly at one suspect's head at close range. The court found that an arrest had occurred. The action was clearly excessive given the fact that the suspects had just deplaned and could not have been carrying weapons.

6. Detention of Property Under *Terry*

Terry concerned seizures of the person, but its principles have been applied to seizures of property as well. The Court in United States v. Van Leeuwen, 397 U.S. 249 (1970), held that some detentions of property could occur upon reasonable suspicion. Officers, acting upon reasonable suspicion, detained a mailed package for more than a day, while an investigation was made for purposes of developing probable cause and obtaining a warrant. A unanimous Court recognized that detention of mail could at some point become an unreasonable seizure, but found that in the instant case the investigation was conducted promptly and diligently. The Court concluded that "[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route." The Court emphasized that the privacy interest in the packages was "not disturbed or invaded until the approval of the magistrate was obtained." See also United States v. Ramirez, 342 F.3d 1210 (10th Cir. 2003) (officers were permitted, on reasonable suspicion, to remove a package from the "mail stream" for 28 hours in order to conduct a canine sniff and investigate other leads). Compare United States v. Dass, 849 F.2d 414 (9th Cir.1988) (reasonable suspicion does not justify detention of mail for 7–23 days, where the delay could have been reduced to 32 hours if officers had acted diligently); United States v. Aldaz, 921 F.2d 227 (9th Cir.1990) (three-day detention of mail permissible upon reasonable suspicion, where drug-sniffing dogs were 700 air miles away, and other delays were caused by remoteness of post office).

The Court in *Van Leeuwen* upheld a one-day detention without probable cause, while an investigation was conducted. Recall the facts of *Sharpe*. Do you think the Court would have allowed the suspects to be detained without probable cause for more than a day, while a diligent investigation was being conducted?[20] If not, what is the difference between the seizure in *Sharpe* and that in *Van Leeuwen*? Could it be argued that the detention in *Van Leeuwen* was no seizure at all, because a person to whom mail is sent has no legitimate expectation of receiving it on a particular day? See United States v. Va Lerie, 424 F.3d 694 (8th Cir.2005) (en banc) (no seizure where officers removed checked luggage from the luggage compartment of a bus and transported it into the bus

[20] See United States v. $191,910.00 in Currency, 16 F.3d 1051, 1060 n. 16 (9th Cir.1994) ("[I]f a police officer had sufficient reasonable suspicion to detain a person, he could not hold that person for 24 hours before obtaining probable cause, even if the government was working as quickly as it could to gather evidence establishing probable cause.").

terminal in order to obtain consent to search; officer's removal of the luggage did not delay the passenger's travel or impact his freedom of movement); United States v. Terriques, 319 F.3d 1051 (8th Cir. 2003) (handling and observation of package by mail clerk was not a seizure as it did not delay the time of delivery).

Unreasonably Lengthy Detention of Property: United States v. Place

The Court in United States v. Place, 462 U.S. 696 (1983), noted that it is often necessary to seize property upon reasonable suspicion, while an investigation of criminal activity continues. The Court recognized, however, that if a person is traveling with his property, then a seizure of that property "intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." It concluded that "the limitations applicable to investigative detentions of the person should define the permissible scope of the person's luggage on less than probable cause."

On the facts, the Court held that the officers detained Place's luggage for such a long period that probable cause was required to support the detention; because the officers had only reasonable suspicion, the detention was illegal. Police officers seized Place's luggage as he arrived at LaGuardia Airport on a flight from Miami. 90 minutes later, they subjected the luggage to a canine sniff. Justice O'Connor, writing for the Court, stated that the 90 minute detention was unreasonable in the absence of probable cause, because the delay was caused by the failure to transport the drug detecting dog from one New York metropolitan airport to another. She reasoned that the dog could have been transported while Place was in the air en route to New York, since the officers had reasonable suspicion during that time. She concluded that the officers had not diligently pursued the investigation, and that "we have never approved a seizure of the person for the prolonged 90-minute period involved here." Finally, the Court noted that the Fourth Amendment violation was "exacerbated by the failure of the agents to inform the respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion." Under these circumstances, the detention of Place's luggage was tantamount to a detention of Place himself.

Justice Brennan, joined by Justice Marshall, concurred in the result. He argued that the *Terry* balancing approach "should not be conducted except in the most limited circumstances." Justice Blackmun also concurred in the result, similarly expressing concern "with what appears to me to be an emerging tendency on the part of the Court to convert the

Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."

QUESTIONS AFTER PLACE

Does *Place* mean that a 90-minute detention of luggage in transit is *always* unreasonable in the absence of probable cause? The Court in United States v. $191,910.00 in Currency, 16 F.3d 1051 (9th Cir.1994) held that a two-hour detention of a traveler's luggage, pending a dog sniff, violated the Fourth Amendment solely because of its length. Even if "an unforeseeable canine virus" had suddenly afflicted all the available drug-sniffing dogs, that court would have invalidated the two-hour seizure of the person's luggage. Do you agree, or should the officer's diligence in pursuing the investigation be the only factor for determining the reasonableness of the length of the seizure?

Does *Place* mean that officers must have the drug sniffing dog on the premises at the time the luggage is seized? See United States v. Frost, 999 F.2d 737 (3d Cir.1993) (80-minute detention of luggage pending dog sniff was reasonable: "It does not demonstrate a lack of diligence on the part of the detectives that a drug-sniffing unit was not on duty that day, so that he had to be summoned to the airport"; *Place* distinguished because officers in that case had substantial time to bring the dog to the airport before the luggage arrived).

Seizure of Property with No Deprivation of a Liberty Interest

In United States v. LaFrance, 879 F.2d 1 (1st Cir.1989), police had reasonable suspicion to believe that a Federal Express package, addressed to LaFrance, contained drugs. The package was guaranteed for delivery that day by noon. The officers arranged for a dog sniff, but the dog was several miles away. The sniff began at 1:15 p.m., and was completed by 2:15; the test was positive. Then a warrant was obtained to search the package. LaFrance challenged the reasonableness of the detention of the package. He testified at the suppression hearing that on the basis of prior experience, he expected to receive the package by 11:00 a.m. The court held that "LaFrance's anticipation that he would receive the goods soon after 11 a.m., though based on earlier experiences, is irrelevant. It is hornbook contract law that where a delivery time is agreed upon, a court should not intrude to imply a different reasonable time for delivery." The court recognized that "once noon arrived, the constitutional chemistry was altered" but that the detention from that point was for a limited time, and that the police were diligent in their investigation during that time.

In *LaFrance*, the detention of the package on reasonable suspicion was longer than that held impermissible in *Place*; however, the court reasoned that unlike the traveler in *Place*, LaFrance's liberty interest was

not impaired by the detention of the Federal Express package. Place could not really go anywhere without his luggage, whereas LaFrance was at home and free to go wherever he wanted. Because the intrusion was not as severe as that in *Place*, the court reasoned that the somewhat longer detention of the package was permissible so long as the police were acting diligently. Do you agree with the court that LaFrance's liberty interest was not impaired by the detention of the package? Wasn't LaFrance essentially confined to his home by his need to wait for the package?

7. Limited Searches for Evidence by Law Enforcement Officers Under *Terry*

Terry allows limited investigative seizures of the person or property on the basis of reasonable suspicion. *Terry* also allows limited searches *for self-protection* on the basis of reasonable suspicion. Does *Terry* permit limited, cursory inspections by law enforcement officers searching for *evidence* on the basis of reasonable suspicion rather than probable cause? This was one question encountered by the Court in Arizona v. Hicks, 480 U.S. 321 (1987). Police lawfully entered premises from which a weapon had been fired, and noticed two sets of expensive stereo components in an otherwise squalid apartment. Suspecting that the components were stolen, one officer moved a turntable in order to read the serial number that was on the underside of the unit. The serial number matched that of a turntable that had been reported stolen. The State did not argue that probable cause existed to move the turntable, but rather that the movement and inspection was a "cursory" search that was justified by reasonable suspicion.

Justice Scalia, writing for the Court, rejected the State's argument that a search for evidence could be justified upon reasonable suspicion. He declared that probably cause was required for the search of the turntable, even though it was cursory and minimally intrusive. Justice Scalia stated that "a search is a search, even if it happens to disclose nothing but the bottom of a turntable." He concluded that "we are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a full-blown search. Nothing in the prior opinions of this Court supports such a distinction." Why doesn't the prior opinion of the Court in *Terry* support the distinction that Justice Scalia rejected?

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, dissented. She argued that police officers who have reasonable, articulable suspicion that an object they come across in a lawful search is evidence of crime may make a cursory inspection of the object to verify their suspicion. Justice Powell added a dissenting opinion, joined by the Chief Justice and Justice O'Connor, that suggested that the majority's

distinction between observing a serial number while searching (permissible) and moving an object to read a serial number (impermissible) trivialized the Fourth Amendment and would cause uncertainty. See also Minnesota v. Dickerson, 508 U.S. 366 (1993) (*Terry* protective search can be conducted if the officer has reasonable suspicion that the suspect poses a risk of harm to the officer or others; however, a search for contraband by law enforcement officers is outside the *Terry* doctrine and requires probable cause).

QUESTIONS AFTER HICKS

The State in *Hicks* did not argue that the presence of two new stereos in a squalid apartment constituted probable cause to believe they were stolen. Should this argument have been made?

The holding in *Hicks* has not prevented the government from arguing that cursory inspections can be conducted on reasonable suspicion. In United States v. Winsor, 846 F.2d 1569 (9th Cir.1988) (en banc), officers chased suspected bank robbers fleeing from the crime into a hotel. Given the large number of rooms in the hotel, the court found that there was reasonable suspicion, but not probable cause, to believe that the robbers were in any particular room. At each room, the officers knocked on the door and announced "Police, open the door." After checking a few rooms, they knocked on a door answered by Dennis Winsor. They recognized him as the robber. At this point, the police had probable cause to enter, whereupon they found Peter Winsor, the other robber, as well as incriminating evidence. The Winsors argued that under *Hicks*, the police conducted a search of their room when they knocked on the door, commanded that it be opened, and looked inside. The government argued that the officers had not conducted a full-blown search for evidence, but rather only a cursory inspection that was justified by reasonable suspicion. The court of appeals held that the evidence the officers discovered when the door was opened (and all evidence found in the room thereafter) was illegally obtained:

> We refuse the government's invitation to decide this case by balancing the competing interests at stake. Instead, we adhere to the bright-line rule that *Hicks* appears to have announced: The Fourth Amendment prohibits searches of dwellings without probable cause.

Other courts have taken the contrary view and held—despite *Hicks*—that a minimally intrusive search for evidence is permissible if supported by reasonable suspicion. For example, in United States v. Concepcion, 942 F.2d 1170 (7th Cir.1991), officers took a key found on the defendant, and inserted it into a lock on a door to an apartment in which drugs had been found. The court held that this was a search, because the use of the key in the lock gave the officers information they did not otherwise have, i.e., that the defendant had a key to the apartment. But the search was upheld even though, at the time they used the key, the officers had only reasonable suspicion and not probable cause to connect the defendant with the apartment. The court

reasoned that the search was minimally intrusive. It distinguished *Hicks* on the ground that the information uncovered in *Hicks* was more private: the officers in *Concepcion* could have connected the defendant with the apartment in a variety of ways. Is this a meaningful distinction?

8. Application of the *Terry* Reasonableness Analysis Outside the Stop and Frisk Context—To Probationers and Parolees

The *Terry* analysis balances the nature of the individual interest at stake in a search and seizure against the interest of the government in investigating and preventing crime. *Terry* applied this reasonableness analysis in the context of the limited intrusion known as stop and frisk. But it is possible that the balancing analysis could be applied in a wide variety of contexts to allow intrusions on less than probable cause, and without a warrant. To do so, however, would raise tension with the Court's position in *Hicks* and *Dickerson* that searches for evidence of a crime, even if not particularly intrusive, require probable cause.

In United States v. Knights, 534 U.S. 112 (2001), Chief Justice Rehnquist wrote for the Court as it held that no more than reasonable suspicion is required to search a probationer's home. He reasoned that "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." The Court appeared to apply a reasonableness balancing approach even though the search was for evidence of a crime (as opposed to a *Terry* frisk for the protection of the officer. The Chief Justice declared as follows:

> [W]e conclude that the search of Knights was reasonable under our general Fourth Amendment approach of "examining the totality of the circumstances," with the probation search condition being a salient circumstance.
>
> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. Knights's status as a probationer subject to a search condition informs both sides of that balance. * * * Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens * * * Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution

when the balance of governmental and private interests makes such a standard reasonable. See, e.g., Terry v. Ohio. Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.

QUESTIONS ABOUT KNIGHTS

Does the result in *Knights* mean that the reasonableness of *every* search—and accordingly the necessary standard of proof—is based on a balance of the needs of the state and the privacy interests of the individual? If so, what is left of its declaration in *Hicks* that "a search is a search" that requires probable cause even though the particular search is cursory and relatively unintrusive? And what is left of the *Terry* Court's statement that officers during a stop can conduct a search upon reasonable suspicion, but only for self-protection and not to search for evidence?

Suspicionless Searches of Parolees Found Reasonable: Samson v. California

In Samson v. California, 547 U.S. 843 (2006), the Court answered a question it left open in *Knights*: whether a condition of a parolee's release can so diminish or eliminate his reasonable expectation of privacy that a *suspicionless* search by a law enforcement officer would be permissible under the Fourth Amendment. The case involved a California statute providing that every prisoner eligible for release on state parole "shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Samson so agreed and was paroled. While on parole he was searched without suspicion, and was found in possession of drugs. The Court, in an opinion by Justice Thomas, found that the search was reasonable.

Justice Thomas relied heavily on *Knights,* even though the search in that case was conducted upon reasonable suspicion. Justice Thomas emphasized that the parolee's expectation of privacy is substantially diminished, because his very liberty is conditional. In contrast, the state's interest in conducting a suspicionless search was found "substantial" because "parolees are more likely to commit future criminal offenses." He explained that, "most parolees require intense supervision" and that "a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders". In Justice Thomas's view, a reasonable suspicion standard would be deleterious to these state

interests, because it "would give parolees greater opportunity to anticipate searches and conceal criminality."

Justice Thomas rejected the argument that the California law permitted "a blanket grant of discretion untethered by any procedural safeguards." He stated that "[t]he concern that California's suspicionless search system gives officers unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on arbitrary, capricious or harassing searches."

Justice Thomas emphasized that the Court did not "address whether California's parole search condition is justified as a special need," [see the discussion of "special needs" searches later in this Chapter] because "our holding under general Fourth Amendment principles renders such an examination unnecessary."

Justice Stevens, joined by Justices Souter and Breyer, dissented in *Samson*. He noted that the search at issue could not possibly have been justified as a "special needs" search, because it was done for criminal law enforcement purposes. Yet the majority, in Justice Stevens's view, unaccountably found a suspicionless search to be reasonable in this case. Justice Stevens elaborated as follows.

> Ignoring just how closely guarded is that category of constitutionally permissible suspicionless searches, the Court for the first time upholds an entirely suspicionless search unsupported by any special need. And it goes further: In special needs cases we have at least insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion. Here, by contrast, there are no policies in place—no standards, guidelines, or procedures—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness.

Can the Knights/Samson Balancing Test Be Extended Beyond Probationers and Parolees?

Knights and *Samson* could be broadly read to allow searches for evidence on less than probable cause whenever the state interest supporting the search outweighs the individual's interest in preventing it—in other words, a free-form balancing test that would allow any number of searches that would, under traditional Fourth Amendment theory (as applied in *Hicks* and *Dickerson, supra*) require probable cause.

The lower courts had generally read *Knights* and *Samson* narrowly, to searches of probationers and parolees, and even then the courts have required something in the probation/parole conditions that authorize a search on less than probable cause. *See, e.g.,* United States v. Freeman, 479 F.3d 743 (10th Cir. 2007) ("We interpret the *Knights-Samson* line of cases as resting on the parolee's diminished expectation of privacy stemming from his own parole agreement and the state regulations applicable to his case."). But the Supreme Court, in Maryland v. King, 133 S.Ct. 1958 (2013), seemed to rely on a *Knights/Samson*-like free-form balancing in upholding DNA testing of arrestees. *King* is set forth in full after the treatment of "special needs" searches, infra.

C. SEARCH INCIDENT TO ARREST: THE ARREST POWER RULE

A warrantless search incident to a valid arrest was an accepted practice at the time the Bill of Rights was adopted. While the principle was and is well-accepted, the application of the arrest power rule to various fact situations, and even the rationale underlying the exception, have been subject to dispute and inconsistent application in the Supreme Court. In the following case, the Court sought to explain the rationale of the search incident to arrest exception, and to limit the scope of an incident search to the rationale supporting the exception.

1. Spatial Limitations

CHIMEL V. CALIFORNIA

Supreme Court of the United States, 1969.
395 U.S. 752.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case raises basic questions concerning the permissible scope under the Fourth Amendment of a search incident to a lawful arrest.

The relevant facts are essentially undisputed. Late in the afternoon of September 13, 1965, three police officers arrived at the Santa Ana, California, home of the petitioner with a warrant authorizing his arrest for the burglary of a coin shop. The officers knocked on the door, identified themselves to the petitioner's wife, and asked if they might come inside. She ushered them into the house, where they waited 10 or 15 minutes until the petitioner returned home from work. When the petitioner entered the house, one of the officers handed him the arrest warrant and asked for permission to "look around." The petitioner objected, but was advised that "on the basis of the lawful arrest," the officers would nonetheless conduct a search. No search warrant had been issued.

Accompanied by the petitioner's wife, the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. * * * After completing the search, they seized numerous items—primarily coins, but also several medals, tokens, and a few other objects. The entire search took between 45 minutes and an hour.

At the petitioner's subsequent state trial on two charges of burglary, the items taken from his house were admitted into evidence against him, over his objection that they had been unconstitutionally seized. * * *

Without deciding the question, we proceed on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution. This brings us directly to the question whether the warrantless search of the petitioner's entire house can be constitutionally justified as incident to that arrest. The decisions of this Court bearing upon that question have been far from consistent, as even the most cursory review makes evident.

* * *

[The Court describes its erratic decisions beginning with dictum in Weeks v. United States, 232 U.S. 383 (1914), and continuing through Harris v. United States, 331 U.S. 145 (1947), Trupiano v. United States, 334 U.S. 699 (1948), and United States v. Rabinowitz, 339 U.S. 56 (1950).]

Rabinowitz has come to stand for the proposition, *inter alia*, that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested. And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.

* * *

* * * When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

* * *

It is argued in the present case that it is "reasonable" to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively "unreasonable" to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of arrest. * * * Thus, although "[t]he recurring questions of the reasonableness of searches" depend upon "the facts and circumstances—the total atmosphere of the case," those facts and circumstances must be viewed in the light of established Fourth Amendment principles.

It would be possible, of course, to draw a line between *Rabinowitz* and *Harris* on the one hand, and this case on the other. For *Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched. But such a distinction would be highly artificial. The rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.

The petitioner correctly points out that one result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere. We do not suggest that the petitioner is necessarily correct in his

assertion that such a strategy was utilized here, but the fact remains that had he been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant. * * *

[The concurring opinion of JUSTICE HARLAN is omitted.]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, dissenting.

* * *

The justifications which make such a search reasonable obviously do not apply to the search of areas to which the accused does not have ready physical access. This is not enough, however, to prove such searches unconstitutional. The Court has always held, and does not today deny, that when there is probable cause to search and it is "impracticable" for one reason or another to get a search warrant, then a warrantless search may be reasonable. This is the case whether an arrest was made at the time of the search or not.

This is not to say that a search can be reasonable without regard to the probable cause to believe that seizable items are on the premises. But when there are exigent circumstances, and probable cause, then the search may be made without a warrant, reasonably. An arrest itself may often create an emergency situation making it impracticable to obtain a warrant before embarking on a related search. Again assuming that there is probable cause to search premises at the spot where a suspect is arrested, it seems to me unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search. This must so often be the case that it seems to me as unreasonable to require a warrant for a search of the premises as to require a warrant for search of the person and his very immediate surroundings.

* * *

Application of Chimel's Case-by-Case Approach to the Permissible Scope of a Search Incident to Arrest

What are the precise spatial limitations on the arrest power rule after *Chimel*? Is the permissible scope of the search determined by where the suspect was arrested, or by where the search occurred? Does it make a difference that the suspect is handcuffed? Infirm? Consider United States v. Lucas, 898 F.2d 606 (8th Cir.1990), where the defendant was

convicted of bank robbery based in part upon evidence found in the following search incident to arrest:

> The magistrate found that Lucas was seated at a kitchen table with two other men as the officers stood in the front doorway of the apartment in which he was arrested. As Lucas began to get up from the table, the officers entered the apartment and ran into the kitchen. Two officers attempted to apprehend Lucas, and one officer monitored the other two men seated at the table. By the time the officers reached Lucas, his hand was within inches of the handle on a cabinet door. During the ensuing struggle, which lasted for approximately forty seconds, Lucas and the two officers slid around on the slick floor. At one point, Lucas fell to the floor, and the skirmish continued until Lucas was handcuffed. As an officer pulled Lucas from the floor and moved him toward the living room, another officer immediately stood up, opened the cabinet door that Lucas had been attempting to reach, and found a chrome automatic pistol inside the cabinet. The two men seated at the kitchen table were not handcuffed until after the gun was discovered.

