
Volume 26

Number 1 *Symposium: The Bill of Rights
Yesterday and Today: A Bicentennial
Celebration*

pp.223-241

Symposium: The Bill of Rights Yesterday and Today: A Bicentennial Celebration

The Fourth Amendment: A Bicentennial "Checkup"

Wayne R. LaFave

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Wayne R. LaFave, *The Fourth Amendment: A Bicentennial "Checkup"*, 26 Val. U. L. Rev. 223 (1991).

Available at: <https://scholar.valpo.edu/vulr/vol26/iss1/18>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE FOURTH AMENDMENT: A BICENTENNIAL "CHECKUP"

WAYNE R. LAFAVE*

During a recent chance encounter with my doctor, for which I will doubtless be billed, he expressed concern at not having seen me for some years. "A man your age," he grumbled, "ought to get annual checkups." I am sure he is right in this, so very soon I will obeisantly submit to the necessary poking, prodding and unmentionable indignities.

That incident got me thinking that our 200-year-old Fourth Amendment¹ is surely due for a "checkup." But reference to this venerability is a bit misleading, for during much of its history the Amendment has been quiescent. As one historian put it, the Fourth Amendment "remained for almost a century a largely unexplored territory";² it was not until the 1886 case of *Boyd v. United States*³ that the Supreme Court had occasion to elaborate upon the Amendment's protections. In one sense the Fourth Amendment has been active a mere thirty years, as not until *Mapp v. Ohio*⁴ in 1961 were states required to exclude evidence obtained in violation of the Amendment, thus ensuring that its guarantees would be taken seriously. Since then, however, the Fourth Amendment has received a good deal of wear and tear, so a "checkup" is nonetheless in order.

The health of the Fourth Amendment ought to be of concern to every American, for its protections largely determine "the kind of society in which we live."⁵ Its vitality is a matter of special interest to me, however, as my professional life and the Fourth Amendment's post-1961 active life have been closely intertwined. The landmark *Mapp*⁶ case was decided soon after I commenced a career of law professing, so it was only natural that I should turn

* This article is based upon remarks delivered at the Valparaiso University School of Law on September 21, 1991, as part of a symposium entitled "The Bill of Rights Yesterday and Today: A Bicentennial Celebration."

† David C. Baum Professor of Law and Center for Advanced Study Professor of Law, University of Illinois. B.S. 1957, LL.B. 1959, S.J.D. 1965, University of Wisconsin.

1. See *infra* note 8 and accompanying text.

2. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 49 (1966).

3. 116 U.S. 616 (1886).

4. 367 U.S. 643 (1961).

5. ERWIN N. GRISWOLD, *SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT* 39 (1975).

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

to the Fourth Amendment as a subject for research. Over the intervening years, I have sprinkled the law reviews with an array of articles concerning the Amendment, and I have also penned (or, should I say word-processed) a treatise on the subject, which in its most recent reincarnation appeared, quite appropriately, in *four* volumes.⁷ In the treatise alone, I estimate I have written well over twenty-five thousand words for *each* of the fifty-four words in the Fourth Amendment, which may make you wonder what you are in for today! But let's begin with the Amendment's fifty-four words:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁸

In exploring the present state of the Fourth Amendment's health, I shall pursue three broad inquiries about that language: (1) What kinds of police activity qualify as "searches" or "seizures" under the Amendment? (2) What factual basis is needed to make such activity constitutionally permissible under the Amendment? and (3) When is a warrant issued by a neutral and detached judicial officer a prerequisite to such activity under the Amendment?⁹

The first of these is in a sense the most critical, for police conduct which falls outside the "searches and seizures" language of the Fourth Amendment quite obviously is totally free of the Amendment's restraints. As for the Fourth Amendment term "searches," the view that it covered only intrusions into a "constitutionally protected area" was abandoned in the landmark 1967 case of *Katz v. United States*.¹⁰ *Katz* involved eavesdropping on one end of a phone conversation by a device attached to the outside of a telephone booth, and the Supreme Court held this was a search because the government "violated the privacy upon which [Katz] justifiably relied while using the telephone booth."¹¹ In an oft-quoted concurring opinion, Justice Harlan enunciated "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"¹²

7. WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (2d ed. 1987).

8. U.S. CONST. amend IV.

9. This is an updated version of an exploration of these issues which I undertook at the time of the Constitution's bicentennial. See Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061 (1987).

10. 389 U.S. 347, 351 (1967).

11. *Id.* at 353.

12. *Id.* at 361.

Harlan later realized that the first of these requirements deserves no place in a theory of what the Fourth Amendment protects. As he then counseled, analysis under *Katz* must "transcend the search for subjective expectations," for "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."¹³ Although the Supreme Court on one occasion acknowledged that the "actual (subjective) expectation of privacy" formulation might sometimes "provide an inadequate index of Fourth Amendment protection,"¹⁴ too often the Court has been unduly demanding with respect to subjective expectations.