The court upheld the search under *Chimel:*

> Lucas argues that *Chimel* does not justify the search here because he was being escorted, handcuffed, from the kitchen when the search occurred. While relevant under *Chimel,* this is not a determinative factor. * * * [A] warrantless search incident to an arrest may be valid even though a court, operating with the benefit of hindsight in an environment well removed from the scene of the arrest, doubts that the defendant could have reached the items seized during the search. The officers in this case searched a cabinet in a small kitchen immediately after handcuffing Lucas and while removing him from the kitchen. Moreover, two of Lucas' friends who had not been handcuffed were still at the kitchen table when the search took place. On these facts, we conclude that this was a valid warrantless search incident to Lucas' arrest. This conclusion is consistent not only with [this Circuit's opinions] but also with opinions from other circuits. See United States v. Queen, 847 F.2d at 352–54 (holding search valid even though it occurred when arrestee was handcuffed and guarded by two police officers several feet from the searched area).

Does the court in *Lucas* show too much or just enough concern for the safety of the officers? Compare United States v. Blue, 78 F.3d 56 (2d Cir.1996) (search of an area between a mattress and a box spring could not be justified under the arrest power rule; the suspects were on the floor, handcuffed with their hands behind their backs, and many officers were controlling them); United States v. Neely, 345 F.3d 366 (5th Cir.

2003) (officers could not seize the clothing of a suspect who was brought to the hospital and was in surgery: "there are no indications that he could have attempted to destroy the clothing" at the time of the seizure).

In United States v. Currence, 446 F.3d 554 (4th Cir. 2006), the defendant was arrested while on his bicycle. He was suspected of dealing drugs. Officers searched the inside of the handlebars of the bike and found cocaine. The court upheld that search under *Chimel*:

> We believe that because [the officer] was able to remove the handlebar end cap by simply sliding it off * * * there is no basis under *Chimel* to treat the handlebar differently from other items within the immediate control of an arrestee that may be opened in a search incident to an arrest. Just as an arrestee's ability to reach into, for example, a closed container or a locked bag makes those items searchable incident to an arrest, Currence's ability to reach into the easily accessible handlebar likewise makes it searchable.

The court did note, however, that "there are limits to the scope of a search incident to arrest" and that its opinion "should not be construed as a holding that all areas of a bicycle can automatically be searched in every case." So what areas on a bike could not be searched incident to arrest?

Timing of Grab Area Determination

Should the scope of the grab area be determined by where the arrestee is at the time of the *search*, or rather by where the arrestee *was* at the time of *arrest*? In Davis v. Robbs, 794 F.2d 1129 (6th Cir.1986), the court upheld the seizure of a rifle that had been in close proximity to the arrestee at the time of the arrest. Judge Wellford dissented on this point, noting that the search and seizure occurred after the arrestee was put in the squad car:

> The rationale justifying the search incident to arrest exception is that some exigency exists at the time of the search or seizure, not arrest. Otherwise, no actual exigency, such as danger to the safety of the police or others, would exist. The actual exigency at the time of arrest would become fictional through transplantation to the time of the search and seizure. At the time the police seized the rifle in the present case, [the arrestee] was handcuffed and in the squad car. He no longer had access to the gun nor posed any danger to the police. * * * Thus, the rationale justifying the exception does not support the seizure of the rifle. The danger had passed.

The court in United States v. Abdul-Saboor, 85 F.3d 664 (D.C.Cir.1996) agreed with the majority in *Davis* that the grab area should be determined as of the time of the arrest, not the time of the search. Thus, an officer's search of an area after the arrestee had been taken out of the

room was permissible. The court reasoned that "if the courts were to focus exclusively upon the moment of the search, we might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." Do you think this is a realistic possibility?

Since the above cases were decided, the Supreme Court in Arizona v. Gant—discussed infra—held that when a person in a *car* is arrested, the grab area is to be determined as of the time of the *search*—so if at the time of the search the arrestee has been placed in the squad car, the passenger compartment of his vehicle is no longer within the grab area. Some courts have relied on *Gant* to hold that when a person is arrested outside the car context, the grab area must be determined as of the time of the search, not what it was at the time the person was arrested. An example is United States v. Shakir, 616 F.3d 315 (3rd Cir. 2010). Shakir challenged the search of a bag that he was carrying when arrested. He argued that at the time of the search of the bag, he was already handcuffed. The government responded by citing several circuit court decisions that assessed the grab area as of the time of the arrest; the defendant conceded that he had access to the bag at the time he was arrested. The court rejected the government's argument that the *Gant* time of search rule applied only to vehicle searches. It found "no plausible reason" to limit *Gant* to vehicle searches, as opposed to "any situation where the item searched is removed from the suspect's control between the time of the arrest and the time of the search." The court read *Gant* as "refocusing our attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted."

It is notable, though, that the *Shakir* court upheld the search of the defendant's bag under the arrest-power rule. Even as assessed at the time of the search, the search of the bag was reasonably directed to protecting against destruction of evidence and harm to police officers. The court stated that handcuffs are "not fail-safe" and reasoned as follows:

> Although he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor. Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, we do not regard this possibility as remote enough to render unconstitutional the search incident to arrest. This is especially true when we consider that Shakir was subject to an arrest warrant for armed bank robbery, and that he was arrested in a public area near some 20 innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers.

Arrest Power Can Be Invoked for Any Custodial Arrest and Can Cover Post-Arrest Movements: Washington v. Chrisman

Does the rationale of *Chimel*, allowing search incident to arrest to protect the officer and preserve the evidence, apply to every arrest? Does it apply even if the arrestee is allowed to move about? In Washington v. Chrisman, 455 U.S. 1 (1982), Chief Justice Burger, writing for the Court, declared that "the absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person" and to conduct an automatic search for evidence and weapons within the grab area. The Court stated that "every arrest must be presumed to present a risk of danger to the arresting officer," because "there is no way for an officer to predict reliably how a particular subject will react to arrest of the degree of potential danger."

The Court in *Chrisman* upheld a search and seizure incident to arrest under the following circumstances: A police officer saw Chrisman, who appeared to be underage, carrying liquor. He asked for identification and Chrisman said it was in his dormitory room. At that point he was placed under arrest and the officer accompanied him to the dorm room to retrieve the identification. As Chrisman entered the room the officer remained in the open doorway, from where he saw Chrisman's roommate become nervous. The officer entered the room and noticed seeds and a small pipe that he concluded were used in marijuana smoking. After warning both roommates of their rights, the officer asked about other drugs and was given additional marijuana. The officer subsequently obtained consent to search the room and found LSD.

Chief Justice Burger reasoned that once the officer placed his suspect under arrest before returning to the suspect's room "[t]he officer had a right to remain literally at the suspect's elbow at all times." This was so even though the officer admitted that he did not think that Chrisman was going up to the room to destroy evidence or get a weapon. The Chief Justice concluded that because the officer had a valid right to enter the room at any time to monitor the movements of the arrested person, he had a right to be where he was when he first saw the seeds and the pipe.

Justice White, joined by Justices Brennan and Marshall, dissented. The thrust of the dissent was that an officer "should not be permitted to invade living quarters any more than is necessary to maintain control and protect himself," which were not the reasons for the invasion in this case.[21]

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[21] Although the Supreme Court reversed the Washington Supreme Court in *Chrisman*, it was the state supreme court that was to have the last word. On remand, it held that the officer violated the state constitution, which it interpreted to prohibit warrantless entry into a private

Arrest Leading to Exigent Circumstances

Justice White, dissenting in *Chimel*, argues that when a person is arrested, the fact of the arrest itself will in almost all cases give rise to exigent circumstances to search beyond the grab area of the arrestee. He reasoned that friends, family or business associates of the arrestee will almost always become aware of an arrest and will almost always try to destroy evidence (or police officers) when they learn about the arrest. Justice White does not contend that exigent circumstances will arise after *every* arrest, nor could he: if Chimel was a hermit, there could be no threat that upon his arrest one of his associates would immediately destroy evidence or raise a weapon. Rather, Justice White argues that exigent circumstances will arise *so often* upon an arrest that it makes sense to establish a bright line rule permitting a search, so as to avoid the negative effects of ad hoc judgments by officers on the one hand and the costs of a case-by-case approach by the courts on the other.

Why did Justice White's argument for a bright-line rule not persuade the majority? If, as *Chrisman* states, we presume that the arrestee will destroy evidence or harm the officer even if that is not so in a particular case, why do we not presume that the arrestee's *associates* will learn about the arrest and destroy evidence or harm the officer?

The exigent circumstances exception will be discussed later in this Chapter, but for now it is important to note that the Court requires a showing of exigency on the particular facts of the case; the arrest of a person, while certainly relevant, is not dispositive of whether there is a risk of destruction of evidence or harm to the officers or public that would excuse the warrant requirement. Illustrative is Vale v. Louisiana, 399 U.S. 30 (1970). Officers observing Vale had probable cause to believe that he had engaged in a drug transaction outside his house. When they approached, Vale walked quickly toward the house. He was arrested on his front steps. The officers then searched the house and found narcotics in the back bedroom. Three minutes after the officers entered the house, Vale's mother and brother came home carrying groceries. Justice Stewart wrote for the Court as it held that the officers' warrantless search of the bedroom violated the Fourth Amendment. The Court found that the State had not met its burden of showing that exigent circumstances existed. Justice Stewart stated that "the goods ultimately seized were not in the process of destruction," and rejected the argument that "an arrest on the street can provide its own exigent circumstance so as to justify a warrantless search of the arrestee's house."[22]

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dwelling by an officer unless he has specific articulable facts justifying the entry. State v. Chrisman, 100 Wash.2d 814, 676 P.2d 419 (1984).

[22] Justice Blackmun did not take part. Justice Black, joined by Chief Justice Burger, dissented. He concluded that the State's burden of showing exigent circumstances was met.

Notwithstanding *Vale,* in many cases an arrest *will* create exigent circumstances due to the risk that the arrestee's friends, family, or criminal associates will destroy evidence or use weapons. In United States v. Socey, 846 F.2d 1439 (D.C.Cir.1988), the court set forth the following standard for determining whether exigent circumstances arise after an arrest:

> Consistent with *Vale,* we believe that a police officer can show an objectively reasonable belief that contraband is being, or will be, destroyed within a home if he can show 1) a reasonable belief that third persons were inside a private dwelling and 2) a reasonable belief that these third persons are aware of an * * * arrest of a confederate outside the premises so that they might see a need to destroy evidence.

The court in *Socey* found that exigent circumstances existed where an arrest was made outside a house in which a large-scale drug operation was being conducted. The court stated that it was not unreasonable for the officers to believe "that such an operation would have some type of look-out system." The court also emphasized the fact that drugs are easily destroyed. Has the court in *Socey* applied a per se rule of exigent circumstances for arrests outside suspected drug operations? Is that consistent with *Chimel* and *Vale?*

Protective Sweep After an Arrest

Even in the absence of exigent circumstances, police may have the authority, pursuant to the *Terry* doctrine, to search beyond the *Chimel* spatial limitations in order to conduct a "protective sweep" of the place where the arrest is made. In Maryland v. Buie, 494 U.S. 325 (1990), the Court defined a "protective sweep" as a "quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others." The Court held that a protective sweep could be justified by reasonable suspicion "that the area swept harbored an individual posing a danger to the officer or others." Probable cause was not necessary for such a sweep. Justice White, writing for the Court, concluded that the spatial limitations of *Chimel* were not undermined by allowing a protective sweep on reasonable suspicion. Unlike a search incident to arrest, the protective sweep is limited to areas where persons may be hidden. Nor does the officer have an automatic right to conduct a protective sweep (unlike the automatic right to conduct a search incident to arrest). Justice Stevens concurred to emphasize that a protective sweep could not be conducted to root out those who might destroy evidence but who would not present a safety risk to the officers or others. That is, the protective sweep is a safety-based and not an evidence-based doctrine. Justice Brennan, joined by Justice Marshall dissented.

2. Temporal Limitations

Sequence of Search and Arrest

Generally, a search incident to arrest takes place immediately after the arrest itself. But courts will not overly concern themselves with the technicality of which came first—the arrest or the search—when both are nearly simultaneous and probable cause to arrest existed before the search was conducted. As the Court stated in Rawlings v. Kentucky, 448 U.S. 98 (1980): "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." See also United States v. Cutchin, 956 F.2d 1216 (D.C.Cir.1992) ("The sequence makes no difference since police did not need the fruits of the search to establish probable cause.").

While a search can precede the arrest, a search cannot be used to provide the probable cause necessary to make the arrest. As the Court stated in the per curiam opinion in Smith v. Ohio, 494 U.S. 541 (1990): "That reasoning, * * * justifying the arrest by the search and at the same time * * * the search by the arrest, just will not do."

Removal from the Arrest Scene

The term "incident to" implies that if the search is too far removed from the arrest, it will not qualify for the exception. But how removed is too removed? In Chambers v. Maroney, 399 U.S. 42 (1970), officers searched an automobile that had been impounded and brought to the police station after the arrest of its occupants. The Court held that this search could not be justified as incident to the arrests, stating that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." The Court concluded that the reasons for a search incident to arrest "no longer obtain when the accused is safely in custody at the station house." The Court applied the same principle in United States v. Chadwick, 433 U.S. 1 (1977), where a footlocker was searched at the police station, 90 minutes after the arrest of its owner. The Court stated that the search "cannot be viewed as incidental to the arrest or as justified by any other exigency."

In United States v. Edwards, 415 U.S. 800 (1974), the Court held that a suspect, who was arrested and jailed around midnight for attempting to break into a post office, could be searched incident to arrest the next morning. After the arrest, the police discovered that entry into the post office apparently involved prying open a window with an iron bar that caused paint to chip. They seized Edwards's shirt and trousers in the morning and subjected them to analysis that revealed paint chips. Justice

White, writing for the majority, declared that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." He went on to conclude "that the normal processes incident to arrest and custody had not yet been completed when Edwards was placed in his cell." Justice White left open the possibility that a warrant might be required for some post-seizure searches of arrestees, but strongly implied that most searches and seizures of the arrestee's person and things in his possession at the time of the arrest could be examined automatically. Justice Stewart, joined by Justices Douglas, Brennan and Marshall dissented, taking the view that "the considerations that typically justify a warrantless search incident to a lawful arrest were wholly absent here." See also United States v. Johnson, 445 F.3d 793 (5th Cir. 2006) (testing the defendant's hands for gunpowder residue at the police station was a permissible search incident to the arrest: noting that the defendant, or time, could have removed or destroyed the evidence).

Edwards was cited by Justice Blackmun in dissent in *Chadwick*. Is there any way to reconcile the two cases? Do they take a different view of what is incident to arrest, or do they merely deal with different types of searches? The next case may have some bearing on this question.

3. Searches of the Person—and Containers on the Person — Incident to Arrest

UNITED STATES V. ROBINSON

Supreme Court of the United States, 1973.
414 U.S. 218.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robinson was convicted in United States District Court for the District of Columbia of the possession and facilitation of concealment of heroin * * *. [T]he Court of Appeals en banc reversed the judgment of conviction, holding that the heroin introduced in evidence against respondent had been obtained as a result of a search which violated the Fourth Amendment to the United States Constitution. * * *

On April 23, 1968, at approximately 11 p.m., Officer Richard Jenks, a 15-year veteran of the District of Columbia Metropolitan Police Department, observed the respondent driving a 1965 Cadillac near the intersection of 8th and C Streets, N.E., in the District of Columbia. Jenks, as a result of previous investigation following a check of respondent's operator's permit four days earlier, determined there was reason to believe that respondent was operating a motor vehicle after the revocation of his operator's permit. This is an offense defined by statute in

the District of Columbia which carries a mandatory minimum jail term, a mandatory minimum fine, or both.

Jenks signaled respondent to stop the automobile, which respondent did, and all three of the occupants emerged from the car. At that point Jenks informed respondent that he was under arrest for "operating after revocation and obtaining a permit by misrepresentation." It was assumed by the Court of Appeals, and is conceded by the respondent here, that Jenks had probable cause to arrest respondent, and that he effected a full-custody arrest.

In accordance with procedures prescribed in police department instructions, Jenks then began to search respondent. * * * During this patdown, Jenks felt an object in the left breast pocket of the heavy coat respondent was wearing, but testified that he "couldn't tell what it was" and also that he "couldn't actually tell the size of it." Jenks then reached into the pocket and pulled out the object, which turned out to be a "crumpled up cigarette package." Jenks testified that at this point he still did not know what was in the package. * * *

The officer then opened the cigarette pack and found 14 gelatin capsules of white powder which he thought to be, and which later analysis proved to be, heroin. Jenks then continued his search of respondent to completion, feeling around his waist and trouser legs, and examining the remaining pockets. The heroin seized from the respondent was admitted into evidence at the trial which resulted in his conviction in the District Court.

* * * We conclude that the search conducted by Jenks in this case did not offend the limits imposed by the Fourth Amendment, and we therefore reverse the judgment of the Court of Appeals.

* * *

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

Examination of this Court's decisions shows that these two propositions have been treated quite differently. The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case. The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched. * * *

* * *

Throughout the series of cases in which the Court has addressed the second proposition relating to a search incident to a lawful arrest—the permissible area beyond the person of the arrestee which such a search may cover—no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee.

* * * Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.

* * *

In its decision of this case, the Court of Appeals decided that even after a police officer lawfully places a suspect under arrest for the purpose of taking him into custody, he may not ordinarily proceed to fully search the prisoner. He must, instead, conduct a limited frisk of the outer clothing and remove such weapons that he may, as a result of that limited frisk, reasonably believe and ascertain that the suspect has in his possession. While recognizing that Terry v. Ohio dealt with a permissible "frisk" incident to an investigative stop based on less than probable cause to arrest, the Court of Appeals felt that the principles of that case should be carried over to this probable-cause arrest for driving while one's license is revoked. Since there would be no further evidence of such a crime to be obtained in a search of the arrestee, the court held that only a search for weapons could be justified.

* * *

The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. The standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made.

Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from

the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. * * * A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

* * *

MR. JUSTICE POWELL, concurring.

* * *

* * * I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. * * *

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

* * *

The majority opinion fails to recognize that the search conducted by Officer Jenks did not merely involve a search of respondent's person. It also included a separate search of effects found on his person. And even were we to assume, *arguendo*, that it was reasonable for Jenks to remove the object he felt in respondent's pocket, clearly there was no justification consistent with the Fourth Amendment which would authorize his opening the package and looking inside.

To begin with, after Jenks had the cigarette package in his hands, there is no indication that he had reason to believe or did in fact believe that the package contained a weapon. More importantly, even if the crumpled-up cigarette package had in fact contained some sort of small weapon, it would have been impossible for respondent to have used it once the package was in the officer's hands. Opening the package, therefore, did not further the protective purpose of the search. * * *

* * *

The Government argues that it is difficult to see what constitutionally protected "expectation of privacy" a prisoner has in the interior of a cigarette pack. One wonders if the result in this case would have been the same were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere in the wallet, to open it, remove all the contents, and examine each item carefully? * * * Would it not be more consonant with the purpose of the Fourth Amendment and the legitimate needs of the police to require the officer, if he has any question whatsoever about what the wallet or letter contains, to hold on to it until the arrestee is brought to the precinct station?[a]

Searches of Smartphones and Other Electronics Found on an Arrestee

Robinson held that the officer could thoroughly search the cigarette pack even without any showing on the facts that there was evidence of a weapon in that container. Thus under *Robinson* there would appear to be an automatic right to search any container found on a person subject to a custodial arrest. But maybe some containers are different than others. What if the officer effectuating a custodial arrest for a traffic offense, as in *Robinson*, finds a smartphone in the arrestee's suit pocket? Can the

[a] Nor would it necessarily have been reasonable for the police to have opened the cigarette package at the police station. The Government argued below, as an alternative theory to justify the search in this case, that when a suspect is booked and is about to be placed in station house detention, it is reasonable to search his person to prevent the introduction of weapons or contraband into the jail facility and to inventory the personal effects found on the suspect. Since respondent's cigarette package would have been removed and opened at the station house anyway, the argument goes, the search might just as well take place in the field at the time of the arrest. This argument fails * * *. [A]s the Court of Appeals had indicated in its opinion in United States v. Mills, 472 F.2d 1231 (1972) (en banc), the justification for station-house searches is not the booking process itself, but rather the fact that the suspect will be placed in jail. In the District of Columbia, petty offenses of the sort involved in the present case are bailable, and, as the Government stipulated in *Mills*, the normal procedure is for offenders to be advised of the opportunity to post collateral at the station house and to avoid an inventory search unless they are unable or refuse to do so. One cannot justify a full search in the field on a subsequent event that quite possibly may never take place.

officer open the phone, use the apps, check the arrestee's email, and so forth?

Judge Posner, in United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012), reviewed the constitutionality of a search of a cellphone incident to arrest. Flores-Lopez was arrested for drug violations, and an officer searched a cell phone on his person. The scope of the search was pretty limited. The officer searched the cellphone for its number, then used that information to subpoena the phone company for the call history of the phone. The call history indicated many calls were made between the defendant and other drug dealers.

Judge Posner noted that a cellphone fit the definition of a container, i.e., an object that contains something else. He also noted that under a "fair literal" reading of *Robinson*, any container found on a person who is arrested may be searched incident to that arrest. But Judge Posner thought that there might be some limitations on the *Robinson* rule, because "the Court did not reject the possibility of categorical limits to the rule laid down" in that case. Judge Posner proceeded as follows:

> The potential invasion of privacy in a search of a cell phone is greater than in a search of a "container" in a conventional sense even when the conventional container is a purse that contains an address book (itself a container) and photos. Judges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book. "[A]nalogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. . . . [T]here is a far greater potential for the 'inter-mingling' of documents and a consequent invasion of privacy when police execute a search for evidence on a computer." United States v. Lucas, 640 F.3d 168, 178 (6th Cir.2011). An iPhone application called iCam allows you to access your home computer's webcam so that you can survey the inside of your home while you're a thousand miles away. At the touch of a button a cell phone search becomes a house search, and that is not a search of a "container" in any normal sense of that word, though a house contains data.

Judge Posner noted the limited nature of the search of the cellphone in this case, and analogized it to searches of diaries found on arrestees that have been upheld under *Robinson*.