Illustrative is *California v. Ciraolo*,¹⁵ where the Supreme Court answered in the negative the question "whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home."¹⁶ The defendant was growing marijuana in a backyard plot prudently surrounded by a solid 10-foot high fence. The majority in *Ciraolo*, per Chief Justice Burger, offered the gratuitous observation that because "a 10-foot fence might not shield these plants from the eyes of a citizen . . . perched on the top of . . . a two-level bus," it "is not entirely clear" whether the defendant "therefore manifested a subjective expectation of privacy from *all* observations of his backyard."¹⁷ Putting aside the Chief Justice's failure to notice that this case arose not in London but in Santa Clara, California, where -- I am reliably informed -- there are no double-decker buses, the unfortunate implication of his statement is that a defendant cannot get by even the first *Katz* hurdle unless he has taken steps to ensure against all conceivable efforts at scrutiny, so that it is not enough (as the dissenters put it) that "he had taken steps to shield those activities from the view of passersby."¹⁸ To assert that such extraordinary precautions are necessary cannot be squared with *Katz*, for in that case "there was no suggestion that the defendant in the phone booth took any precautions against the wiretapping at issue in that case."¹⁹

As for the second *Katz* requirement, often referred to as a reasonable "expectation of privacy,"²⁰ it requires courts to make "a value judgment": "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy

13. *United States v. White*, 401 U.S. 745, 786 (1971).

14. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

15. 476 U.S. 207 (1986).

16. *Id.* at 209.

17. *Id.* at 211-12 (emphasis in original).

18. *Id.* at 222 (Powell, J., dissenting).

19. Eric D. Bender, *The Fourth Amendment in the Age of Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 753 (1985).

20. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."²¹ Unfortunately, in recent years the Supreme Court itself seems not to have grasped that this is really what *Katz* is all about, as is evident from a brief look at a few cases.

In *United States v. Miller*,²² the Supreme Court held a person has no justified expectation of privacy in the records of his banking transactions kept at those financial institutions with which he does business, because the documents "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."²³ That, of course, overlooks the fact that bank employees examine a customer's checks briefly and one at a time and thus do not construct conclusions about his lifestyle, while when police study the totality of one's banking records they acquire a virtual current biography.

The Court's error in *Miller* was compounded in *Smith v. Maryland*,²⁴ holding one has no legitimate expectation of privacy in the numbers he dials on his phone because those numbers are conveyed to the telephone company's switching equipment and, in the case of long-distance calls, end up on the customer's bill. Thus the defendant in that case could not object to police use of a pen register to determine *all* numbers he dialed, though once again the more focused police examination revealed much more than the limited and episodic scrutiny which the phone company gave the same numbers.

And what about the overflight case, *Ciraolo*, that I mentioned earlier. The Court there held it is no search for police to look down from an airplane into one's solid-fenced back yard to learn of his cannabis agronomy, as "[a]ny member of the public flying over this airspace who glanced down could have seen everything that these officers observed."²⁵ Ha! On your next flight out of your local airport, just try checking out your garden -- or, for that matter, just try locating your house, or even your block. As the dissenters in *Ciraolo* aptly noted, the majority ignored the fact that "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent."²⁶ Indeed, one wonders if the Court is even thinking about privacy any more. In a recent progeny of *Ciraolo*, a case called *Florida v. Riley*,²⁷ the Court held it was no

21. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

22. 425 U.S. 435 (1976).

23. *Id.* at 442.

24. 442 U.S. 735 (1979).

25. *California v. Ciraola*, 476 U.S. 207, 213-14 (1986).

26. *Id.* at 223.

27. 488 U.S. 445 (1989).

search to look into a greenhouse from a helicopter hovering 400 feet above, and the plurality opinion seemed to say that all such overflight was outside the Fourth Amendment unless the aircraft were to get so incredibly close as to produce "undue noise, . . . wind, dust, or threat of injury."²⁸ Curiously, the Fourth Amendment seems less about privacy than good housekeeping!²⁹

Turning now to the other critical Fourth Amendment term, "seizures," it is fair to say that the Court's definition of what constitutes a seizure of an object has been more straightforward and less controversial: "some meaningful interference with an individual's possessory interests in . . . property."³⁰ But the question of what constitutes a seizure of a person has proved much more troublesome. The test, as embraced by a majority of the Supreme Court in *Florida v. Royer*,³¹ holding that an initial airport confrontation between a drug agent and a suspected drug courier was no seizure, is as follows: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."³² More recently, the Court has said that this is not merely a "reasonable person" test, but rather a reasonable innocent person standard,³³ though given how the Court has applied *Royer* it would have been more accurate had the Court described the test in terms of a reasonable pachydermatous person. Before you reach for your dictionaries, I'll tell you I'm talking about a person with the hide of an elephant, impervious to the official inquiry about criminal activity which has been directed at him.