> [O]pening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested, clearly is permissible; and what happened in this case was similar but even less intrusive, since a cell phone's phone

number can be found without searching the phone's contents, unless the phone is password-protected—and on some cell phones even if it is. On an iPhone without password protection two steps are required to get the number: touching the "settings" icon and then the "phone" icon. On a Blackberry only one step is required: touching the "phone" icon. Moreover, the phone company knows a phone's number as soon as the call is connected to the telephone network; and obtaining that information from the phone company isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number. Smith v. Maryland, 442 U.S. 735(1979).

We are quite a distance from the use of the iCam to view what is happening in the bedroom of the owner of the seized cell phone.

It's not even clear that we need a rule of law specific to cell phones or other computers. If police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number. If allowed to leaf through a pocket address book, as they are, United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir.1993), they should be entitled to read the address book in a cell phone. If forbidden to peruse love letters recognized as such found wedged between the pages of the address book, they should be forbidden to read love letters in the files of a cell phone. * * *

Judge Posner also noted that cellphone searches, unlike diaries, might involve the possibility of exigent circumstances, especially in cases involving drug conspiracies:

[A]ssume that justification is required for police who have no warrant to look inside a cell phone even if all they're looking for and all they find is the phone number. The government emphasizes the danger of "remote wiping." Instant wiping, called "local wiping," as by pressing a button on the cell phone that wipes its contents and at the same time sends an emergency alert to a person previously specified, was not a danger in this case once the officers seized the cell phone. But remote-wiping capability is available on all major cell-phone platforms; if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company. Wiped data may be recoverable in a laboratory, but that involves delay.

According to Apple, a person with a "jailbroken" iPhone (that is, a "self-hacked" iPhone, modified by its owner to enlarge its functionality or run unauthorized applications) could enable anonymous phone calls to be made, a capability that Apple claims "would be desirable to drug dealers." David Kravets, "iPhone Jailbreaking Could Crash Cellphone Towers, Apple Claims," Wired, July 28, 2009, www.wired.com/threatlevel/2009/07/jailbreak/. Apple would

like the "jailbreaking" of its phones made illegal, so it is not a disinterested commentator on the use of its phones by those dealers.

Other conspirators were involved in the distribution of methamphetamine besides * * * the defendant, and conceivably could have learned of the arrests (they might even have been monitoring the transaction with the informant in the garage from afar) and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search pursuant to it for the cell phone's number; and conceivably the defendant might have had time to warn them before the cell phone was taken from him, giving them time to wipe it. "Conceivably" is not "probably"; but set off against the modest benefit to law enforcement of being able to obtain the cell phone's phone number immediately was only a modest cost in invasion of privacy. Armed with that number the officers could obtain the call history at their leisure, and the defendant does not deny that if the number was lawfully obtained the subpoenaing of the call history from the phone company was also lawful and the history thus obtained could therefore properly be used in evidence against him.

The defendant argues that the officers could have eliminated any possibility of remote wiping just by turning off the cell phone. Without power a cell phone won't be connected to the phone network and so remote wiping will be impossible. But a "roving bug" installed in the phone could record everything that the phone's microphone could pick up even though the phone was turned off (because "turning off" a cell phone often just means a reduction in power—a kind of electronic hibernation). * * * And if the phone is either turned off or powered down to a level at which it appears to be turned off, the police can't obtain information from it, even its phone number, knowledge of which as we said is minimally invasive of privacy. * * *

Judge Posner ultimately concluded that the limited search of the cellphone was reasonable under *Robinson*, and left for another day whether *Robinson* also validates more extensive searches of data on cellphones incident to arrest. He concluded as follows:

We need not consider what level of risk to personal safety or to the preservation of evidence would be necessary to justify a more extensive search of a cell phone without a warrant, especially when we factor in the burden on the police of having to traipse about with * * * mirror-copying technology and having to be instructed in the use of these methods for preventing remote wiping or rendering it ineffectual. We can certainly imagine justifications for a more extensive search. The arrested suspect might have prearranged with

> coconspirators to call them periodically and if they didn't hear from him on schedule to take that as a warning that he had been seized, and to scatter. Or if conspirators buy prepaid SIM (subscriber identity module) cards, each of which assigns a different phone number to the cell phone in which the card is inserted, and replace the SIM card each day, a police officer who seizes one of the cell phones will have only a short interval within which to discover the phone numbers of the other conspirators. * * * The officer who doesn't make a quick search of the cell phone won't find other conspirators' phone numbers that are still in use.
>
> But these are questions for another day, since the police did not search the contents of the defendant's cell phone, but were content to obtain the cell phone's phone number.

Wouldn't it be easier to treat cellphones the same as any other container of information? Does *Robinson* really invite *any* limitation to its apparent rule that a search of a container found upon an arrestee is automatically reasonable under the arrest power rule? It is true that *Robinson* involved a cigarette pack, and at the time of that case people couldn't be carrying a computer or smartphone on their person. But would that have made a difference to the *Robinson* Court, which appeared to be concerned only with providing bright line rules for police to use? *See* People v. Diaz, 51 Cal.4th 84, 244 P.3d 501 (2011) (search of cellphone incident to arrest upheld because a cellphone is a container and *Robinson* authorizes all searches of containers found on the person of the arrestee).

For a view different from that of Judge Posner, based on the fact that cellphones and smartphones—unlike the cigarette pack in *Robinson*—can contain so much private information, see United States v. Wurie, 728 F.3d 1 (1st Cir. 2013) ("the search incident to arrest exception does not authorize the warrantless search of data on a cellphone seized from an arrestee's person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence."). At the time of publication of this casebook, the Court has scheduled *Wurie* for oral argument.

Custodial Arrests for Minor Offenses

The Court in *Robinson* was not called upon to address whether Robinson's custodial arrest was reasonable under the Fourth Amendment. Robinson challenged only the search and not the validity of the arrest for a traffic offense. But why is it reasonable to impose the serious intrusion of a custodial arrest upon a person who has done nothing more than commit a minor traffic offense? Note that one possible limitation on the broad search rights given to police under *Robinson* would be to hold that certain violations are so minimal that they do not

justify a custodial arrest. But this option was rejected by the Supreme Court in the following case.

ATWATER v. CITY OF LAGO VISTA

United States Supreme Court, 2001.
532 U.S. 318.

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine. We hold that it does not.

* * * In Texas, if a car is equipped with safety belts, a front-seat passenger must wear one, and the driver must secure any small child riding in front. Violation of either provision is a misdemeanor punishable by a fine not less than $25 or more than $50. Texas law expressly authorizes "[a]ny peace officer [to] arrest without warrant a person found committing a violation" of these seatbelt laws, although it permits police to issue citations in lieu of arrest.

In March 1997, Petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was wearing a seatbelt. Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. According to Atwater's complaint (the allegations of which we assume to be true for present purposes), Turek approached the truck and "yelled" something to the effect of "we've met before" and "you're going to jail." [Turek had previously stopped Atwater for what he had thought was a seatbelt violation, but then had realized that Atwater's son, although seated on the vehicle's armrest, was in fact belted in. Atwater acknowledged that her son's seating position was unsafe, and Turek had issued a verbal warning.] He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times." Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "you're not going anywhere." As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater's "mug shot" and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on $310 bond. Atwater was charged with driving without her seatbelt fastened, failing to secure her

children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a $50 fine; the other charges were dismissed.

* * * Atwater and her husband * * * filed suit * * * under 42 U.S.C. § 1983 against Turek and respondents City of Lago Vista and Chief of Police Frank Miller. So far as concerns us, petitioners (whom we will simply call Atwater) alleged that respondents (for simplicity, the City) had violated Atwater's Fourth Amendment "right to be free from unreasonable seizure," and sought compensatory and punitive damages. * * * Given Atwater's admission that she had "violated the law" * * * the District Court ruled the Fourth Amendment claim "meritless" and granted the City's summary judgment motion. [The Fifth Circuit ultimately agreed with the lower court.]

We granted certiorari to consider whether the Fourth Amendment * * * limits police officers' authority to arrest without warrant for minor criminal offenses. We now affirm.

* * * Atwater's specific contention is that "founding-era common-law rules" forbade peace officers to make warrantless misdemeanor arrests except in cases of "breach of the peace," a category she claims was then understood narrowly as covering only those nonfelony offenses "involving or tending toward violence." Although her historical argument is by no means insubstantial, it ultimately fails.

* * * [Justice Souter engaged in an extensive and detailed analysis of pre-founding English common law and concluded that, "the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power. Moreover, in the years leading up to American independence, Parliament repeatedly extended express warrantless arrest authority to cover misdemeanor-level offenses not amounting to or involving any violent breach of the peace."]

* * * An examination of specifically American evidence is to the same effect. Neither the history of the framing era nor subsequent legal development indicates that the Fourth Amendment was originally understood, or has traditionally been read, to embrace Atwater's position.

[Justice Souter engages in another extensive and detailed analysis of American practice with respect to arrests, both pre-and post-founding. He concludes that there was a basic assumption that a custodial arrest was reasonable for nonviolent misdemeanors.]

* * * Small wonder, then, that today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace, as do a host of congressional enactments. * * * Atwater does not wager all

on history. * * * Atwater * * * argues for a modern arrest rule * * * forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review! *See, e.g.,* United States v. Robinson. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

At first glance, Atwater's argument may seem to respect the values of clarity and simplicity, so far as she claims that the Fourth Amendment generally forbids warrantless arrests for minor crimes not accompanied by violence or some demonstrable threat of it (whether "minor crime" be defined as a fine-only traffic offense, a fine-only offense more generally, or a misdemeanor). But the claim is not ultimately so simple, nor could it be, for complications arise the moment we begin to think about the possible applications of the several criteria Atwater proposes for drawing a line between minor crimes with limited arrest authority and others not so restricted.

One line, she suggests, might be between "jailable" and "fine-only" offenses * * *. The trouble with this distinction, of course, is that an officer on the street might not be able to tell. It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes, but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below

the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on. But Atwater's refinements would not end there. She represents that if the line were drawn at nonjailable traffic offenses, her proposed limitation should be qualified by a proviso authorizing warrantless arrests where "necessary for enforcement of the traffic laws or when [an] offense would otherwise continue and pose a danger to others on the road." * * * The proviso only compounds the difficulties. Would, for instance, either exception apply to speeding? At oral argument, Atwater's counsel said that "it would not be reasonable to arrest a driver for speeding unless the speeding rose to the level of reckless driving." But is it not fair to expect that the chronic speeder will speed again despite a citation in his pocket, and should that not qualify as showing that the "offense would * * * continue" under Atwater's rule? And why, as a constitutional matter, should we assume that only reckless driving will "pose a danger to others on the road" while speeding will not?

* * * Atwater's rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur. For all these reasons, Atwater's various distinctions between permissible and impermissible arrests for minor crimes strike us as very unsatisfactory lines to require police officers to draw on a moment's notice. * * *.

Just how easily the costs could outweigh the benefits may be shown by asking, as one Member of this Court did at oral argument, "how bad the problem is out there." The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no. So far as such arrests might be thought to pose a threat to the probable-cause requirement, anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate's review of probable cause within 48 hours, County of Riverside v. McLaughlin, and there is no reason to think the procedure in this case atypical in giving the suspect a prompt opportunity to request release. Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses. It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation, for * * * it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason. Finally, and significantly, under current doctrine the preference for categorical treatment of Fourth Amendment claims gives way to

individualized review when a defendant makes a colorable argument that an arrest, with or without a warrant, was conducted in an extraordinary manner, unusually harmful to his privacy or even physical interests. The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress. * * *

Accordingly, we confirm today what our prior cases have intimated: * * * If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.

* * * Atwater's arrest satisfied constitutional requirements. There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. * * * Turek was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not Atwater's arrest was in some sense necessary.

Nor was the arrest made in an "extraordinary manner, unusually harmful to [her] privacy or * * * physical interests." * * * Atwater's arrest was surely "humiliating," * * * but it was no more "harmful to privacy or physical interests" than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station, where officers asked her to remove her shoes, jewelry, and glasses, and to empty her pockets. They then took her photograph and placed her in a cell, alone, for about an hour, after which she was taken before a magistrate, and released on $310 bond. The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.

The Court of Appeals's en banc judgment is affirmed.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

* * *

A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. * * * The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record. * * *

* * * The per se rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors. In Texas alone, for example, disobeying any sort of traffic warning sign is a misdemeanor punishable only by fine, as is failing to pay a highway toll, and driving with expired license plates. Nor are fine-only crimes limited to the traffic context. In several States, for example, littering is a criminal offense punishable only by fine. * * * Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. Or, if a traffic violation, the officer may stop the car, arrest the driver, search the driver, * * * and impound the car and inventory all of its contents. * * * Such unbounded discretion carries with it grave potential for abuse. * * * Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.

* * *

Arrests for Minor Offenses After Atwater

The *Atwater* majority relies in part of a "dearth of horribles"—few if any examples of full custodial arrests for fine-only offenses. After *Atwater* there have indeed been real-life examples of such arrests; one such instance was reviewed by then-Judge Roberts in Hedgepeth v. Washington Metro Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004). Judge Roberts described the facts:

> No one is very happy about the events that led to this litigation. A twelve-year-old girl was arrested, searched, and handcuffed. Her shoelaces were removed, and she was transported in the windowless rear compartment of a police vehicle to a juvenile processing center, where she was booked, fingerprinted, and detained until released to her mother some three hours later—all for eating a single french fry in a Metrorail station. The child was frightened, embarrassed, and crying throughout the ordeal.

The arrest was the result of WMATA's "zero-tolerance" policy for violations of the rule prohibiting eating on the subway. The arrest was

made by an undercover officer, whose job that day was to pose as a passenger and look for people eating on the subway.

Judge Roberts found that while the arrest was the result of bad policy—a policy subsequently suspended due to public outcry—it was not unreasonable under the Fourth Amendment. The court concluded: "Given the undisputed existence of probable cause, *Atwater* precludes further inquiry into the reasonableness" of the arrest under the Fourth Amendment.

Could the *Atwater* Court take comfort in the fact that after the student's arrest for eating a french fry, the public outcry was so great that the WMATA ended its policy of arresting people for violating the no-eating rule?

Robinson and Containers in the Arrestee's Grab Area

The Court in *Robinson* established an automatic right to search everything found on a person who has been subjected to a custodial arrest. Does that automatic search power extend to containers found in the arrestee's grab area? In United States v. Chadwick, supra, the Court held that a search of a footlocker at the police station could not be justified as a search incident to arrest because it occurred long after Chadwick was in custody. In a footnote, the Court referred to *Robinson* and distinguished its automatic search rule:

> Unlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

Does this passage mean that the officer has no automatic right to search containers incident to arrest when they are within the control area but not on the person? This would mean that briefcases, pocketbooks and bookbags could be seized, but they could not be searched without a warrant or exigent circumstances (such as a ticking briefcase); whereas wallets and cigarette packs found on the person could be thoroughly and automatically searched under *Robinson*. Does this distinction based on privacy interests make sense? Wouldn't the things one carries on one's person be more and not less private?

Despite the distinction proffered in *Chadwick*, most lower courts have applied the automatic arrest power rule of *Robinson* to searches of briefcases and the like in the arrestee's grab area. See, e.g., United States v. Morales, 923 F.2d 621 (8th Cir.1991) (distinguishing *Chadwick* as a case involving a search that occurred too long after the arrest was completed and upholding search of a container under the arrest power

rule). But see United States v. Gorski, 852 F.2d 692 (2d Cir.1988) (search of bag during arrest must be justified by exigent circumstances, otherwise seizure is all that is permitted).

4. The Arrest Power Rule Applied to Automobiles

Assume that an officer has probable cause to believe that the driver of an automobile has committed a crime for which a custodial arrest is authorized. The officer pulls over the car and places the driver under arrest, handcuffs the driver, and places him in a squad car. Can the officer then search the car incident to the arrest?

The Belton Rule

In New York v. Belton, 453 U.S. 454 (1981), the Court held that the passenger compartment of an automobile constituted the grab area of the car, and therefore officers arresting someone in the car were permitted to search the car incident to the arrest, and also to open any containers that are found in the passenger compartment. (The Court dropped a footnote indicating that the passenger compartment did not include the trunk of the car.) The precise scope of *Belton* was unclear, but most lower courts held that under *Belton* an arresting officer had an *automatic right* to search the passenger compartment and all containers therein, even if the arrestee had absolutely no possible way to reach into the car for evidence or weapons at the time of the search.

The *Belton* Court styled its rule as being nothing more than an application of the *Chimel* grab area rule to the specific situation of cars. But it seemed hard to argue that the *Belton* search had anything to do with preserving evidence or protecting officers—the underlying reasons for permitting a search incident to arrest under *Chimel*.

Thereafter in Thornton v. United States, 541 U.S. 615 (2004), the Court held that the search power granted by *Belton* applied whenever the person arrested was a "recent occupant" of the car to be searched. Officers thought that Thornton was driving a stolen car, but before they could pull him over, Thornton parked the car and got out of the vehicle. Thornton was subjected to a *Terry* frisk that uncovered narcotics. He was arrested a few feet away from the car, and a search of the passenger compartment incident to arrest turned up a gun. The *Thornton* Court held that the search was permissible under *Belton* because Thornton was a recent occupant and any other rule would only encourage drivers to pop out of a car when they saw police coming, in order to avoid a search of the passenger compartment.

Justice Scalia, joined by Justice Ginsburg, concurred in the judgment in *Thornton*, but took the opportunity to question the wisdom and rationale of the *Belton* rule. He argued as follows:

I see three reasons why the search in this case might have been justified to protect officer safety or prevent concealment or destruction of evidence. None ultimately persuades me.

The first is that, despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence from his vehicle—a theory that calls to mind Judge Goldberg's reference to the mythical arrestee "possessed of the skill of Houdini and the strength of Hercules." * * * The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*, *supra*.

The second defense of the search in this case is that, since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first. * * * The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. * * *

The third defense of the search is that, even though the arrestee posed no risk here, *Belton* searches in general are reasonable, and the benefits of a bright-line rule justify upholding that small minority of searches that, on their particular facts, are not reasonable. The validity of this argument rests on the accuracy of *Belton*'s claim that the passenger compartment is "in fact generally, even if not inevitably," within the suspect's immediate control. By the United States' own admission, however, "the practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would . . . largely render *Belton* a dead letter." Reported cases involving this precise factual scenario—a motorist handcuffed and secured in the back of a squad car when the search takes place—are legion.

So in Justice Scalia's view, an automatic search of the passenger compartment incident to arrest cannot be supported by the reasons cited by *Chimel* for the search power incident to arrest, i.e., the need to protect against the arrestee's destruction of evidence or use of a weapon. Justice Scalia argued, however, that the power to search after an arrest might be justified on another ground. He explained as follows:

If *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested. * * *

Numerous earlier authorities support this approach, referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction. [Citing cases.] Only in the years leading up to *Chimel* did we start consistently referring to the narrower interest in frustrating concealment or destruction of evidence.

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Nevertheless, *Chimel*'s narrower focus on concealment or destruction of evidence also has historical support. [Citing cases.] * * *

Belton cannot reasonably be explained as a mere application of *Chimel*. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel*—limited, of course, to searches of motor vehicles, a category of "effects" which give rise to a reduced expectation of privacy, and heightened law enforcement needs.

Limitations on Arrest-Power Rule as Applied to Automobile Searches: Arizona v. Gant

In the following case, the Court rejected the *Belton* rule, insofar as that rule was read to allow the automatic search of the passenger compartment of a car after a recent occupant of the car was arrested. But it substitutes Justice Scalia's evidence-based view of the arrest power, articulated in his separate opinion in *Thornton*.

ARIZONA v. GANT

Supreme Court of the United States, 2009.
556 U.S. 332.

JUSTICE STEVENS delivered the opinion of the Court.

After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat.

Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, the Arizona Supreme Court held that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in Chimel v. California, and applied to vehicle searches in New York v. Belton, did not justify the search in this case. We agree with that conclusion.

Under *Chimel*, police may search incident to arrest only the space within an arrestee's "immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence." The safety and evidentiary justifications underlying *Chimel's* reaching-distance rule determine *Belton's* scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in Thornton v. United States, and following the suggestion in Justice SCALIA's opinion concurring in the judgment in that case, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

[Gant was arrested shortly after getting out of his car. He was handcuffed and locked in the back of a squad car. The officers then searched the passenger compartment and found a gun and some cocaine.]

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (i.e., the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that * * * *Belton* did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. When asked at the suppression hearing why the search was conducted, Officer Griffith responded: "Because the law says we can do it." [The Trial Court refused to suppress the evidence and Gant was convicted. But the Arizona Supreme Court, for reasons discussed *infra*, ruled that the search violated the Fourth Amendment.]

The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari.

* * *

In *Belton*, we considered *Chimel*'s application to the automobile context. [The Court discusses the facts and arguments of the parties in *Belton*.] There was no suggestion by the parties or amici that *Chimel*

authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.

* * * [W]e held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach."

The Arizona Supreme Court read our decision in *Belton* as merely delineating "the proper scope of a search of the interior of an automobile" incident to an arrest. That is, when the passenger compartment is within an arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached. On that view of *Belton*, the state court concluded that the search of Gant's car was unreasonable because Gant clearly could not have accessed his car at the time of the search.

* * *

Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the "fiction . . . that the interior of a car is always within the immediate control of an arrestee who has recently been in the car." * * *

Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[a]

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[a] Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S., at 632 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. * * *

The State does not seriously disagree with the Arizona Supreme Court's conclusion that Gant could not have accessed his vehicle at the time of the search, but it nevertheless asks us to uphold the search of his vehicle under the broad reading of *Belton* discussed above. The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. * * * At the same time as it undervalues these

of access to the arrestee's vehicle remains. * * * But in such a case a search incident to arrest is reasonable under the Fourth Amendment.

privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line."

Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, Michigan v. Long, 463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross, 456 U.S. 798 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice SCALIA's opinion concurring in the judgment in *Thornton*, which we conclude today are reasonable for purposes of the Fourth Amendment, *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. * * *

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. * * *

Our dissenting colleagues argue that the doctrine of stare decisis requires adherence to a broad reading of *Belton* even though the justifications for searching a vehicle incident to arrest are in most cases absent. The doctrine of stare decisis is of course "essential to the respect accorded to the judgments of the Court and to the stability of the law," but it does not compel us to follow a past decision when its rationale no longer withstands "careful analysis."

* * *

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment

at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

JUSTICE SCALIA, concurring.

To determine what is an "unreasonable" search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness. Since the historical scope of officers' authority to search vehicles incident to arrest is uncertain, traditional standards of reasonableness govern. It is abundantly clear that those standards do not justify what I take to be the rule set forth in New York v. Belton, and *Thornton*: that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons. When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

* * *

Justice STEVENS acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and Thornton adopted. * * * Justice STEVENS would therefore retain the application of Chimel v. California in the car-search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle so long as the "arrestee is within reaching distance of the passenger compartment at the time of the search." I believe that this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search. In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is ipso facto "reasonable" only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred. Because respondent was arrested for driving without a license (a crime for which no evidence could be expected to be found in the vehicle), I would hold in the present case that the search was unlawful.

Justice ALITO insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results. We should recognize *Belton's* fanciful reliance upon officer safety for what it was: a return to the broader sort of [evidence-gathering] search incident to arrest that we allowed before *Chimel*.

* * *

No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

JUSTICE BREYER, dissenting.

I agree with Justice ALITO that New York v. Belton is best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant-regardless of the danger the arrested individual in fact poses. I also agree with Justice STEVENS, however, that the rule can produce results divorced from its underlying Fourth Amendment rationale. For that reason I would look for a better rule—were the question before us one of first impression.

The matter, however, is not one of first impression, and that fact makes a substantial difference. The *Belton* rule has been followed not only by this Court in Thornton v. United States, but also by numerous other courts. Principles of stare decisis must apply, and those who wish this Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden. I have not found that burden met. * * *

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE BREYER joins except as to Part II–E, dissenting.

I

Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.

* * *

The precise holding in *Belton* could not be clearer. The Court stated unequivocally: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

Despite this explicit statement, the opinion of the Court in the present case curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out in the *Belton* opinion, namely, that an officer arresting a vehicle occupant may search the passenger compartment "when the passenger compartment is within an arrestee's reaching distance." * * *

II

* * *

The opinion of the Court recognizes that *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years. But for the Court, this seemingly counts for nothing.

* * *

* * * Abandonment of the *Belton* rule cannot be justified on the ground that the dangers surrounding the arrest of a vehicle occupant are different today than they were 28 years ago. The Court claims that "[w]e now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach," but surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.

* * * The *Belton* rule has not proved to be unworkable. On the contrary, the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply. * * *

The first part of the Court's new rule—which permits the search of a vehicle's passenger compartment if it is within an arrestee's reach at the time of the search—reintroduces the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid. As the situation in *Belton* illustrated, there are cases in which it is unclear whether an arrestee could retrieve a weapon or evidence in the passenger compartment of a car.

Even more serious problems will also result from the second part of the Court's new rule, which requires officers making roadside arrests to determine whether there is reason to believe that the vehicle contains

evidence of the crime of arrest. What this rule permits in a variety of situations is entirely unclear.

* * *

E

* * * The Court is harshly critical of *Belton*'s reasoning, but the problem that the Court perceives cannot be remedied simply by overruling *Belton*. *Belton* represented only a modest—and quite defensible—extension of *Chimel*, as I understand that decision.

* * *

Unfortunately, *Chimel* did not say whether "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence" is to be measured at the time of the arrest or at the time of the search, but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest.

This is so because the Court can hardly have failed to appreciate the following two facts. First, in the great majority of cases, an officer making an arrest is able to handcuff the arrestee and remove him to a secure place before conducting a search incident to the arrest. Second, because it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases. * * * Thus, if the area within an arrestee's reach were assessed, not at the time of arrest, but at the time of the search, the *Chimel* rule would rarely come into play.

Moreover, if the applicability of the *Chimel* rule turned on whether an arresting officer chooses to secure an arrestee prior to conducting a search, rather than searching first and securing the arrestee later, the rule would "create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." United States v. Abdul-Saboor, 85 F.3d 664, 669 (C.A.D.C.1996). If this is the law, the D.C. Circuit observed, "the law would truly be, as Mr. Bumble said, 'a ass.' "

I do not think that this is what the *Chimel* Court intended. Handcuffs were in use in 1969. The ability of arresting officers to secure arrestees before conducting a search—and their incentive to do so—are facts that can hardly have escaped the Court's attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.

The *Belton* Court, in my view, proceeded on the basis of this interpretation of *Chimel*. Again speaking through Justice Stewart, the *Belton* Court reasoned that articles in the passenger compartment of a

car are "generally, even if not inevitably" within an arrestee's reach. This is undoubtedly true at the time of the arrest of a person who is seated in a car but plainly not true when the person has been removed from the car and placed in handcuffs. Accordingly, the *Belton* Court must have proceeded on the assumption that the *Chimel* rule was to be applied at the time of arrest. Viewing *Chimel* as having focused on the time of arrest, *Belton*'s only new step was to eliminate the need to decide on a case-by-case basis whether a particular person seated in a car actually could have reached the part of the passenger compartment where a weapon or evidence was hidden. For this reason, if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests.

F

The Court, however, does not reexamine *Chimel* and thus leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court's new two-part rule—which permits an arresting officer to search the area within an arrestee's reach at the time of the search—applies, at least for now, only to vehicle occupants and recent occupants, but there is no logical reason why the same rule should not apply to all arrestees.

The second part of the Court's new rule, which the Court takes unaccountably from Justice SCALIA's separate opinion in *Thornton*, raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search "reason to believe" rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? It is true that an arrestee's vehicle is probably more likely to contain evidence of the crime of arrest than of some other crime, but if reason-to-believe is the governing standard for an evidence-gathering search incident to arrest, it is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime other than the crime of arrest.

Nor is it easy to see why an evidence-gathering search incident to arrest should be restricted to the passenger compartment. The *Belton* rule was limited in this way because the passenger compartment was considered to be the area that vehicle occupants can generally reach, but since the second part of the new rule is not based on officer safety or the preservation of evidence, the ground for this limitation is obscure.

QUESTIONS AFTER GANT

As Justice Alito predicted, the lower courts after *Gant* are now trending toward a time-of-search rule for *all* searches incident to arrest. See the discussion of *Shakir* earlier in this section. Doesn't this mean, as Justice Alito

believes, that the arrest-power rule provides little if any utility for officers—because at the time of the search the officer will have put the arrestee in custody so that he no longer presents any risk of destroying evidence or getting a weapon? Is Justice Alito correct that the Court in *Chimel* could not have been going to so much trouble to craft a rule that would seldom if ever be used?

Perhaps, though, a time-of-search rule might still lead to a finding that a passenger car was in the grab area in a particular case. For example, suppose a single officer arrests a driver of a car in which there are five tough-looking occupants, and it is late at night in a high crime area. If the officer searches the passenger compartment before securing all the occupants, do you think a court would find such a search to be valid under *Gant*? See United States v. Salamasina, 615 F.3d 925 (8th Cir. 2010) (search of passenger compartment permissible under *Gant*; while the defendant was secured, his wife was not, and she was repeatedly entering and exiting the vehicle to tend to her children, and was communicating to the defendant in a foreign language despite the officers' direction not to talk to him).

What is the meaning of *Gant's* newly-minted "reason to believe" test? It can't mean that a search of the car is permitted under the arrest-power rule if there is probable cause to believe that there is evidence of the crime for which an arrest has been effectuated. If probable cause were the test, then the doctrine would be completely unnecessary because officers already are permitted to search a car without a warrant if they have probable cause. See the materials on the automobile exception to the warrant requirement later in this Chapter. Accordingly, "reason to believe" must mean that a search of the passenger compartment is permitted upon proof less than probable cause to believe that evidence of the crime that is the subject of arrest will be found. See United States v. Vinton, 594 F.3d 14 (D.C.Cir. 2010) ("Presumably, the 'reason to believe' standard requires less than probable cause, because otherwise *Gant's* evidentiary rationale would merely duplicate the automobile exception, which the Court in *Gant* specifically identified as a distinct exception to the warrant requirement."). Accordingly, the lower courts after *Gant* have interpreted "reason to believe" as equivalent to the reasonable suspicion standard established in *Terry*. Id.

Even as so construed, the "reason to believe" standard appears to be of marginal use to officers as it is specifically limited by the *Gant* Court to evidence of the offense for which the suspect has been arrested. Thus, in a case involving a traffic violation, like *Gant*, the "reason to believe" test will not be useful because there will rarely be evidence of the traffic violation in the passenger compartment. And for arrests on evidence-based crimes, such as drug offenses, the "reason to believe" test will be of little utility because if there is probable cause to arrest the defendant there will, in all but a few cases, be probable cause to believe that there is evidence of that crime in his car—and so the evidence could be found through the automobile exception.

If the "reason to believe" test somehow becomes untethered from the crime for which the person is arrested, *then* it could be useful to the police. For example, if officers have only reasonable suspicion that the defendant is dealing drugs, and arrest him for a traffic offense, the "reason to believe" prong of *Gant*—if it applied—would be very useful to the police. It would come close to the arrest power rules that were granted by *Belton*. Perhaps that is why Justice Alito, in his *Gant* dissent, questions why the "reason to believe" test should be limited to evidence of the crime for which the person is arrested.

Assume a driver is arrested for driving without a license, or driving while texting. Does an officer have "reason to believe" that there is evidence of such offenses when he sees the driver's cellphone in the passenger compartment? Might there be some information on a cellphone about a traffic offense?

5. The Arrest Power Rule Where No Custodial Arrest Takes Place

In *Robinson*, the Court established a bright-line rule permitting full-blown searches when a person has been subjected to a custodial arrest; *Gant* allows a search of a passenger compartment upon arrest if the occupant has access at the time of search or if there is "reason to believe" that evidence pertinent to the crime is located there. Each case involved a traffic stop, and in each case a custodial arrest was authorized, but it was not mandatory. What if an officer makes a traffic stop and merely issues a ticket? Does the arrest-power rule apply to permit a search of the person and the grab area? In Knowles v. Iowa, 525 U.S. 113 (1998), the Court held that it was not—the arrest-power rule is limited to situations in which the person is subjected to a custodial arrest. Chief Justice Rehnquist, writing for a unanimous Court, noted that the threat to officer safety from issuing a traffic citation "is a good deal less than in the case of a custodial arrest." Moreover, the threat of destruction of evidence of a traffic stop was nonexistent. In Knowles's case, he was stopped for speeding, and "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." The Court also noted that the *Terry* doctrine was in place to protect the interests of officers, should circumstances warrant. Chief Justice Rehnquist concluded as follows:

> In *Robinson*, we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the

same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so.

QUESTION ON KNOWLES

By denying the right to a search in the absence of a custodial arrest, isn't the Court providing police officers with an incentive to use a custodial arrest rather than a ticket for a minor traffic offense? How does encouraging police officers to act more intrusively further Fourth Amendment values?

6. The Arrest Power Rule Where the Arrest Violates State Law

In Virginia v. Moore, 553 U.S. 164 (2008),[1] the Court considered whether a police officer violates the Fourth Amendment by searching a person incident to a custodial arrest based on probable cause, when the custodial arrest was not authorized by state law. Moore was arrested for driving with a suspended license. Officers searched him incident to the arrest and found drugs. State law, however, did not permit a custodial arrest for driving with a suspended license. But the Court, in an opinion by Justice Scalia for eight Justices, held that the search was valid under the Fourth Amendment. Justice Scalia reasoned as follows:

> [L]inking Fourth Amendment protections to state law would cause them to vary from place to place and from time to time. Even at the same place and time, the Fourth Amendment's protections might vary if federal officers were not subject to the same statutory constraints as state officers. In Elkins v. United States, 364 U.S. 206 (1960), we noted the practical difficulties posed by the "silver-platter doctrine," which had imposed more stringent limitations on federal officers than on state police acting independent of them. It would be strange to construe a constitutional provision that did not apply to the States at all when it was adopted to now restrict state officers more than federal officers, solely because the States have passed search-and-seizure laws that are the prerogative of independent sovereigns.
>
> We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.

Because the arrest was valid, the Court also found the search of Moore's person to be valid under *Robinson*.[23]

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[23] Justice Ginsburg concurred in the judgment.

D. PRETEXTUAL STOPS AND ARRESTS

The authority we have discussed this far, such as *Terry* and *Robinson,* give police officers the right to conduct certain searches on the basis of a stop or arrest for a minor offense, such as a traffic offense. Is it possible that these investigatory powers as to minor crimes can be used to search for evidence of a more serious crime for which probable cause or reasonable suspicion does not exist? Are you concerned with that possibility? Is it possible that the right to stop/arrest/search pursuant to a minor traffic offense could be used by police as a tool for harassing citizens, particularly minorities? Does the Fourth Amendment protect a citizen from pretextual stops, arrests and searches if the citizen has in fact committed a minor offense? The Supreme Court considered these questions in the following case.

WHREN V. UNITED STATES

Supreme Court of the United States, 1996.
517 U.S. 806.

JUSTICE SCALIA delivered the opinion of the Court.

In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.

* * *

On the evening of June 10, 1993, plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car. Their suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed. The policemen followed, and in a short while overtook the Pathfinder when it stopped behind other traffic at a red light. They pulled up alongside, and Officer Ephraim Soto stepped out and approached the driver's door, identifying himself as a police officer and directing the driver, petitioner Brown, to put the vehicle in park. When Soto drew up to the driver's window, he immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands. Petitioners were arrested, and quantities of several types of illegal drugs were retrieved from the vehicle.

Petitioners were charged in a four-count indictment with violating various federal drug laws, * * *. At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual. The District Court denied the suppression motion, concluding that "the facts of the stop were not controverted," and "there was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop." [The defendants were convicted and the Court of Appeals affirmed.]

* * *

Petitioners accept that Officer Soto had probable cause to believe that various provisions of the District of Columbia traffic code had been violated. See 18 D. C. Mun. Regs. §§ 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle"); 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions"). They argue, however, that "in the unique context of civil traffic regulations" probable cause is not enough. Since, they contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not * * * whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.

* * * Petitioners contend that the standard they propose is consistent with our past cases' disapproval of police attempts to use valid bases of action against citizens as pretexts for pursuing other investigatory agendas. We are reminded that in Florida v. Wells, 495 U.S. 1 (1990), we stated that "an inventory search must not be used as a ruse for a general rummaging in order to discover incriminating evidence"; that in Colorado v. Bertine, 479 U.S. 367 (1987), in approving an inventory search, we apparently thought it significant that there had been "no showing that the police, who were following standard procedures, acted in bad faith or for the sole purpose of investigation"; and that in New York v. Burger, 482 U.S. 691 (1987), we observed, in upholding the constitutionality of a

warrantless administrative inspection, that the search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." But only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the absence of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.

* * *

* * * Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. * * * In United States v. Robinson, we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," and that a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches. * * *

We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

* * * Recognizing that we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of "reasonableness." They insist that the standard they have put forward—whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given—is an "objective" one.

But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit

only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.

Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account actual and admitted pretext is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option. If those cases were based only upon the evidentiary difficulty of establishing subjective intent, petitioners' attempt to root out subjective vices through objective means might make sense. But they were not based only upon that, or indeed even principally upon that. Their principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent. But even if our concern had been only an evidentiary one, petitioners' proposal would by no means assuage it. Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a "reasonable officer" would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities. The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others." This basis of invalidation would not apply in jurisdictions that had a different practice. And it would not have applied even in the District of Columbia, if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser.

* * *

Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop.

But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.

Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct.

QUESTIONS ABOUT WHREN

Professor Maclin, in Race and the Fourth Amendment, 51 Vand. L.Rev. 333 (1998), cites statistics that might give some perspective on the impact of *Whren* on Fourth Amendment protections. These statistics were compiled in two separate actions in Maryland and New Jersey, each alleging that State Troopers were engaged in racial profiling of Black motorists. The New Jersey Turnpike data revealed the following:

> A count of the traffic indicated that 13.5% of the automobiles carried a black occupant. A count of the traffic surveyed for speeding indicated that 98.1% of the vehicles on the road exceeded the speed limit. Fifteen percent of the speeding vehicles had a black occupant. Fifteen percent of the automobiles that both violated the speed limit and committed some other moving violation also had a black occupant. * * * [W]hile automobiles with black occupants represented only 15% of the motorists who violated the speeding laws, * * * 35.6% of the race identified stops * * * involved vehicles with black occupants.

In the Maryland case, Wilkins v. Maryland State Police, a state trooper stopped an automobile with four black occupants for speeding in April 1992 in Allegheny County. One of the occupants was Robert Wilkins, a Washington, D.C., criminal defense lawyer, who with his family, was returning to Washington after attending a funeral in Chicago. He was detained for more than 30 minutes, and the officer had a drug-sniffing dog brought to the scene. The canine sniff revealed no narcotics; the officer then permitted Wilson and his family to leave after writing out a speeding ticket.

Wilkins subsequently filed a class action lawsuit alleging Maryland troopers were illegally stopping black motorists because of their race. In addition to the police data, the plaintiffs' expert designed a statistical plan to determine whether Maryland troopers stop and search black motorists at a

rate disproportionate to their numbers on the roads. The expert's data indicated that

> 93.3% of the drivers on Interstate 95 "were violating traffic laws and thus were eligible to be stopped by State Police. Of the violators, 17.5% were black, and 74.7% were white." * * * 72.9% of the motorists stopped and searched were black; 80.3% of the motorists searched were black, Hispanic or some other racial minority group; 19.7% of those searched were white. * * * [T]hirteen troopers conducted 85.4% of the searches. With the exception of one trooper, all of these troopers searched black and other minority motorists at much higher rates than these motorists travel on the highway. The trooper (omitting the trooper who searched black motorists at a rate close to their presence on the roads) with the lowest percentage of black motorist searches still searched black motorists at nearly twice the rate they were found to travel on the highway. The trooper with the highest percentage of black motorist searches searched only black motorists. Ten of the thirteen troopers searched minority motorists at least 80% of the time.
>
> * * * Troopers recovered contraband from 28.4% of the black motorists searched and from 28.8% of the white motorists searched. Thus, seventy percent of the searches uncovered no contraband.

The plaintiff's expert in *Wilkins* concluded that "the probability that black Interstate 95 drivers are subjected to searches at so high a rate by chance is less than one in one quintillion. It is wildly significant by statistical measures."

In light of the statistics indicating that traffic stops are used as a pretext to search minorities, did the Court reach the right result in *Whren* when it held that probable cause of a traffic violation ends the Fourth Amendment inquiry? If that is the wrong result, what should the Court have done? Should it have held that officers cannot make stops or arrests for traffic violations? Should it have held that officers can make stops for traffic violations, but that any evidence they find of some other violation cannot be admitted at trial? Would excluding the evidence, even though "legally" found, be justified? Would it deter police officers from stopping for traffic violations simply to harass minority drivers?

Professor Leong, in The Open Road and the Traffic Stop: narratives and Counter-Narratives of the American Dream, 64 Fla L. Rev. 305 (2012), notes that *Whren* provides officers virtually unlimited discretion to stop and search cars, and courts have done little to regulate this discretion:

> Under current doctrine, the legal justification for stopping a car need not be the same as the real reason the police officer wants to stop the car, so long as a reasonable officer would have had probable cause to believe that a traffic infraction in fact took place. [Professor] Paul Butler [now of the Georgetown University Law Center] describes riding in a police cruiser with a police officer friend and playing a game his friend

invented called "Stop that Car!" in which Butler "pick[s] a car—any car—and [the officer] stops it." Butler explains that his friend "is a good cop" because "[h]e waits until he has a legal reason to stop the car. It doesn't take long, never more than three or four blocks of following. There are so many potential traffic infractions that it is impossible to drive without committing one." The reality, then, is that the police are free to pick a car they wish to stop, follow it until the driver inevitably violates one of the vehicle code's myriad obscure provisions, and subsequently pull it over.

For other critiques of *Whren*, see O'Neill, Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests, 69 Colo.L.Rev. 693 (1998) (arguing that instead of focusing on privacy, the Court in *Whren* should have focused on whether the police officer's conduct in *Whren* was abusive and arbitrary); Fan, The Police Gamesmanship Dilemma in Criminal Procedure, 44 U.C. Davis L.Rev. 1407 (2011) ("*Whren* stands as a controversial landmark of noninquiry and a license to make racial distinctions. *Whren* is a lightning rod for controversy because the Court took a don't ask, don't tell approach allowing police to do whatever it takes—without examining the accuracy of police beliefs about what it takes, basing deference on noninquiry rules rather than data.").

Atwater and *Whren* make a powerful combination. See Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles? 74 Geo.Wash.L.Rev. 956 (2006) ("*Atwater* and *Whren* clearly empower police departments to direct officers who see any traffic violation for which an arrest can be made, no matter how minor, to arrest the driver for the specific purpose of searching the car, even though the officer lacks reasonable suspicion that the car contains contraband or evidence of a crime.").

Testilying?

The police officer in *Whren* testified that when he stopped the suspects' vehicle and approached the car, he observed two large plastic bags of crack cocaine in Whren's hands. Was Whren stupid or something? When he saw the officer approach the car, why didn't he try to hide the drugs? Professor Maclin, in Race and the Fourth Amendment, supra, comments on this aspect of *Whren*:

> After reviewing so many cases where police officers testify that they discovered illegal drugs in plain view or after a consent search, judges may begin to wonder why drug dealers are so stupid. * * * Of course, there is an alternative explanation other than drug dealers' desire to cooperate with the police for the type of police testimony seen in *Whren* and other cases where drugs are claimed to be found in plain view or after a consent search: police perjury. As Joseph D. McNamara, the former Police Chief of Kansas City and San Jose, has explained:

> (H)undreds of thousands of police officers swear under oath that the drugs were in plain view or that the defendant gave consent to a search. This may happen occasionally but it defies belief that so many drug users are careless enough to leave illegal drugs where the police can see them or so dumb as to give cops consent to search them when they possess drugs.
>
> * * * We can suppose that criminals are not rocket scientists and that Freud's insights apply to criminals no less than to anyone else. But even if a self-destructive error of the sort posited by the police is possible, it is not probable.

Equal Protection Issues

Are there limitations other than those of the Fourth Amendment that might constrain officers who use traffic stops as a pretext to search or harass? In United States v. Scopo, 19 F.3d 777 (2d Cir.1994), the court upheld a firearms conviction based on evidence discovered during a stop for a traffic offense. Judge Newman, concurring, declared as follows:

> In upholding Scopo's arrest, we should not be understood to be giving police officers carte blanche to skew their law enforcement activity against any group that displeases them. Though the Fourth Amendment permits a pretext arrest, if otherwise supported by probable cause, the Equal Protection Clause still imposes restraint on impermissibly class-based discriminations.

The Court in *Whren* also cited the Equal Protection Clause as a constraint on police officers in cases where the stop or arrest is reasonable under the Fourth Amendment. But it is extremely difficult to prove an equal protection violation when it comes to police officer conduct in the streets. Professor Maclin, in Race and the Fourth Amendment, supra, elaborates:

> Before a black motorist can * * * prevail on the merits of an equal protection claim, he will have to show that he was singled out because of his race or ethnicity, and that similarly situated white motorists were not stopped. In the typical case, this means that a black defendant must show a specific intent or purpose by either the officer or his department to target blacks for traffic stops. * * * Unless an officer were to testify that the motorist was stopped because he was black or Hispanic, the specific intent standard will doom the typical pretextual traffic stop case involving a black motorist. In the atypical case involving a defense able to conduct a systematic study of the enforcement practices of a particular police department, there is a better chance of success if statistics suggest that officers are targeting black motorists. But even where statistics show a strong correlation between race and a particular outcome, the Court has still required the individual criminal defendant to prove

that the government officials in his case were motivated by a discriminatory intent.

Finally, even if a black defendant challenging a pretextual traffic stop is able to obtain discovery and prevail on the merits of an equal protection claim, there is the question of remedy. The Court has shown no sign that it interprets the Equal Protection Clause to embody an exclusionary rule remedy, or that the Clause even requires the dismissal of criminal charges in a case involving a race-based prosecution. * * *

For these reasons, successful equal protection challenges to pretextual traffic stops by minority motorists will be rare. Thus, the *Whren* Court's apparent accord with the constitutional challenge in that case, ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race."), seems hollow.

For cases rejecting equal protection challenges to police searches and seizures after *Whren*, see, e.g., Johnson v. Crooks, 326 F.3d 995 (8th Cir. 2003) (even though officer followed a black motorist 11 miles before making a traffic stop, there was no showing of an equal protection violation, as the plaintiff "offered no evidence that Crooks does not stop non-African Americans under similar circumstances."); Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003) ("Essentially, Bingham argues that because he is African-American, the officer is white, and they disagree about the reasonableness of the traffic stop, these circumstances are sufficient to raise an inference of discrimination. We disagree that this is sufficient to state an equal protection claim."); Bradley v. United States, 299 F.3d 197 (3rd Cir. 2002) (the fact that the plaintiff, an African-American, was thoroughly searched at a Customs checkpoint while several white males were allowed to pass is not enough to show discriminatory intent).

Moreover, as predicted by Professor Maclin, courts have held that even if there is an equal protection violation, the evidence obtained is not excluded. See United States v. Nichols, 512 F.3d 789 (6th Cir. 2008) ("we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause, and we decline Nichols's invitation to do so here. Rather, we believe the proper remedy for any alleged violation is a 42 U.S.C. § 1983 action against the offending officers.").

Is it possible that the solution to pretextual stops after *Whren* has been shifted from constitutional regulation to regulation by public outrage and legislation? Public outrage over racial profiling in the use of traffic stops led to personnel changes in New Jersey, as well as new rules requiring Troopers to file reports concerning the race of motorists whom

they stop. See "Whitman Admits Police Used Race in Turnpike Stops," New York Times, April 21, 1999, at B1. Legislation exists in a number of states requiring studies of how often racial profiling occurs and requiring police to record the race of each person stopped for a traffic violation. Samborn, "Profiled and Pulled Over," ABA Journal, October, 1999, at 18. Can you think of any other legislation that might be useful in regulating the pretextual use of traffic stops?

Probable Cause of a Traffic Violation

One of the consequences of *Whren* is that courts, in deciding the reasonableness of searches and seizures under the Fourth Amendment, often find themselves immersed in interpreting the intricacies of state and local traffic laws. A traffic stop can only be used as a pretext under *Whren* if the officer has reasonable cause to believe that the motorist has actually violated a traffic law. See United States v. Mariscal, 285 F.3d 1127 (9th Cir. 2002) (*Whren* not applicable because the officer stopped the defendant for something that was not a traffic violation: the defendant turned right without signaling, but the local traffic law prohibited such turns only if "other traffic" would be affected by the turn; in this case, there was no "other traffic" on the road; the fact that the police officer's car was affected by the defendant's turn was irrelevant, because it was affected only "to the extent that the turn energized the officers to swoop down upon their prey"). See also United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (search made after officer stopped the defendant for speeding was invalid because determination of speeding—that the defendant was driving 75 mph in a 70 mph zone—was based on a visual estimate by an inexperienced officer who testified that he watched the defendant driving for about 100 yards and that "there's 12 feet in a yard" and 12 inches on a yardstick).

Reasonable Mistake of Fact, Mistake of Law

Remember that in assessing probable cause or reasonable suspicion, the officer need not be correct. Reasonable mistakes of fact are excused. So it is with traffic stops and arrests after *Whren*. Thus, in United States v. Flores-Sandoval, 366 F.3d 961 (8th Cir. 2004), the defendant was stopped for not having a front license plate, in violation of the state traffic law. After the stop (and recovery of evidence) it was determined that the car did in fact have a front license plate that was partially obscured from view because it had been mounted below the standard plate bracket. The court held that the evidence was properly admitted. It analyzed the officer's mistake as follows:

> [A] mistake of fact does not automatically negate the validity of the stop. Officer Lippold was justified in making the stop if he had an

objectively reasonable basis for believing that the vehicle was not in conformity with Nebraska's traffic laws. * * *

Officer Lippold testified that he saw an empty front license bracket and assumed that there was no license plate on the front of the car. If credited, Lippold's testimony shows he mistakenly believed that Flores-Sandoval's car did not have a front license plate, in violation of Nebraska law. There is nothing in the record before this court to call into question the credibility determination made by the district court that Officer Lippold believed he had probable cause to stop Flores-Sandoval's vehicle. Officer Lippold's mistake was one of fact, not of law. So, we now turn to the question of whether his mistake of fact was objectively reasonable.

Officer Lippold testified that he relied on a regular practice of observing oncoming traffic via his rear view mirror and observing the light that bounced off of the reflective surface on the front license plate of the approaching vehicle. His observation of the Toyota led him to conclude—after seeing no reflection from the front of the vehicle and an empty plate bracket—that the vehicle did not have a front license plate. These perceptions, although flawed, were sufficiently reasonable to provide probable cause to stop the vehicle in which Flores-Sandoval was traveling.

On the other hand, if the officer is mistaken about whether a particular set of facts is in violation of the traffic law, a stop or arrest will be unreasonable. As indicated in *Flores-Sandoval*, the courts distinguish between reasonable mistakes of fact and mistakes of law. See United States v. Chanthasouxat, 342 F.3d 1271 (11th Cir. 2003) (officer's mistaken belief that the city code required vehicles to have an inside rear view mirror did not justify the traffic stop of the defendant's van: "the officer's mistake was one of law" and "an officer's mistake of law cannot provide the objective grounds for reasonable suspicion or probable cause to justify a traffic stop.").

E. PLAIN VIEW AND PLAIN TOUCH SEIZURES

The concept of plain view underlies much of the law and practice under the *Terry* doctrine and the arrest-power rule, and it applies as well during searches conducted pursuant to a warrant or another exception to the warrant requirement. For example, the officer in *Robinson* seized narcotics in plain view (in the cigarette pack) during the course of a search incident to arrest; the officers in *Long* seized weapons in plain view in Long's car during the course of a search for self-protection under *Terry;* the officer in *Whren* seized evidence that he saw in Whren's hands after making a lawful traffic stop. As the Court put it in Texas v. Brown, 460 U.S. 730, 739 (1983), the plain view doctrine is best understood "not

as an independent exception to the warrant clause, but simply as an extension of whatever the prior justification for an officer's access to an object may be."

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice Stewart's plurality opinion stated that if officers have a right to be in a particular place and come upon evidence that they have probable cause to believe is subject to seizure, they may seize it. See also Texas v. Brown, *supra* ("if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately"). In the following case, the Court explains the plain view doctrine in detail, and revisits some of the problems of applying that doctrine that divided the Court in *Coolidge*.

HORTON V. CALIFORNIA

Supreme Court of the United States, 1990.
496 U.S. 128.

JUSTICE STEVENS delivered the opinion of the Court.

In this case we revisit an issue that was considered, but not conclusively resolved, in Coolidge v. New Hampshire: Whether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate "plain view" seizures, it is not a necessary condition.

* * * Petitioner was convicted of the armed robbery of Erwin Wallaker, the treasurer of the San Jose Coin Club. * * *

Sergeant LaRault, an experienced police officer, investigated the crime and determined that there was probable cause to search petitioner's home for the proceeds of the robbery and for the weapons used by the robbers. His affidavit for a search warrant referred to police reports that described the weapons as well as the proceeds, but the warrant issued by the Magistrate only authorized a search for the proceeds, including three specifically described rings.

Pursuant to the warrant, LaRault searched petitioner's residence, but he did not find the stolen property. During the course of the search, however, he discovered the weapons in plain view and seized them. * * * LaRault testified that while he was searching for the rings, he also was interested in finding other evidence connecting petitioner to the robbery. Thus, the seized evidence was not discovered "inadvertently."

* * *

The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a

seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.

The criteria that generally guide "plain view" seizures were set forth in Coolidge v. New Hampshire. The Court held that the seizure of two automobiles parked in plain view on the defendant's driveway in the course of arresting the defendant violated the Fourth Amendment. Accordingly, particles of gun powder that had been subsequently found in vacuum sweepings from one of the cars could not be introduced in evidence against the defendant. The State endeavored to justify the seizure of the automobiles, and their subsequent search at the police station, on four different grounds, including the "plain view" doctrine. The scope of that doctrine as it had developed in earlier cases was fairly summarized in * * * Justice Stewart's opinion:

* * *

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. * * * Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

* * *

Justice Stewart concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. He explained:

> "The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to

seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as '*per se* unreasonable' in the absence of 'exigent circumstances.'"

* * *

We find two flaws in this reasoning. First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

* * *

Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," and that a warrantless search be circumscribed by the exigencies which justify its initiation. Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. * * *

* * *

In this case, the scope of the search was not enlarged in the slightest by the omission of any reference to the weapons in the warrant. Indeed, if the three rings and other items named in the warrant had been found at the outset—or if petitioner had them in his possession and had responded to the warrant by producing them immediately—no search for weapons could have taken place. * * *

* * * The prohibition against general searches and general warrants serves primarily as a protection against unjustified intrusions on privacy.

But reliance on privacy concerns that support that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant.

* * *

[Based on the above reasoning, the Court rejects the implication in *Coolidge* that a plain view seizure must be inadvertent.]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

* * *

[T]here are a number of instances in which a law enforcement officer might deliberately choose to omit certain items from a warrant application even though he has probable cause to seize them, knows they are on the premises, and intends to seize them when they are discovered in plain view. For example, the warrant application process can often be time-consuming, especially when the police attempt to seize a large number of items. An officer interested in conducting a search as soon as possible might decide to save time by listing only one or two hard-to-find items, such as the stolen rings in this case, confident that he will find in plain view all of the other evidence he is looking for before he discovers the listed items. Because rings could be located almost anywhere inside or outside a house, it is unlikely that a warrant to search for and seize the rings would restrict the scope of the search. An officer might rationally find the risk of immediately discovering the items listed in the warrant—thereby forcing him to conclude the search immediately—outweighed by the time saved in the application process.

* * * It is true that the inadvertent discovery requirement furthers no privacy interests. * * * But it does protect possessory interests. * * * The Court today eliminates a rule designed to further possessory interests on the ground that it fails to further privacy interests. I cannot countenance such constitutional legerdemain.

* * *

Probable Cause to Seize an Item in Plain View: Arizona v. Hicks

One of the difficult plain view issues is how closely the police may examine an object to decide whether it is subject to seizure. In the 6–3 decision in Arizona v. Hicks, 480 U.S. 321 (1987), Justice Scalia wrote for the Court as it held that probable cause is necessary to justify a search that precedes a plain view seizure. Arizona police entered Hicks' apartment after a bullet was fired through its floor into the apartment

below, injuring a man. The officers looked for the shooter, other victims and weapons. One officer noticed two sets of expensive stereo components that seemed out of place in an "ill-appointed four-room apartment." The officer moved some of the components in order to find serial numbers, telephoned in the numbers, and learned that one turntable he had moved was stolen. He seized the turntable immediately. Later it was learned that other equipment was stolen, and a warrant was obtained.

Justice Scalia rejected the state's argument that the officer's inspection of the underside of the turntable did not amount to a search: "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." He also rejected the argument that the officer had sufficient cause to justify his actions. The state conceded that the officer lacked probable cause for a search, but sought to justify his actions on the basis of reasonable suspicion. Justice Scalia described the plain view doctrine as resting on the "desirability of sparing police, whose viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place, the inconvenience and the risk—to themselves or to preservation of the evidence—of going to get a warrant." He further observed that "[n]o reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises." Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, dissented.

After *Hicks*, an officer must have probable cause to seize an item that he views during the course of legal activity. And that probable cause must be *readily apparent*—meaning that probable cause must exist without the necessity of a further search. For cases discussing the probable cause requirement for plain view seizures after *Hicks*, see United States v. Benish, 5 F.3d 20 (3d Cir.1993) (probable cause to seize a marijuana plant was immediately apparent, as the officer had taken classes on identifying marijuana); United States v. Cooper, 19 F.3d 1154 (7th Cir.1994) (probable cause to seize an empty ammunition box was immediately apparent, where it was found together with drugs and weapons: "The ammunition box, unlike a cigar box, is probative of weapons possession and drug dealing."); United States v. Pindell, 336 F.3d 1049 (D.C.Cir. 2003) (probable cause to seize a notebook was immediately apparent, as the victim of a robbery had told the officer that the perpetrator had been disguised as a police officer and had recorded information in a notebook during the robbery; the officer found the notebook lying next to a police uniform in the defendant's car).

The Plain Touch Doctrine

If an officer, acting in the course of lawful activity, can determine *by touch* that an object is evidence or contraband, can he seize the object? That was the question in Minnesota v. Dickerson, 508 U.S. 366 (1993), where an officer, in the course of a stop and frisk permitted by the *Terry* doctrine, patted-down the suspect and felt a small, hard, pea-shaped object in the suspect's shirt pocket. At the suppression hearing, the officer testified that he examined the object with his fingers "and it slid and it felt to be a lump of crack cocaine in cellophane." Because the suspect had left a house known to be a place for drug activity, the officer concluded that there was probable cause to believe that the pea-shaped object was contraband, and he pulled the object from the suspect's pocket; the object turned out to be a small plastic bag containing crack cocaine.

The state in *Dickerson* argued that the seizure was permissible because the officer obtained probable cause by "plain touch" during a lawful frisk, which was analogized to obtaining probable cause by plain view during a lawful search. The Supreme Court, in an opinion by Justice White stated that the plain view doctrine "has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search."

While the Court found that the Fourth Amendment permits the seizure of evidence discovered through the sense of touch in the course of a lawful search, it also found that the plain touch exception *did not justify the search* under the facts of *Dickerson*. This was because the officer did more than merely touch the object in the course of a lawful *Terry* frisk. Rather, he went beyond the scope of a *Terry* protective frisk, by pushing and prodding the object—after concluding that it was not a weapon—in order to determine whether it was contraband. Thus the officer at that point was conducting a search for evidence, beyond the permissible scope of the *Terry* doctrine.. Justice White evaluated the facts of *Dickerson* as follows:

> Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or any other exception to the warrant requirement. Because the further search of respondent's jacket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional.

Justice Scalia wrote a short concurring opinion. Chief Justice Rehnquist wrote a short dissenting opinion joined by Justices Blackmun and Thomas. He agreed with the majority's position on the plain touch

exception, but argued that a remand was necessary to allow the Minnesota court to apply the exception to the facts of the case.

How much more information would have been required for the officer to find probable cause to believe that a hard, pea-shaped object in Dickerson's pocket was crack cocaine? See United States v. Yamba, 506 F.3d 251 (3rd Cir. 2007) (officer properly frisking for weapons felt a "soft, squishy substance" and what felt like "small buds or seeds" inside the suspect's coat pocket; at that point the officer had probable cause to believe the suspect possessed marijuana); United States v. Williams, 139 F.3d 628 (8th Cir.1998) (officer who conducted *Terry* frisk and felt a package, had probable cause to seize it because the suspect had just been observed taking part in a drug transaction).

F. AUTOMOBILES AND OTHER MOVABLE OBJECTS

One of the well-recognized exceptions to the warrant requirement is that which is commonly referred to as the "automobile exception." Under that exception the police may search an automobile without a warrant, so long as they have probable cause to believe it contains evidence of criminal activity. The Court first created the exception in Carroll v. United States, 267 U.S. 132 (1925), and it is sometimes called "the *Carroll* Doctrine." As you study the following material, consider two questions: whether the rationale for the exception can withstand analysis; and whether acceptance of the rationale might logically require its extension to objects other than cars.

1. The *Carroll* Doctrine

Carroll v. United States involved a violation of the National Prohibition Act, as did many early search and seizure cases. In December 1921, Carroll and a cohort were driving westward on a highway between Detroit and Grand Rapids when they were stopped by federal prohibition agents who were patrolling the road. Bootlegging traffic was known to be heavy in the area, due to its proximity to Canada. The officers knew the men had been previously involved in transporting liquor. Carroll's car was searched without a warrant, and 68 quarts of whiskey and gin were found behind the upholstering of the seats. The defendants were convicted of illegal transportation of intoxicating liquor, a misdemeanor.

The Court, in a 7–2 decision written by Chief Justice Taft, found the search to be constitutional. The major contention was not probable cause, but whether a warrant was required for the search. Justice Taft declared that a warrant could not reasonably have been demanded in light of the mobility of the vehicle:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the

beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Taft further noted that the right to search and the validity of the seizure were not dependent on the right to arrest, thus clearly distinguishing this search from that of an automobile incident to the arrest of the driver.

2. The Progeny of *Carroll*

In the following case, the Court considered whether the *Carroll* doctrine, and its reliance on a car's mobility, could be invoked when a warrantless search of a car occurred after the car had been removed to the police station. A car impounded by the police is hardly mobile within the meaning of *Carroll*. So what can justify a warrantless search of an immobile car?

CHAMBERS v. MARONEY

Supreme Court of the United States, 1970.
399 U.S. 42.

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal question in this case concerns the admissibility of evidence seized from an automobile, in which petitioner was riding at the time of his arrest, after the automobile was taken to a police station and was there thoroughly searched without a warrant. The Court of Appeals for the Third Circuit found no violation of petitioner's Fourth Amendment rights. We affirm.

[Officers had probable cause to believe that the petitioner and three other men had robbed a gas station and left in a car. The car was identified and pulled over by officers. The occupants were arrested and the car was driven to the police station. In the course of a thorough search of the car at the station, the police found weapons and other evidence of the crime.]

[The Court holds that the police had probable cause to make an arrest, but that the search of the car at the police station was too removed from the arrest to be justified as a search incident to arrest.]

* * *

* * * *Carroll* holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be

found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

Arguably, because of the preference for a magistrate's judgment only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[a] The same consequences may not follow where there is unforeseeable cause to search a house. Compare Vale v. Louisiana [discussed in the section on exigent circumstances]. But as *Carroll*, supra, held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

* * *

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

* * *

The Court concedes that the police could prevent removal of the evidence by temporarily seizing the car for the time necessary to obtain a warrant. It does not dispute that such a course would fully protect the interests of effective law enforcement; rather it states that whether temporary seizure is a "lesser" intrusion than warrantless search "is itself a debatable question and the answer may depend on a variety of

[a] It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.

circumstances."[b] I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values.