I say this because I believe a reasonable person with just average dermatological characteristics would, in the language of *Royer*, ordinarily feel that he was "not free to leave" when under police inquiry regarding criminal activity. As one federal judge once put it: "Implicit in the introduction of the [officer] and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer."³⁴ But the Supreme Court disagrees, for the Court's position is that inquiry by a known police officer regarding possible criminal conduct is not alone a basis for concluding a seizure has occurred.³⁵ As actually applied by the Supreme Court and the lower courts, then, the *Royer* standard has come to mean that a police-citizen encounter, even

28. *Id.* at 446.

29. For further criticism of this line of cases, see Wayne R. LaFave, *The Forgotten Motto of Obsia Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291 (1986).

30. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

31. 460 U.S. 491 (1983).

32. *Id.* at 502.

33. *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

34. *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975).

35. *Florida v. Rodriguez*, 469 U.S. 1 (1984).

when the officer is making inquiries a private citizen would not,³⁶ becomes a seizure only if the officer otherwise conducts himself in a fashion which a reasonable person would view as threatening or offensive if performed by another private citizen -- for example, blocking the suspect's path,³⁷ grabbing him,³⁸ or encircling him.³⁹

It is not surprising that some have taken a dim view of this state of affairs, questioning why it is that "social amenities should govern fourth amendment standards."⁴⁰ I must confess that I have not been among those critics, for I have in the past accepted the notion that the police, without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed "to seek cooperation . . . even though many citizens will defer to this authority of the police because they believe -- in some vague way -- that they should."⁴¹ But even one so hard-nosed might conclude, as I have,⁴² that in two cases decided this past Term the Court has moved well beyond *Royer* and unduly narrowed the "seizures" concept of the Fourth Amendment, much as has already occurred with respect to "searches."

One of these cases, *Florida v. Bostick*,⁴³ involved the so-called suspicionless bus sweep, a new and increasingly common tactic in the war on drugs. Police board a bus while it is stopped at an intermediate point on its route and question passengers as to their identity and the purpose of their travel, ask to examine their tickets, and then request to search their luggage, all of which usually occurs without express objection from the passengers. The Florida Supreme Court, using the *Royer* test, found one such incident to involve a seizure which, for lack of any justification, was then held illegal, requiring suppression of the drugs found in the defendant's luggage.⁴⁴ The United States Supreme Court reversed. That Court took the position that the appropriate inquiry in a case such as this "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter,"⁴⁵ a proposition which is itself unobjectionable. But then the Court went on to

36. *United States v. Barnes*, 496 A.2d 1040 (D.C. 1985).

37. *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982).

38. *United States v. Sokolow*, 808 F.2d 1366 (9th Cir. 1987).

39. *United States v. Berryman*, 717 F.2d 651 (1st Cir. 1983).

40. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771, 801 (1982). See also Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1313 (1990).

41. 1975 Model Code of Pre-Arrest Procedure 258.

42. See Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. (forthcoming 1991).

43. 111 S. Ct. 2382 (1991).

44. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989).

45. *Florida v. Bostick*, 111 S. Ct. 2382, 2387 (1991).

conclude that the state court's analysis was faulty (i) because that court focused on the *Royer* "free to leave" question, which is inapplicable as to a person who otherwise had no desire to leave the bus, and (ii) because that court adopted a per se rule covering all bus sweep encounters, contrary to established doctrine that "the totality of the circumstances" must be considered.

The Supreme Court's analysis in *Bostick*, it seems to me, is dead wrong. For starters, the Court misrepresents what the state court had done, as the state court opinion unquestionably did apply a "totality of the circumstances" test and did assay all the relevant factors. Admittedly, the state court found the on-bus locale of the challenged encounter a very important factor, but that is as it should be, and the Supreme Court's failure to appreciate that is, in my judgment, the fatal defect in *Bostick*. Two points need to be made in that regard.

The first derives largely from the common understanding that "the insides of commercial passenger buses are normally only accessible to bus personnel and paying-ticket holders."⁴⁶ That being the case, when police undertake a bus sweep they act with the obvious connivance of the common carrier to which bus travelers have entrusted their care. Such a situation is highly coercive because it is so unlike any contact which might occur between two private citizens. In other words, applying the *Royer* test as it had theretofore existed in reality actually supports the result reached by the Florida court.