* * * [I]n the circumstances in which this problem is likely to occur, the lesser intrusion will almost always be the simple seizure of the car for the period—perhaps a day—necessary to enable the officers to obtain a search warrant. In the first place, as this case shows, the very facts establishing probable cause to search will often also justify arrest of the occupants of the vehicle. Since the occupants themselves are to be taken into custody, they will suffer minimal further inconvenience from the temporary immobilization of their vehicle. Even where no arrests are made, persons who wish to avoid a search—either to protect their privacy or to conceal incriminating evidence—will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search. To be sure, one can conceive of instances in which the occupant, having nothing to hide and lacking concern for the privacy of the automobile, would be more deeply offended by a temporary immobilization of his vehicle than by a prompt search of it. However, such a person always remains free to consent to an immediate search, thus avoiding any delay. Where consent is not forthcoming, the occupants of the car have an interest in privacy that is protected by the Fourth Amendment even where the circumstances justify a temporary seizure. The Court's endorsement of a warrantless invasion of that privacy where another course would suffice is simply inconsistent with our repeated stress on the Fourth Amendment's mandate of adherence to judicial processes.[c]

* * *

QUESTIONS AFTER CHAMBERS

What implications does *Chambers* have for searches of parked cars, where the police do not make an initial stop? Does it matter where the car is parked, or whether the initial police-vehicle encounter is deliberate or by chance? The Court considered these questions in Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the police seized the defendant's car from his driveway shortly after the defendant's arrest, and searched it two days later at the police station, and twice more in the following months. A plurality held that the warrantless search was not permissible, because of the absence of

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[b] The Court, unable to decide whether search or temporary seizure is the "lesser" intrusion, in this case authorizes both. * * * At all times the car and its contents were secure against removal or destruction. Nevertheless, the Court approves the searches without even an inquiry into the officers' ability promptly to take their case before a magistrate.

[c] Circumstances might arise in which it would be impracticable to immobilize the car for the time required to obtain a warrant—for example, where a single police officer must take arrested suspects to the station, and has no way of protecting the suspects' car during his absence. In such situations it might be wholly reasonable to perform an on-the-spot search based on probable cause. However, where nothing in the situation makes impracticable the obtaining of a warrant, I cannot join the Court in shunting aside that vital Fourth Amendment safeguard.

exigency. This is the first and last Supreme Court case in which a warrantless automobile search was held to be unconstitutional for that reason. In *Coolidge*, the government could not argue that it was impracticable to obtain a warrant before seizing the car, because in fact the officers *had* obtained a warrant; the problem was that it was defective because it was not issued by a neutral and detached magistrate. The Court considered whether the potential mobility of the car justified the warrantless seizure (and therefore justified a warrantless search of the car under *Chambers*). Justice Stewart, writing for the plurality, found no exigency based on mobility, because Coolidge had been arrested, his wife had been removed from the premises, and the police had control of the car as it was parked outside Coolidge's house.

Justice Stewart distinguished *Chambers* on the ground that the *initial* intrusion was unjustified without a warrant. That is, the officers did not obtain a proper warrant even though they knew precisely where Coolidge's car was parked at all times, and had been investigating him for weeks. This was unlike the situation in *Chambers*, where the officers were on patrol and happened to *come upon* a car that fit the description of one seen at a gas station robbery; there was no way in which the officers in *Chambers* could have been expected to obtain a warrant *before* they even seized the car. And because they could seize it without a warrant, under the rationale of *Chambers*, they could also search it without a warrant.

Subsequently, the Supreme Court has narrowed *Coolidge* to its facts—it does not stand for the proposition that the car must be actually mobile before officers can search without a warrant. In one post-*Coolidge* case, Cardwell v. Lewis, 417 U.S. 583 (1974), a plurality of the Court explicitly rejected the contention that mobility of the car before it is seized makes a difference: "The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance." Similarly, in Texas v. White, 423 U.S. 67 (1975), the Court upheld the warrantless search of an automobile that had been towed to the police department's impound lot. The Court rejected the argument of the dissenters that the police should have been required to provide a justification for removing the car to the stationhouse rather than searching it on the scene. See also Michigan v. Thomas, 458 U.S. 259 (1982) (holding "that the justification to conduct such a warrantless search does not vanish once the car has been immobilized"). An impatient Supreme Court summarily reversed a Florida intermediate appellate court in Florida v. Meyers, 466 U.S. 380 (1984) (per curiam), and, as in Michigan v. Thomas, reiterated the *Chambers* holding that a warrantless search of an automobile may be conducted after it has been immobilized, as long as there is probable cause to believe that the automobile contains evidence of criminal activity.

In light of *White* and *Thomas*, some lower courts have interpreted *Coolidge* to mean that a warrant is required only if the officers had a clear opportunity to obtain a warrant before *seizing* the car. Under this view, *Chambers* is based on the rationale that due to its mobility, a car can be

seized pending the obtaining of a warrant; and a search without a warrant is permitted because the search of a car is no more intrusive than would be the seizure of the car pending a warrant. But if the original seizure itself could have been preceded by a warrant, then the premise of *Chambers* is missing and the car exception ought not to apply. This explanation is consistent with the facts of *Chambers*, where the officers clearly could not have obtained a warrant before seizing the car, and with the facts of *Coolidge*, where the officers could have obtained a valid warrant before seizing the car. See, e.g., United States v. Moscatiello, 771 F.2d 589 (1st Cir.1985) (*Coolidge* distinguished where officers seized car after pursuing it in a rapidly developing situation); United States v. Reed, 26 F.3d 523 (5th Cir.1994) (warrantless search of car permitted; *Coolidge* distinguished because the officers "did not know where the car was, nor that it contained the money, until they completed their tracking upon arrival at the house").

The Diminished Expectation of Privacy Rationale: California v. Carney

It is apparent that exigency based on actual mobility is not a sufficient basis for the automobile exception after cases like *Chambers*, *White* and *Thomas*. The Court has explicitly held that the car exception permits a warrantless search even if the vehicle is immobile. See also See United States v. Howard, 489 F.3d 484 (2nd Cir. 2007) (Sotomayor, J.) ("Even where there is little practical likelihood that the vehicle will be driven away, the exception applies at least when that possibility exists"—requiring actual mobility would "impermissibly graft onto the automobile exception a requirement beyond the inherent mobility of an operational vehicle"); United States v. Navas, 597 F.3d 492 (10th Cir. 2010) (upholding a warrantless search of a trailer unattached to a car: "a vehicle's inherent mobility—not the probability that it might actually be set in motion—is the foundation of the mobility rationale").

In California v. Carney, 471 U.S. 386 (1985), the Court re-evaluated the automobile exception to the warrant requirement and concluded that "the reasons for the vehicle exception are twofold." Chief Justice Burger, writing for the Court, explained as follows:

> The capacity to be quickly moved was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. * * *
>
> However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. * * * Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect

to one's automobile is significantly less than that relating to one's home or office.

Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception.

See also United States v. Howard, 489 F.3d 484 (2nd Cir. 2007) (Sotomayor, J.) ("Thus, even if the vehicles searched in the case at hand were not 'readily mobile' within the meaning of the automobile exception, a warrantless search of them would be justified based on the diminished expectation of privacy enjoyed by the drivers and passenger while traveling on the Thruway.").

Why do citizens have a diminished expectation of privacy with respect to their automobiles? The Chief Justice in *Carney* explained that these reduced expectations "derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways." He stressed that automobiles are "subjected to pervasive and continuing governmental regulation and controls."

In Pennsylvania v. Labron, 518 U.S. 938 (1996), the Court, in a per curiam decision, reaffirmed the principle that exigent circumstances are not required to justify the warrantless search of an automobile. The Court upheld warrantless searches of two cars where the police had probable cause to believe that each contained drugs. It did not matter that there was no risk of destruction of evidence at the time the searches were conducted. Thereafter, in Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam), the Court once again reaffirmed the *Carroll* doctrine, relying on *Labron* to overturn a state court's suppression of evidence. Officers had probable cause to believe that Dyson's car contained drugs, and they conducted a warrantless search. The Maryland court suppressed the evidence because there was no indication of any exigency that would have precluded the police from obtaining a warrant before the search. The Court stated categorically that "the automobile exception has no separate exigency requirement" and that the probable cause finding "alone satisfies the automobile exception to the Fourth Amendment's warrant requirement."

Motor Homes

The Court in *Carney* considered whether the dual justification for the automobile exception (inherent mobility and diminished expectation of privacy) applied to the warrantless search of a motor home. A six-person majority held that police officers validly searched a "Dodge Mini Motor Home" with probable cause but no warrant when the motor home was parked in a lot in a downtown area. Officers had received information

that the motor home was used by a person who exchanged marijuana for sex. They watched a youth enter the motor home and remain there for more than an hour. When he left, the officers stopped him and learned that he had received marijuana in exchange for sexual contacts. The officers knocked on the door and Carney stepped out. They identified themselves as officers and entered the motor home where they saw marijuana and related paraphernalia.

Chief Justice Burger rejected the argument that the motor home was different from other vehicles because it was capable of functioning as a home as well as a vehicle. He reasoned that "[t]o distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments" and "to fail to apply the exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity." Thus, the Court declined "to distinguish between 'worthy' and 'unworthy' vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence." In a footnote, the Court noted that it did not "pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence." It suggested, however, some factors that might be relevant in determining whether a warrant would be required: "its location, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road."[24]

Justice Stevens, joined by Justices Brennan and Marshall, dissented. He argued that the Court "accorded priority to an exception rather than to the general rule." He concluded that because a motor home was a combination of home and car, the general preference for a warrant should govern a close case.

3. Movable Containers—In and Out of Cars

If the automobile exception were based totally on exigency due to mobility of the car, then it should also permit warrantless searches of other mobile containers such as briefcases, suitcases, and footlockers—they are potentially mobile as well. However, as seen in *Carney*, the exception is also (and probably primarily) based on the reduced expectation of privacy accorded an automobile. Is there any way to distinguish mobile containers, such as suitcases, from automobiles on privacy grounds? The Supreme Court did just that in United States v.

[24] See United States v. Navas, 597 F.3d 492 (2nd Cir. 2010) (warrantless search of a trailer unattached to a vehicle upheld: "the trailer bore no objective indicia of residential use that might give rise to elevated privacy expectations in its contents").

Chadwick, 433 U.S. 1 (1977), where it held that the mobility of a footlocker justified its *seizure* upon probable cause, but that a warrant was required to *search* the footlocker, unless emergency circumstances rendered a seizure insufficient to protect the state interest (e.g., if the footlocker was ticking). Chief Justice Burger, writing for the Court, distinguished mobile containers from cars on the following grounds:

> The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Because of the higher expectation of privacy in the footlocker, it could not be said, as it could in *Chambers,* that an immediate search would be no more intrusive than a seizure pending a warrant. As the Chief Justice explained in a footnote:

> A search of the interior [of the footlocker] was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.

It was the greatly reduced expectation of privacy in the automobile that made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile constituted a greater intrusion than its seizure pending a warrant. But because there is a higher expectation of privacy in luggage than cars, a search of that luggage was found to be a greater intrusion than seizure pending a warrant.

QUESTIONS AFTER CHADWICK

The crux of the majority's argument in *Chadwick* is that one has a lesser expectation of privacy in one's car than in movable containers such as luggage. Is the lesser expectation of privacy surrounding autos simply the result of the Supreme Court having said so?

Does the fact that vehicles are used essentially for transportation demand, or even allow, the conclusion that they are seldom used as repositories for personal effects? Would that assertion hold true in the case of a traveling salesman who lives out of his car for several days each week? Do the particular facts of any case make a difference in light of the Court's categorical "diminished expectation" analysis?

Mobile Containers in the Car

With a warrant required for the search of a mobile container, but not required for the search of an automobile, it was only a matter of time before the Court was presented with cases in which the two rules would collide. Which rule applies when an officer finds a mobile container when searching a car without a warrant? In Arkansas v. Sanders, 442 U.S. 753 (1979), the Court held that a warrant was required to search a suitcase that had been placed in the trunk of a taxi. In *Sanders*, officers had probable cause to search the passenger's suitcase, but no probable cause to search anywhere else in the taxi. Thereafter, in United States v. Ross, 456 U.S. 798 (1982), the Court upheld the warrantless search of a paper bag and pouch found during the search of a car. Justice Stevens, writing for a six-person majority, noted that "in neither *Chadwick* nor *Sanders* did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the latter." In contrast, in *Ross* the officers had probable cause to search the entire car for drugs. Justice Stevens noted that the *Carroll* doctrine would largely be nullified if it did not extend to containers such as those in *Ross*, because "contraband goods rarely are strewn across the trunk or floor of a car."

Justice Marshall, joined by Justice Brennan in dissent in *Ross*, emphasized the anomalous results that could occur due to the fine lines drawn between *Ross* and *Sanders*. For example, if officers were informed that a person has drugs in a bag in the trunk, it would appear that probable cause is localized in the bag, and hence *Sanders* would apply. But if they are more generally informed that there are drugs in the trunk, *Ross* would apply. Yet it is notable that the *Ross* dissenters did not challenge the primacy of the *Carroll* doctrine, and accepted the majority's premise that there is a diminished expectation of privacy in an automobile. *Sanders*, *Ross*, and *Chadwick* are extensively discussed in the next case, in which the Court again tries to resolve the question of whether a warrant is required to search a container placed in a car.

CALIFORNIA V. ACEVEDO

Supreme Court of the United States, 1991.
500 U.S. 565.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us once again to consider the so-called "automobile exception" to the warrant requirement of the Fourth Amendment and its application to the search of a closed container in the trunk of a car.

* * * On October 28, 1987, Officer Coleman of the Santa Ana, Cal., Police Department received a telephone call from a federal drug

enforcement agent in Hawaii. The agent informed Coleman that he had seized a package containing marijuana which was to have been delivered to the Federal Express office in Santa Ana and which was addressed to J.R. Daza at 805 West Stevens Avenue in that city. The agent arranged to send the package to Coleman instead. Coleman then was to take the package to the Federal Express office and arrest the person who arrived to claim it.

* * * At about 10:30 a.m. on October 30, a man, who identified himself as Jamie Daza, arrived to claim the package. He accepted it and drove to his apartment on West Stevens. He carried the package into the apartment.

* * *

At 12:30 p.m., respondent Charles Steven Acevedo arrived. He entered Daza's apartment, stayed for about 10 minutes, and reappeared carrying a brown paper bag that looked full. The officers noticed that the bag was the size of one of the wrapped marijuana packages sent from Hawaii. Acevedo walked to a silver Honda in the parking lot. He placed the bag in the trunk of the car and started to drive away. Fearing the loss of evidence, officers in a marked police car stopped him. They opened the trunk and the bag, and found marijuana.

* * *

The California Court * * * concluded that the marijuana found in the paper bag in the car's trunk should have been suppressed. The court concluded that the officers had probable cause to believe that the paper bag contained drugs but lacked probable cause to suspect that Acevedo's car, itself, otherwise contained contraband. Because the officers' probable cause was directed specifically at the bag, the court held that the case was controlled by United States v. Chadwick rather than by United States v. Ross. Although the court agreed that the officers could seize the paper bag, it held that, under *Chadwick*, they could not open the bag without first obtaining a warrant for that purpose. The court then recognized "the anomalous nature" of the dichotomy between the rule in *Chadwick* and the rule in *Ross*. That dichotomy dictates that if there is probable cause to search a car, then the entire car—including any closed container found therein—may be searched without a warrant, but if there is probable cause only as to a container in the car, the container may be held but not searched until a warrant is obtained.

* * *

In United States v. Ross, we held that a warrantless search of an automobile under the *Carroll* doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause. * * * Thus, "[i]f probable cause justifies the

search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." In *Ross*, therefore, we clarified the scope of the *Carroll* doctrine as properly including a "probing search" of compartments and containers within the automobile so long as the search is supported by probable cause.

In addition to this clarification, *Ross* distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers. The Court had announced this separate rule, unique to luggage and other closed packages, bags, and containers, in United States v. Chadwick. In *Chadwick*, federal narcotics agents had probable cause to believe that a 200-pound double-locked footlocker contained marijuana. The agents tracked the locker as the defendants removed it from a train and carried it through the station to a waiting car. As soon as the defendants lifted the locker into the trunk of the car, the agents arrested them, seized the locker, and searched it. In this Court, the United States did not contend that the locker's brief contact with the automobile's trunk sufficed to make the *Carroll* doctrine applicable. Rather, the United States urged that the search of movable luggage could be considered analogous to the search of an automobile.

The Court rejected this argument because, it reasoned, a person expects more privacy in his luggage and personal effects than he does in his automobile. * * *

In Arkansas v. Sanders, the Court extended *Chadwick's* rule to apply to a suitcase actually being transported in the trunk of a car. In *Sanders*, the police had probable cause to believe a suitcase contained marijuana. They watched as the defendant placed the suitcase in the trunk of a taxi and was driven away. The police pursued the taxi for several blocks, stopped it, found the suitcase in the trunk, and searched it. Although the Court had applied the *Carroll* doctrine to searches of integral parts of the automobile itself, (indeed, in *Carroll*, contraband whiskey was in the upholstery of the seats) it did not extend the doctrine to the warrantless search of personal luggage "merely because it was located in an automobile lawfully stopped by the police." * * *

In *Ross*, the Court endeavored to distinguish between *Carroll*, which governed the *Ross* automobile search, and *Chadwick* * * *. It held that the *Carroll* doctrine covered searches of automobiles when the police had probable cause to search an entire vehicle but that the *Chadwick* doctrine governed searches of luggage when the officers had probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.

* * *

* * * We now must decide the question deferred in *Ross:* whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

* * * Dissenters in *Ross* asked why the suitcase in *Sanders* was "more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable-cause search of an entire automobile?" We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here. Furthermore, by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.

The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules that govern the two objects to be searched may enable the police to broaden their power to make warrantless searches and disserve privacy interests. * * * At the moment when officers stop an automobile, it may be less than clear whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross.*

* * * We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one.

To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. *Chadwick.* Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases. And the police often will be able to search containers without a warrant, despite the *Chadwick-Sanders* rule, as a search incident to a lawful arrest.

* * *

Finally, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll*. In that case, prohibition agents slashed the upholstery of the automobile. This Court nonetheless found their search to be reasonable under the Fourth Amendment. If destroying the interior of an automobile is not unreasonable, we cannot conclude that looking inside a closed container is. In light of the minimal protection to privacy afforded by the *Chadwick-Sanders* rule, and our serious doubt whether that rule substantially serves privacy interests, we now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.

* * * The *Chadwick-Sanders* rule not only has failed to protect privacy but it has also confused courts and police officers and impeded effective law enforcement. * * *

The discrepancy between the two rules has led to confusion for law enforcement officers. For example, when an officer, who has developed probable cause to believe that a vehicle contains drugs, begins to search the vehicle and immediately discovers a closed container, which rule applies? The defendant will argue that the fact that the officer first chose to search the container indicates that his probable cause extended only to the container and that *Chadwick* and *Sanders* therefore require a warrant. On the other hand, the fact that the officer first chose to search in the most obvious location should not restrict the propriety of the search. The *Chadwick* rule, as applied in *Sanders*, has devolved into an anomaly such that the more likely the police are to discover drugs in a container, the less authority they have to search it. We have noted the virtue of providing "clear and unequivocal guidelines to the law enforcement profession." The *Chadwick-Sanders* rule is the antithesis of a "clear and unequivocal guideline."

* * *

Although we have recognized firmly that the doctrine of stare decisis serves profoundly important purposes in our legal system, this Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results. * * * [T]he existence of the dual regimes for automobile searches that uncover containers has proved as confusing as the *Chadwick* and *Sanders* dissenters predicted. We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*.

* * *

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

* * *

JUSTICE SCALIA, concurring in the judgment.

I agree with the dissent that it is anomalous for a briefcase to be protected by the "general requirement" of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile. On the other hand, I agree with the Court that it would be anomalous for a locked compartment in an automobile to be unprotected by the "general requirement" of a prior warrant, but for an unlocked briefcase within the automobile to be protected. I join in the judgment of the Court because I think its holding is more faithful to the text and tradition of the Fourth Amendment, and if these anomalies in our jurisprudence are ever to be eliminated that is the direction in which we should travel.

* * *

Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness. For some years after the (still continuing) explosion in Fourth Amendment litigation that followed our announcement of the exclusionary rule in Weeks v. United States, our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. (The opinions preferring a warrant involved searches of structures.) See generally Chimel v. California. By the late 1960's, the preference for a warrant had won out, at least rhetorically. See *Chimel;* Coolidge v. New Hampshire.

The victory was illusory. Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school

search[es]. . . ." Bradley, Two Models of the Fourth Amendment, 83 Mich.L.Rev. 1468, 1473–1474 (1985) (footnotes omitted). * * * Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement.

Unlike the dissent, therefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. * * *

In my view, the path out of this confusion should be sought by returning to the first principle that the "reasonableness" requirement of the Fourth Amendment affords the protection that the common law afforded. I have no difficulty with the proposition that that includes the requirement of a warrant, where the common law required a warrant; and it may even be that changes in the surrounding legal rules * * * may make a warrant indispensable to reasonableness where it once was not. But the supposed "general rule" that a warrant is always required does not appear to have any basis in the common law and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances, as the anomaly eliminated and the anomaly created by today's holding both demonstrate.

* * *

JUSTICE WHITE, dissenting.

Agreeing as I do with most of Justice Stevens' opinion and with the result he reaches, I dissent and would affirm the judgment below.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

* * *

To the extent there was any "anomaly" in our prior jurisprudence, the Court has "cured" it at the expense of creating a more serious paradox. For, surely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car. One's privacy interest in one's luggage can certainly not be diminished by one's removing it from a public thoroughfare and placing it—out of sight—in a privately owned vehicle. * * *

* * *

To support its argument that today's holding works only a minimal intrusion on privacy, the Court suggests that "[i]f the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to

establish the general probable cause required by *Ross*." * * * [T]his fear is unexplained and inexplicable. Neither evidence uncovered in the course of a search nor the scope of the search conducted can be used to provide post hoc justification for a search unsupported by probable cause at its inception.

* * *

* * * No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime.

* * *

Probable Cause Issues After Acevedo

Professor Green has pointed out that the rule in *Acevedo* does not eliminate all the uncertainty of the previous law. There will still be difficult questions of whether there is probable cause to search a certain part of the car. See Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990–91 Term, 70 No.Car.L.Rev. 373 (1992). Not surprisingly, the lower courts have reached divergent results on the probable cause/location question after *Acevedo*. Compare United States v. McSween, 53 F.3d 684 (5th Cir.1995) (when officer smelled burnt marijuana, he had probable cause to search under the hood of the defendant's car, even though a search of the passenger compartment had turned up nothing), with United States v. Nielsen, 9 F.3d 1487 (10th Cir.1993) (when officer smelled burnt marijuana and a search of the passenger compartment turned up nothing, his search of the trunk was illegal: "We do not believe under the circumstances that there was a fair probability that the *trunk* contained marijuana, or that a disinterested magistrate would so hold if asked to issue a search warrant.").

Delayed Search of Containers: United States v. Johns

In United States v. Johns, 469 U.S. 478 (1985), the Court considered whether there are any temporal limitations on the power to search containers in cars without a warrant. Customs agents removed packages from a trunk, placed them in a Drug Enforcement Agency warehouse, and searched the packages three days later. The officers had probable cause, but no warrant. Writing for the Court, Justice O'Connor reasoned that *Ross* would have authorized a warrantless search of the packages when they were removed from the trunk; that previous cases—e.g., Chambers v. Maroney and Texas v. White—authorized a delayed search of the trunk; and that "searches of containers discovered in the course of a

vehicle search are [not] subject to temporal restrictions not applicable to the vehicle search itself." The Court indicated that it did not intend to authorize indefinite retention of vehicles or "to foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest." The Court also rejected the defendant's argument that the automobile exception was inapplicable because the agents had taken the packages from the trunk before searching them. Justice O'Connor saw no reason to require officers to keep a container in a car while the search of that container is conducted. Justice Brennan, joined by Justice Marshall, dissented and argued that no exigency precluded reasonable efforts to obtain a warrant.

Search of Passenger's Property: Wyoming v. Houghton

In *Ross* and *Acevedo*, the Court upheld warrantless searches of containers that were clearly owned by the driver of the car, when there was probable cause to believe that they contained evidence of a crime. Should the situation change if the officer conducts a warrantless search of a passenger's property? The Supreme Court considered that question in Wyoming v. Houghton, 526 U.S. 295 (1999). Justice Scalia, writing for the Court, set forth the facts:

> In the early morning hours of July 23, 1995, a Wyoming Highway Patrol officer stopped an automobile for speeding and driving with a faulty brake light. There were three passengers in the front seat of the car: David Young (the driver), his girlfriend, and respondent. While questioning Young, the officer noticed a hypodermic syringe in Young's shirt pocket. He left the occupants under the supervision of two backup officers as he went to get gloves from his patrol car. Upon his return, he instructed Young to step out of the car and place the syringe on the hood. The officer then asked Young why he had a syringe; with refreshing candor, Young replied that he used it to take drugs.
>
> At this point, the backup officers ordered the two female passengers out of the car and asked them for identification. Respondent falsely identified herself as "Sandra James" and stated that she did not have any identification. Meanwhile, in light of Young's admission, the officer searched the passenger compartment of the car for contraband. On the back seat, he found a purse, which respondent claimed as hers. He removed from the purse a wallet containing respondent's driver's license, identifying her properly as Sandra K. Houghton. When the officer asked her why she had lied about her name, she replied: "In case things went bad."

> Continuing his search of the purse, the officer found a brown pouch and a black wallet-type container. Respondent denied that the former was hers, and claimed ignorance of how it came to be there; it was found to contain drug paraphernalia and a syringe with 60 ccs of methamphetamine. Respondent admitted ownership of the black container, which was also found to contain drug paraphernalia, and a syringe (which respondent acknowledged was hers) with 10 ccs of methamphetamine—an amount insufficient to support the felony conviction at issue in this case. The officer also found fresh needle-track marks on respondent's arms. He placed her under arrest.

The Wyoming Supreme Court found that the search of Houghton's purse violated the Fourth Amendment, because the officer "knew or should have known that the purse did not belong to the driver, but to one of the passengers," and because "there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse."

Justice Scalia disagreed with the Wyoming Court's assumption that a passenger's property is subject to greater protection than that of the driver. He concluded that the search of the purse was permissible because there was probable cause to believe that drugs were in the car in which the purse was located. Under *Ross*, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." While there was no passenger in *Ross*, Justice Scalia reasoned that "if the rule of law that *Ross* announced were limited to contents belonging to the driver, or contents other than those belonging to passengers, one would have expected that substantial limitation to be expressed." * * * Justice Scalia stated that "the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought." Justice Scalia concluded as follows:

> When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the Founding era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband in the car.
>
> * * * Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which travel public thoroughfares, seldom serve as the repository of personal effects, are subjected to police stop and

examination to enforce pervasive governmental controls as an everyday occurrence, and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.

Houghton relied on the case of United States v. Di Re, 332 U.S. 581 (1948), in which the Court had held that probable cause to search a car did not justify a body search of a passenger. But Justice Scalia distinguished *Di Re* on the basis of "the unique, significantly heightened protection afforded against searches of one's person." Quoting *Terry*, he observed that the search of one's person "must surely be an annoying, frightening, and perhaps humiliating experience" and concluded that "[s]uch traumatic consequences are not to be expected when the police examine an item of personal property found in a car."

In contrast to a passenger's minimal privacy expectations in property placed in a car, Justice Scalia found the government interests at stake in the search to be "substantial." This was because "[e]ffective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car." Justice Scalia explained that a passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing. A criminal might be able to hide contraband in a passenger's belongings as readily as in other containers in the car—perhaps even surreptitiously, without the passenger's knowledge or permission." Justice Scalia elaborated:

> To be sure, these factors favoring a search will not always be present, but the balancing of interests must be conducted with an eye to the generality of cases. To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger's belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a "passenger's property" rule would dramatically reduce the ability to find and seize contraband and evidence of crime. * * * [O]nce a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation—in the form of both civil lawsuits and motions to suppress in criminal trials—involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge.

* * *

> We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.

Justice Breyer wrote a short concurring opinion in *Houghton*, reasoning that "[i]f the police must establish a container's ownership prior to the search of that container (whenever, for example, a passenger says 'that's mine'), the resulting uncertainty will destroy the workability of the bright-line rule set forth in United States v. Ross. At the same time, police officers with probable cause to search a car for drugs would often have probable cause to search containers regardless. Hence a bright-line rule will authorize only a limited number of searches that the law would not otherwise justify."

Justice Stevens, joined by Justices Souter and Ginsburg, dissented in *Houghton*. He argued that the Court had gone further than it had in *Ross* because it upheld the search of Houghton's purse even though the officer did not actually have probable cause to believe that there was contraband in the purse:

> * * * Ironically, while we concluded in *Ross* that "[p]robable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab," the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle.
>
> [I]n my view, the State's legitimate interest in effective law enforcement does not outweigh the privacy concerns at issue. * * * Certainly the ostensible clarity of the Court's rule is attractive. But that virtue is insufficient justification for its adoption. Moreover, a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule; it simply protects more privacy.

QUESTIONS AFTER HOUGHTON

Assume the following facts: the officer properly stops the car driven by Young. Young admits that he is a drug user and that syringes and drugs are in the car. He also says that Houghton, his passenger, is accompanying him to a drug counseling center. Houghton explains that she is a drug counselor fiercely opposed to drug use. Houghton produces identification and a business card that supports her statement. The officer searches under the driver's seat and finds drugs. Can he now search Houghton's purse? The answer appears to be yes under the Court's bright-line rule, because the officer has probable cause to search the car and therefore "may inspect passengers' belongings

found in the car that are capable of concealing the object of the search." Does this result make sense under these facts? Are these facts so unlikely that it makes sense to have a bright line rule?

G. EXIGENT CIRCUMSTANCES

1. Exigent Circumstances Generally

It takes time to obtain a warrant. In some cases where police have probable cause to search or arrest, they have to work quickly, because delay 1) could give a suspect the opportunity to escape 2) could give the suspect, or others, an opportunity to take up and use weapons, or hurt others (such as family members during a violent argument), or 3) could give the suspect or others the opportunity to destroy evidence. The exigent circumstance cases concern fact-specific situations in which the state must show that immediate action was reasonably necessary to prevent flight, or to safeguard the police or public, or to protect against the loss of evidence.

The exigent circumstances exception excuses the officer from having to obtain a magistrate's determination that probable cause exists; it does not permit a search in the absence of probable cause. Besides needing probable cause to search, the officer must have probable cause to believe that the persons or items to be searched or seized might be gone, or that some other danger would arise, before a warrant could be obtained.

The exigent circumstances exception applies equally to arrests and to searches. Recall that under Payton v. New York, supra, a warrant is required to arrest a person in his home. However, as the Court there noted, if exigent circumstances are present, a warrant for an in-home arrest is excused. Likewise, officers may search a container, premises, etc. without a warrant if they have probable cause and if exigent circumstances are present. The materials below discuss arrest cases and search cases interchangeably.

2. Hot Pursuit

If officers are in "hot pursuit" of a suspect, this will excuse an arrest warrant where one would otherwise be required, and it will also excuse a search warrant where a search of an area is conducted in order to find and apprehend the suspect. The rationale is that it is unrealistic to expect police officers to stop in the middle of a chase and resort to the warrant process. To do so could allow the suspect to get away and thus render the warrant meaningless. The delay of obtaining a warrant could also allow the suspect to destroy evidence or to create a dangerous situation for police officers or members of the public. In these latter respects, the hot pursuit doctrine is really just a variant of the "public safety" and

"destruction of evidence" aspects of the exigent circumstances doctrine, to be discussed below.

The leading hot pursuit case in the Supreme Court is Warden v. Hayden, 387 U.S. 294 (1967), the case in which the court rejected the "mere evidence" limitation on searches and seizures. Officers pursued a robbery suspect into what was subsequently determined to be the suspect's house. The suspect's wife answered the door, and the police entered the house to search for the suspect. In the course of looking for him, they also looked for weapons which he might have concealed during the pursuit. The officers found incriminating clothing in a washing machine. The Court held that the warrantless search was justified by the "hot pursuit" exception. The fact that the officers found clothing as opposed to weapons in the washing machine was not problematic, because the officers had the right, in these emergency circumstances, to search the washing machine to look for weapons, and thus the seizure of the clothing was permissible under the plain view doctrine.

The "hot pursuit" doctrine is based on the premise that the suspect, knowing that he is being pursued, may seek to escape, destroy evidence or create a threat to public safety. It follows that the "hot pursuit" doctrine cannot apply where the suspect is unaware that he is being pursued by police officers. Thus, in Welsh v. Wisconsin, 466 U.S. 740 (1984), officers were notified that a car had been driven into a ditch. Eyewitnesses told the officers that the driver had been driving erratically, and had walked away from the scene. The officers quickly went to the address listed on the vehicle registration, and arrested Welsh in his home for driving while intoxicated. The Court held that the "hot pursuit" doctrine could not apply in these circumstances, because Welsh was never aware until he was arrested that he was being pursued by police officers. If the "hot pursuit" doctrine were determined only by how expeditiously the police were pursuing the suspect, then it would exist in virtually every case.

On the other hand, the "hot pursuit" doctrine can cover situations significantly short of high speed car chases. For example, in United States v. Santana, 427 U.S. 38 (1976), officers approached Santana while she was standing in the doorway of her home. They had probable cause to arrest her. When Santana saw the officers, she quickly retreated into her house. The officers told her she was under arrest and then followed her into the house to catch her and place her in custody. The Court, in an opinion by Justice Rehnquist, held that the police officers were permitted to follow Santana into her house under the doctrine of "hot pursuit." Justice Rehnquist noted that the hot pursuit doctrine serves to ensure that "a suspect may not defeat an arrest which has been set in motion in a public place * * * by the expedient of escaping into a private place." He concluded: "the fact that the pursuit here ended almost as soon as it

began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry."

3. Police and Public Safety

A warrant is excused if the delay in obtaining it would result in a significant risk of harm to the police or to members of the public. See, e.g., United States v. Salava, 978 F.2d 320 (7th Cir.1992) (risk to public safety excuses warrant where the defendant was found outside his home with blood on his clothes, and stated that he shot someone inside the home; while it was subsequently discovered that the defendant had wounded himself in a fight with an imaginary opponent, the court must evaluate the risk to public safety from the point of view of the officer at the time of the search). See also United States v. Black, 466 F.3d 1143 (9th Cir.2006) (it was proper for police to enter an apartment without a warrant, after they had received reports of a serious domestic disturbance, even though the house was quiet when they arrived and it turned out that nobody was inside; it was reasonable for the officer to believe that someone inside had been injured or was in danger: "This is a case where the police would be harshly criticized had they not investigated and Walker was in fact in the apartment."). Compare United States v. Williams, 354 F.3d 497 (6th Cir. 2003) (public safety not at stake, and warrant not excused, where officers entered a premises to check out a water leak: "Danger of water damage to a carpet is certainly not urgent within the meaning of the 'risk of danger' exigency.").

Public Safety and the Relevance of a Law Enforcement Objective: Brigham City v. Stuart

The following case applies the "public safety" exception and considers whether it can apply even though the officer is subjectively pursuing law enforcement (rather than public safety) objectives.

BRIGHAM CITY V. STUART

Supreme Court of the United States, 2006.
547 U.S. 398.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case we consider whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. We conclude that they may.

* * *

This case arises out of a melee that occurred in a Brigham City, Utah, home in the early morning hours of July 23, 2000. At about 3 a.m.,

four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, they heard shouting from inside, and proceeded down the driveway to investigate. There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw—through a screen door and windows—an altercation taking place in the kitchen of the home. According to the testimony of one of the officers, four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." The officer testified that he observed the victim of the blow spitting blood into a nearby sink. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased.

The officers subsequently arrested respondents and charged them with contributing to the delinquency of a minor, disorderly conduct, and intoxication. In the trial court, respondents filed a motion to suppress all evidence obtained after the officers entered the home, arguing that the warrantless entry violated the Fourth Amendment. The court granted the motion, and the Utah Court of Appeals affirmed. [The Supreme Court of Utah also affirmed, finding the circumstances not sufficient to justify a warrantless entry, and relying on the fact that the officers were primarily motivated in prosecuting crime rather than in law protecting the public.]

* * *

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Nevertheless, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, Michigan v. Tyler, 436 U.S. 499, 509 (1978), to prevent the imminent destruction of evidence, Ker v. California, 374 U.S. 23, 40 (1963), or to engage in "hot pursuit" of a fleeing suspect, United States v. Santana, 427 U.S. 38, 42–43 (1976). * * *

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. * * * Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Respondents do not take issue with these principles, but instead advance two reasons why the officers' entry here was unreasonable. First,

they argue that the officers were more interested in making arrests than quelling violence. They urge us to consider, in assessing the reasonableness of the entry, whether the officers were "indeed motivated primarily by a desire to save lives and property." The Utah Supreme Court also considered the officers' subjective motivations relevant.

Our cases have repeatedly rejected this approach. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action. The officer's subjective motivation is irrelevant. See Whren v. United States. It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.

* * *

Respondents further contend that their conduct was not serious enough to justify the officers' intrusion into the home. They rely on Welsh v. Wisconsin, 466 U.S. 740, 753 (1984), in which we held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." This contention, too, is misplaced. *Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (*i.e.*, the suspect's blood-alcohol level)—an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. Here, the officers were confronted with *ongoing* violence occurring *within* the home. *Welsh* did not address such a situation.

We think the officers' entry here was plainly reasonable under the circumstances. The officers were responding, at 3 o'clock in the morning, to complaints about a loud party. As they approached the house, they could hear from within "an altercation occurring, some kind of a fight." * * * The officers heard "thumping and crashing" and people yelling "stop, stop" and "get off me." * * * The noise seemed to be coming from the back of the house; after looking in the front window and seeing nothing, the officers proceeded around back to investigate further. * * * From there, they could see that a fracas was taking place inside the kitchen. A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood.

In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone

"unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

* * *

Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.

[The concurring opinion of JUSTICE STEVENS is omitted.]

Application of Brigham City v. Stuart: Michigan v. Fisher

In Michigan v. Fisher, 558 U.S. 45 (2009), the Court, in a per curiam opinion, applied its analysis in *Brigham City* to uphold a warrantless search of a house by officer responding to a complaint about a domestic disturbance. Upon arriving in response to the complaint, officers found a house "in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. * * * Through a window, the officers could see Fisher inside the house screaming and throwing things. The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant." The officers entered and saw Fisher pointing a long gun. Fisher was charged with firearms offense and challenged the warrantless entry into his house. The Court found that the public safety interest under the facts was every bit as strong as that found to be sufficient in *Brigham City*. It scolded the state court for dismissing the situation as "a few drops of blood" and not a "life-threatening" emergency. The Court elaborated as follows:

> Officers do not need ironclad proof of "a likely serious, life-threatening" injury to invoke the emergency aid exception. The only injury police could confirm in *Brigham City* was the bloody lip they saw the juvenile inflict upon the adult. Fisher argues that the officers here could not have been motivated by a perceived need to provide medical assistance, since they never summoned emergency medical personnel. This would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if the failure to summon medical personnel conclusively established that Goolsby did not subjectively believe, when he entered the house, that Fisher or someone else was seriously

> injured (which is doubtful), the test, as we have said, is not what Goolsby believed, but whether there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger. * * * It sufficed to invoke the emergency aid exception that it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else. The Michigan Court of Appeals required more than what the Fourth Amendment demands.

Justice Stevens, joined by Justice Sotomayor, dissented in *Fisher*.

911 Calls and Public Safety

If a 911 caller states that, for example, an assault or a murder is occurring in a home, then it goes without saying that officers can enter that home without a warrant unless, upon arriving, it is immediately clear that the call was unjustified. But what if the 911 operator gets a call and there is nothing but static on the other end of the line? If responding officers get to the premises and see nothing one way or the other indicating a risk to public safety, can they enter the home without a warrant? What if, instead, it was a hang-up call? In United States v. Martinez, 643 F.3d 1292 (10th Cir. 2011), the court held that "a static 911 call is insufficient to create an objectively reasonable belief that someone inside the home is in need of aid." The court distinguished static calls from dropped calls, noting that "the two types of calls differ in a fundamental way." The court explained as follows:

> At the very least, 911 hangups inform the police that someone physically dialed 911 and either hung up or was disconnected before he or she could speak to the operator. An unanswered return call [from the operator] gives further information pointing to a probability that after the initial call was placed the caller or the phone has somehow been incapacitated. With a static 911 call, however, there is no such assurance that a person initiated the call. * * * [A]n electrical or weather anomaly can cause such calls * * *.

The court noted that the 911 operator who had received the static call from Martinez's residence returned the call and encountered static on the line, "suggesting there was a line problem." Moreover, "when the officers arrived, they saw no evidence indicating anyone was in the house, much less anyone in need of immediate assistance." The officers contended that the outside of the house was a complete mess, but the court found this irrelevant to any public safety risk under the circumstances, stating that a "person's failure to keep an orderly home should not subject him or her to a warrantless search by police." Accordingly, the court found that the warrantless entry into the home could not be justified under the exigent

circumstances exception, and held that the child pornography found in the search of Martinez's home had to be suppressed.

4. The Risk of Destruction of Evidence

If evidence will be destroyed in the time it takes to obtain a warrant, then the warrant requirement is excused. The question usually disputed in the cases is whether there was really an imminent risk of destruction of evidence under the facts presented.

Not surprisingly, destruction of evidence issues often arise in drug cases. One such case is the en banc decision of United States v. MacDonald, 916 F.2d 766 (2d Cir.1990). A New York Drug Task Force focused attention on an apartment building. An agent approached an apartment and purchased drugs and witnessed men in the apartment with weapons and counting money.

Ten minutes after the controlled purchase, the agent returned to the apartment with reinforcements. After knocking on the door and identifying themselves, the agents heard the sounds of shuffling feet. They also simultaneously received a radio communication from agents remaining outside the building informing them that the occupants of the first floor apartment were attempting to escape through a bathroom window. The agents at the apartment door then used a battering ram, which they happened to bring with them, to force entry. The agents arrested five men in the apartment and discovered in plain view two loaded weapons, large quantities of cocaine and marijuana, narcotics paraphernalia, packaging materials and several thousand dollars in cash.

The majority of the en banc court found that exigent circumstances existed even before the officers knocked on the door and heard people scurrying around. The court stated as follows:

> The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an "urgent need" to render aid or take action. Dorman v. United States, 435 F.2d 385, 391 (D.C.Cir.1970) (in banc). We have adopted the factors set out in *Dorman* as guideposts intended to facilitate the district court's determination. The *Dorman* factors have been summarized as follows:
>
> > (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect "is reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) "strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not

swiftly apprehended"; and (6) the peaceful circumstances of the entry.

* * *

Applying the *Dorman* factors to the case at hand, the district court's determination [that exigent circumstances existed] was far from clearly erroneous. First, the ongoing sale and distribution of narcotics constituted a grave offense. Second, the defendant and at least one of his associates were armed with loaded, semi-automatic weapons. Third, the law enforcement agents had not only probable cause to suspect that a crime had been perpetrated but firsthand knowledge that ongoing crimes were transpiring. Fourth, the agents further knew that the defendant and his associates were in the apartment. Fifth, the likelihood that a suspect might escape if not swiftly apprehended was confirmed by the fact that the man who actually made the sale to Agent Agee had apparently escaped during the ten-minute interval that elapsed after the controlled purchase and before the agents entered the apartment. Sixth, the agents acted in accordance with the law, and first attempted to effect a peaceful entry by knocking and announcing themselves.

* * * In addition, the district court's finding that the agents were confronted by an urgent need to prevent the possible loss of evidence cannot be said to be clearly erroneous in light of the information that the suspects were using an unidentified apartment in the building to store narcotics, the ease with which the suspects could have disposed of the cocaine by flushing it down the toilet, and the possibility that the prerecorded five dollar bill used by Agent Agee in the undercover buy would be lost if the ongoing drug transactions were permitted to continue while the agents sought a warrant.

The *MacDonald* majority was unsympathetic to the defendant's claim that the court was creating a per se exigent circumstances exception in large-scale narcotics cases:

The defendant also argues that narcotics-related crimes so frequently involve exigent circumstances that the exception threatens to eviscerate the rule. * * * If it is true that ongoing retail narcotics operations often confront law enforcement agents with exigent circumstances, we fail to see how such a sad reality constitutes a ground for declaring that the exigencies do not, in fact, exist. To disallow the exigent circumstances exception in these cases would be to tie the hands of law enforcement agents who are entrusted with the responsibility of combating grave, ongoing crimes * * *.

Judge Kearse dissented from the majority's decision in *MacDonald*. In her view, the government had not made a factual showing that any

risk existed or harm to individuals or destruction of evidence given that there was no evidence that the men in the apartment had been alerted to the presence of the Task Force.

Is the en banc decision in *MacDonald* consistent with the Supreme Court's decision in Vale v. Louisiana, 399 U.S. 30 (1970)? In *Vale,* the Court emphasized the fact-based nature of the exigent circumstances inquiry, and held that exigent circumstances did not exist to search Vale's home, when Vale was arrested outside his home for engaging in a drug transaction and there was no indication that anyone was inside destroying evidence. The Court noted that at the time of the officers' entry into the home, the narcotics were not "in the process of destruction." Does the Court in *Vale* mean that the destruction must have already begun before a warrant is excused? Is the issue whether destruction is "imminent?" Was there an imminent risk of destruction of narcotics in *MacDonald?* Compare United States v. Purcell, 526 F.3d 953 (6th Cir. 2008) (no imminent risk of destruction of evidence despite officers' claim that they thought the defendant was operating a methamphetamine lab in a hotel room; that assumption was based only on the defendant's prior meth lab activities, and not on any real indication that methamphetamine cooking was going on when the officers arrived).

The Seriousness of the Offense

In assessing whether there is a risk of destruction of evidence sufficient to excuse a warrant, the *Dorman* factors take into account not only the destructibility of the evidence but also the seriousness of the offense—the more serious the offense, the greater the incentive for destroying evidence, and the greater the government interest in protecting against its loss. For example, the serious nature of a narcotics offense was central to the *MacDonald* Court's finding of exigent circumstances.

The "seriousness" factor raises two questions: 1) Could an offense be so serious that exigency should be deemed automatic, without regard to the actual risk of destruction of evidence? and 2) Could an offense be so minor that a warrant should be required regardless of the actual risk of destruction of evidence? The Supreme Court has had something to say about both of these questions.

Murder Scene

As to the first question, the Court in Mincey v. Arizona, 437 U.S. 385 (1978), considered the government's argument that there should be a "murder scene" exception to the warrant requirement. Mincey shot and killed an officer during a drug bust. Mincey himself was seriously wounded. A protective sweep of the premises resulted in the detention of

Mincey's associates. Ten minutes later, homicide detectives entered the premises without a warrant and began a search for evidence that lasted four days. Every item in the apartment was closely examined and inventoried, and two to three hundred objects were seized.

Justice Stewart wrote for a unanimous Court. He rejected a "scene of the homicide" per se exception to the warrant requirement and stated that the government must make a factual showing of exigent circumstances. Justice Stewart wrote as follows:

> All the persons in Mincey's apartment had been located before the investigating homicide officers arrived there and began their search. And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search.
>
> * * * [T]he State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? No consideration relevant to the Fourth Amendment suggests any point of rational limitation of such a doctrine.

What would be wrong with a rule that allowed automatic searches at the scene of a homicide, rape, or robbery, even the day after the crime has occurred? Won't a search warrant be issued automatically for these kinds of crimes? If the warrant application is perfunctory, what is gained by having the police, who are already at the scene of the crime, seek a warrant?

Minor Offenses

As to the second question, the Court in Welsh v. Wisconsin, 466 U.S. 740 (1984), considered whether an offense could be so minor as not to justify an exception to the warrant requirement even given an imminent risk of destruction of evidence. Officers arrested Welsh in his home shortly after receiving a report from an observer that Welsh had been driving his car while being intoxicated or very sick. After seeing Welsh driving erratically and ultimately swerving off the road into a ditch, the observer blocked Welsh's car with his own car and saw Welsh walk away from the ditch after being refused a ride. Police came to the scene and discovered a motor vehicle registration in Welsh's abandoned car. The police went to the address listed on the registration and arrested Welsh in his home for driving while under the influence of an intoxicant. Welsh subsequently refused to submit to a breathalyzer test. The state revoked his license due to his refusal, and Welsh challenged this action, arguing

that his refusal came about as a result of an illegal warrantless in-home arrest. The state argued that the warrantless arrest was legal because, among other things, the delay in obtaining a warrant would have resulted in the loss of evidence—specifically the loss of proof of Welsh's intoxication.

Justice Brennan's opinion for six members of the Court rejected the destruction of evidence argument and found the warrantless arrest in the home to be illegal. Justice Brennan declared that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." He held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made" and declared that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."

Applying these principles to the facts of the case, Justice Brennan noted that "[t]he State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible," and that "[g]iven this expression of the state's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant."

Justice White, joined by Justice Rehnquist, dissented. He reasoned that a warrantless home entry is no more intrusive for a minor offense than a major one and that the majority's approach will force officers who must make quick decisions to assess whether a violation is major or minor for purposes of making an exigency determination.

Drawing Blood in a DUI Arrest to Prevent the Loss of Evidence: Missouri v. McNeely

In Schmerber v. California, 384 U. S. 757 (1966), the Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." But in Missouri v. McNeely, 133 S. Ct. 1552 (2013), the Court held 5–4 that its decision in *Schmerber* did not establish a per se rule that justifies a warrantless seizure of blood in all drunk-driving cases. The court held that exigency must be established case-by-case based on the totality of the circumstances.

An officer stopped McNeely's truck in the early morning hours for speeding and repeatedly crossing the center line. McNeely did badly on field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC). The officer arrested him and, when McNeely indicated on the way to the station that he would refuse to provide a breath sample, the officer transported him to a hospital. McNeely refused to consent to a blood test even after being warned that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. The officer directed a hospital lab technician to take a blood sample, and the sample showed a blood alcohol level almost double the legal limit.

McNeely moved to suppress the results of the test when prosecuted for driving while intoxicated. The trial judge granted the motion, reasoning that there was no exigency excusing a warrant apart from the fact that "[a]s in all cases involving intoxication, [McNeely's] blood alcohol was being metabolized by his liver." The Missouri Supreme Court affirmed. Justice Sotomayor, writing for the Court, agreed with the state courts.

Justice Sotomayor explained that in *Schmerber* the Court "considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts." She recognized that "[i]t is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated," but reasoned that this reality did not establish an exigency in every drunk driving case, so that "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Justice Sotomayor observed that times had changed since *Schmerber* was decided and that warrants could be obtained through telephonic and electronic means:

> We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 41(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without

undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.

Justice Sotomayor rejected an alternative test offered by Chief Justice Roberts (and joined in by Justices Breyer and Alito) in an opinion concurring in part and dissenting in part "under which a warrantless blood draw is permissible if the officer could not secure a warrant (or reasonably believed he could not secure a warrant) in the time it takes to transport the suspect to a hospital or similar facility and obtain medical assistance." One example she offered to explain the problem with that test was a police officer's chance stop of a suspect near an emergency room. In that example, the test would "enable the officer to conduct a nonconsensual warrantless blood draw even if all agree that a warrant could be obtained with very little delay under the circumstances (perhaps with far less delay than an average ride to the hospital in the jurisdiction)."

Justice Sotomayor rejected a number of arguments for a per se rule, including these: (1) the totality of circumstances test does not provide sufficient guidance to officers; (2) the relatively minor intrusion of a blood test and the motorist's limited expectation of privacy in a car justify a warrantless blood test; and (3) warrantless blood tests are necessary to vindicate the state's strong interest in deterring drunk driving.

Justice Kennedy's short, separate opinion expressed the view that neither the Chief Justice's opinion nor Justice Sotomayor's were required to address the question whether some approach other than a per se rule for all drunk driving cases might satisfy the Fourth Amendment.

Justice Thomas dissented and would have upheld the state's argument for a per se rule that warrantless blood tests are reasonable in drunk driving cases.

5. Impermissibly Created Exigency

In some cases suspects are alerted to the presence of police activity, and at that point there is little dispute about the risk of destruction of evidence or other danger when the officers make an entry. Instead, defendants argue that the police acted impermissibly in revealing their presence—for example, by knocking on a door and yelling "police"—and thus *manufactured* the exigent circumstances. Does manufacturing exigent circumstances disentitle the officers from relying on the exigent circumstances exception? That question is answered in the following case—in which the Court also addresses whether exigent circumstances can be found even if the officers have an opportunity to obtain a warrant before the exigency arises.

KENTUCKY V. KING

Supreme Court of the United States, 2011.
131 S.Ct. 1849.

JUSTICE ALITO delivered the opinion of the Court.

It is well established that exigent circumstances, including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

* * *

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to hurry up and get there before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. * * * Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb * * * testified that the officers banged on the left apartment door as loud as they could and announced, "This is the police" or "Police, police, police." Cobb said that as soon as the officers started banging on the door, they could hear people inside moving, and it sounded as though things were being moved inside the apartment. These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they were going to make entry inside the apartment. Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

[The lower state courts rejected King's argument that the evidence should be suppressed for lack of exigent circumstances.]

The Supreme Court of Kentucky reversed. [That court] assume[d] for the purpose of argument that exigent circumstances existed. To determine whether police impermissibly created the exigency, the Supreme Court of Kentucky announced a two-part test. First, the court held, police cannot deliberately create the exigent circumstances with the bad faith intent to avoid the warrant requirement. Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances. Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence. We granted certiorari.

* * *

This Court has identified several exigencies that may justify a warrantless search of a home. Under the emergency aid exception, for example, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. See United States v. Santana, 427 U.S. 38, 4243 (1976). And what is relevant here the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search.

* * *

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called police-created exigency doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was created or manufactured by the conduct of the police. In applying this exception for the creation or

manufacturing of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because * * * in some sense the police always create the exigent circumstances. That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.

Presumably for the purpose of avoiding such a result, the lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied. * * *

Despite the welter of tests devised by the lower courts, the answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.[a]

We have taken a similar approach in other cases involving warrantless searches. For example, we have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made. * * *

Similarly, officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs. If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.

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[a] There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted. In this case, however, no such actual threat was made, and therefore we have no need to reach that question.

* * *

Some lower courts have adopted a rule that is similar to the one that we recognize today. See United States v. MacDonald, 916 F.2d 766 (C.A.2 1990) (en banc) (law enforcement officers do not impermissibly create exigent circumstances when they act in an entirely lawful manner). But others, including the Kentucky Supreme Court, have imposed additional requirements that are unsound and that we now reject.

Bad faith. Some courts, including the Kentucky Supreme Court, ask whether law enforcement officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement. This approach is fundamentally inconsistent with our Fourth Amendment jurisprudence. Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances, viewed *objectively,* justify the action. * * *

The reasons for looking to objective factors, rather than subjective intent, are clear. Legal tests based on reasonableness are generally objective, and this Court has long taken the view that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.

Reasonable foreseeability. Some courts, again including the Kentucky Supreme Court, hold that police may not rely on an exigency if it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances. Courts applying this test have invalidated warrantless home searches on the ground that it was reasonably foreseeable that police officers, by knocking on the door and announcing their presence, would lead a drug suspect to destroy evidence.

* * *

Adoption of a reasonable foreseeability test would * * * introduce an unacceptable degree of unpredictability. For example, whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them. * * *

A simple example illustrates the difficulties that such an approach would produce. Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20

units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence? * * *

Probable cause and time to secure a warrant. Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search. This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.

First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also may result in considerably less inconvenience and embarrassment to the occupants than a search conducted pursuant to a warrant. Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

We have said that law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause. Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Standard or good investigative tactics. Finally, some lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was contrary to standard or good law enforcement

practices (or to the policies or practices of their jurisdictions). This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies.

* * * Respondent argues for a rule that differs from those discussed above, but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable. In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted indeed, encouraged to identify themselves to citizens, and in many circumstances this is cause for assurance, not discomfort. Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.[b]

* * *

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an

[b] Contrary to respondent's argument, Johnson v. United States, 333 U.S. 10 (1948), does not require affirmance in this case. In *Johnson*, officers noticed the smell of burning opium emanating from a hotel room. They then knocked on the door and demanded entry. Upon seeing that Johnson was the only occupant of the room, they placed her under arrest, searched the room, and discovered opium and drug paraphernalia. Defending the legality of the search, the Government attempted to justify the warrantless search of the room as a valid search incident to a lawful arrest. The Government did not contend that the officers entered the room in order to prevent the destruction of evidence. Although the officers said that they heard a shuffling noise inside the room after they knocked on the door, the Government did not claim that this particular noise was a noise that would have led a reasonable officer to think that evidence was about to be destroyed. Thus, *Johnson* is simply not a case about exigent circumstances.

actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects. When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the occupants choose not to respond or to speak, the investigation will have reached a conspicuously low point, and the occupants will have the kind of warning that even the most elaborate security system cannot provide. And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

[The Court finds no evidence that the officers violated or threatened to violate the Fourth Amendment.]

* * *

JUSTICE GINSBURG, dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

* * *

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on actions taken by the police *preceding* the warrantless search. Wasting a clear opportunity to obtain a warrant, therefore, disentitles the officer from relying on subsequent exigent circumstances. S. Saltzburg & D. Capra, American Criminal Procedure 376 (8th ed.2007).

* * *

I * * * would not allow an expedient knock to override the warrant requirement. Instead, I would accord that core requirement of the Fourth Amendment full respect. When possible, a warrant must generally be secured, the Court acknowledges. There is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion.

Kentucky v. King and the Relevance of a Prior Opportunity to Obtain a Warrant

If the police can foresee that an exigency would arise at a certain time in the future, and have a strong case of probable cause and ample time to obtain a warrant well before that exigency occurs, then that opportunity to obtain the warrant could be argued to prohibit the later invocation of the exigent circumstances exception. For example, assume that an officer knows that a suspect has his house cleaned every Wednesday morning, and that this would destroy relevant forensic evidence. On Wednesday morning, there are exigent circumstances due to the risk of destruction of evidence. But if the officer learned this information on the previous Friday, and had probable cause to search at that time, then he should not be able to invoke the exigent circumstances exception five days later.

The decided cases do not usually present such clean facts, however. In the typical case, the state argues that the officer *did not* have clear probable cause until the exigency arose, and therefore had no prior opportunity to obtain a warrant. The defendant then makes the anomalous argument that the officer *had* probable cause well before that. The state also argues that the officer should not be required to go to the magistrate at the very first moment that probable cause exists—they should have the right to take their time and strengthen their case on probable cause. The state also argues that a rule requiring immediate warrant applications could jeopardize undercover activity and ongoing investigations. See, e.g., United States v. Samboy, 433 F.3d 154 (1st Cir. 2005) (warrantless search upheld, where officers "reasonably delayed not from a desire to avoid seeking a warrant, but because the circumstances of the investigation demanded first caution and then an immediate response.").

In Kentucky v. King, supra, the Court obviously cast substantial doubt on whether a warrantless search based on exigent circumstances could ever be found illegal on the ground that officers had an opportunity to obtain a warrant before the exigency arose. The specific context of *King* was whether police officers' knock on a door impermissibly created exigent circumstances if they had a prior opportunity to obtain a warrant. But the Court's analysis seems to put an end to any argument that officers ever have to exercise a prior opportunity to obtain a warrant if there are in fact exigent circumstances at the time of an entry.

6. Electronic Warrants

As the Court noted in Missouri v. McNeely, supra, warrants can be obtained without having to go to the magistrate in person. Fed.R.Crim.P. 41(d)(3)(A) provides that a magistrate judge "may issue a warrant based

on information communicated by telephone or other reliable electronic means." The language "other reliable electronic means" is intended to allow for the use of email or fax warrants. The rule does not mean that warrants can be obtained immediately, however. Under Rule 41, a duplicate original warrant must be prepared by the officer, and must be read or sent in written form verbatim to the magistrate, who must prepare an original warrant for the record. These recording requirements are considered necessary to prevent post hoc reconstructions of probable cause and particularity. It must also be remembered that at certain times (e.g., late at night or on the weekend), it may be difficult to reach a magistrate, telephonically or otherwise.

While not instantaneous, the time involved in obtaining an electronic warrant can be significantly less than it would take to obtain a warrant in person. In *McNeely, supra,* the Court held that exigency must be assessed by the time it takes to obtain an electronic warrant. See also United States v. Patino, 830 F.2d 1413 (7th Cir.1987) (agent who observed fugitive in defendant's yard had adequate opportunity to obtain an electronic warrant during 30-minute wait for back-up assistance). Compare United States v. Berick, 710 F.2d 1035 (5th Cir.1983) (risk of destruction of evidence resulting from arrest of drug seller was so imminent that recourse to even an electronic warrant was unavailable).

7. Seizing Premises in the Absence of Exigent Circumstances

If exigent circumstances do not exist to search a house or other premises, the officers must obtain a search warrant. But can the officers take any protective action to preserve the status quo while a warrant is being obtained? In Segura v. United States, 468 U.S. 796 (1984), officers had probable cause to believe that two individuals, Segura and Luz Colon, were trafficking in cocaine from their New York apartment. They established surveillance, and arrested Segura as he entered the lobby of his apartment building. The agents took Segura to his apartment, and knocked on the door. Luz Colon answered the door. The agents entered without receiving permission, placed Luz Colon under arrest, and conducted a limited security sweep. In the process of the sweep, they saw evidence of drug activity. Luz Colon and Segura were incarcerated, and two officers waited in Segura's apartment while a search warrant was being obtained. Due to "administrative delay" it was 19 hours before the search of the apartment was eventually conducted.

A majority of the Court found it unnecessary to reach the question of whether the officers acted illegally. The majority reasoned that, even if the warrantless entry of the premises was illegal, the later search conducted pursuant to a warrant was based on an independent legal source, i.e., the information the officers already had before they seized the premises. [The "independent source" aspect of the opinion will be

discussed later in this Chapter in the materials on the exclusionary rule.] Chief Justice Burger, joined by Justice O'Connor, went further, however, and declared that the seizure of the premises pending a warrant was reasonable, even in the absence of exigent circumstances.

Chief Justice Burger's argument in *Segura* was adopted by a majority of the Court in Murray v. United States, 487 U.S. 533 (1988). Thus it is permissible to seize premises for a reasonable period of time while diligent efforts are being made to obtain a warrant. "Seizing" the premises means that occupants are kept out of the premises, in order to protect against the possible destruction of evidence or risk to public safety while a warrant application is pending. See also United States v. Veillette, 778 F.2d 899 (1st Cir.1985) (48 hour seizure of premises, pending a warrant, held reasonable under *Segura*).

Prohibiting Entry While a Warrant Is Being Obtained: Illinois v. McArthur

In the following case, the Court expanded upon the analysis in *Segura* and firmly established the authority of police officers to maintain the status quo while a warrant is being obtained.

ILLINOIS v. MCARTHUR

Supreme Court of the United States, 2001.
531 U.S. 326.

JUSTICE BREYER delivered the opinion of the Court.

Police officers, with probable cause to believe that a man had hidden marijuana in his home, prevented that man from entering the home for about two hours while they obtained a search warrant. We must decide whether those officers violated the Fourth Amendment. We conclude that the officers acted reasonably. They did not violate the Amendment's requirements. And we reverse an Illinois court's holding to the contrary.

* * * On April 2, 1997, Tera McArthur asked two police officers to accompany her to the trailer where she lived with her husband, Charles, so that they could keep the peace while she removed her belongings. The two officers, Assistant Chief John Love and Officer Richard Skidis, arrived with Tera at the trailer at about 3:15 p.m. Tera went inside, where Charles was present. The officers remained outside.

When Tera emerged after collecting her possessions, she spoke to Chief Love, who was then on the porch. She suggested he check the trailer because "Chuck had dope in there." She added (in Love's words) that she had seen Chuck "slid[e] some dope underneath the couch."

Love knocked on the trailer door, told Charles what Tera had said, and asked for permission to search the trailer, which Charles denied. Love then sent Officer Skidis with Tera to get a search warrant.

Love told Charles, who by this time was also on the porch, that he could not reenter the trailer unless a police officer accompanied him. Charles subsequently reentered the trailer two or three times (to get cigarettes and to make phone calls), and each time Love stood just inside the door to observe what Charles did.

Officer Skidis obtained the warrant by about 5 p.m. He returned to the trailer and, along with other officers, searched it. The officers found under the sofa a marijuana pipe, a box for marijuana (called a "one-hitter" box), and a small amount of marijuana. They then arrested Charles.

* * *

Illinois subsequently charged Charles McArthur with unlawfully possessing drug paraphernalia and marijuana (less than 2.5 grams), both misdemeanors. McArthur moved to suppress the pipe, box, and marijuana on the ground that they were the "fruit" of an unlawful police seizure, namely, the refusal to let him reenter the trailer unaccompanied, which would have permitted him, he said, to "have destroyed the marijuana."

The trial court granted McArthur's suppression motion. The Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied the State's petition for leave to appeal. We granted certiorari to determine whether the Fourth Amendment prohibits the kind of temporary seizure at issue here.

* * *

We conclude that the restriction at issue was reasonable, and hence lawful, in light of the following circumstances, which we consider in combination. First, the police had probable cause to believe that McArthur's trailer home contained evidence of a crime and contraband, namely, unlawful drugs. The police had had an opportunity to speak with Tera McArthur and make at least a very rough assessment of her reliability. They knew she had had a firsthand opportunity to observe her husband's behavior, in particular with respect to the drugs at issue. And they thought, with good reason, that her report to them reflected that opportunity.

Second, the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant. * * *

Third, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant.

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