The second point regarding *Bostick* is that this police dominance has a uniquely heavy impact upon bus travelers precisely because they do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize. The latter individuals can "leave the scene and repair to a safe haven to avoid unwanted probing by law enforcement officials,"⁴⁷ but the same is not true of bus passengers. Leaving the bus is not a feasible alternative, for the passenger would thereby risk having the bus depart without him, stranding him in an unfamiliar locale without his luggage. And in any event, debusing would be such an abnormal departure from the passenger's course of conduct that it would be viewed by the police as highly suspicious, justifying further scrutiny of that individual. The bus passenger thus is not "free to leave" in the *Royer* sense, and that circumstance is highly relevant because it means the passenger's only remaining privacy-protection option is obstinate refusal to respond to the officers' questions. But what kind of option is this, for the dynamics of the situation make a nonconforming refusal to cooperate an unlikely choice, especially when it is considered (as one court put it) that bus

46. *United States v. Rembert*, 694 F. Supp. 163, 173 (W.D.N.C. 1988).

47. *Bostick*, 111 S. Ct. at 2393-94 (Marshall, J. dissenting).

transportation is "utilized largely by the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about such deprivations."⁴⁸

The second seizure-of-person case is *California v. Hodari D.*,⁴⁹ where a youthful pedestrian fled when he saw the police approaching, only to be pursued for a block or so by an officer on foot, causing the youth to throw down what proved to be crack cocaine. The state court concluded that the pursuit was a seizure which, because the officer lacked reasonable suspicion, was illegal and thus required suppression of the drugs. Again, the United States Supreme Court reversed. The Court ruled that a seizure of the person under the Fourth Amendment is limited to what constituted an arrest at common law; that is, there must be either physical force or submission to the assertion of authority, neither of which was present here at the time the drugs were ditched.

That conclusion is troublesome for a variety of reasons. For one thing, it is mistaken to conclude that the Fourth Amendment is so ossified that it cannot be extended one iota beyond the common law. Such an interpretation is inconsistent with the Court's earlier teachings, as illustrated by the previously-discussed *Katz* case, where the Court held that there could be a search and seizure of intangibles though quite clearly this was not so at common law. Secondly, the Court in *Hodari D.* is rather selective in its choice of relevant common law, ignoring the fact that the officer's conduct amounted to an unlawful attempted arrest at common law. What the Court should have done was to recognize that the relevant precedents, such as *Royer* and the seminal stop-and-frisk case, *Terry v. Ohio*,⁵⁰ make it clear that the Fourth Amendment protects "liberty," "freedom of movement," and "personal security," and that consequently the real question is whether there has been a "meaningful interference, however brief,"⁵¹ with those interests when a person is subjected by police to a head-on chase. Surely the answer is yes, for the chase puts the pursued individual in apprehension of immediate detention and causes him to commence or continue flight, often by action which is designed to control the direction of his movement. Most certainly, as one lower court put it, "When the chase commences, the stop has begun."⁵² Because of the Supreme Court's failure to appreciate this fact, the police are now tempted to utilize a very threatening and often dangerous chase as an evidence-gathering technique on a mere hunch of drug activity.

48. *United States v. Lewis*, 728 F. Supp. 784, 789 (D.D.C. 1990).

49. 111 S. Ct. 1547 (1991).

50. 392 U.S. 1 (1967).

51. *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984).

52. *In re D.J.*, 532 A.2d 138 (D.C. 1987).

I turn now to my second major area of inquiry, that concerning what factual basis is required for a lawful search or seizure. Here it is well to return to the language of the Fourth Amendment itself: "no Warrants shall issue, but upon probable cause." Of course, probable cause is also needed for warrantless searches and seizures, for (as the Supreme Court has put it) the Amendment's requirements "surely cannot be less stringent"⁵³ when the police act without a warrant. This probable cause requirement, the Court has explained, is intended both "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime" and "to give fair leeway for enforcing the law in the community's protection"; it is "the best compromise that has been found for accommodating these often opposing interests."⁵⁴ Striking just the right balance is a difficult enough task, but doing so in a fashion which contributes meaningfully to the understanding of lower courts and police is a most formidable undertaking, as probable cause is "an exceedingly difficult concept to objectify."⁵⁵

Any assessment of the Supreme Court's "fleshing out" of this probable cause standard must take account of these difficulties. Quite clearly, the Court cannot be criticized for its failure to produce some litmus-paper test which readily decides all future cases; the most that can be expected is that the Court would provide an approach, a structure, which could thereafter be beneficially utilized by police, warrant-issuing magistrates, and suppression hearing judges. In a series of cases, the Supreme Court took very substantial steps in that direction. Focusing upon the oft-litigated question of when information from a police informant amounts to probable cause, the Court in *Aguilar v. Texas*⁵⁶ helpfully developed a "two-pronged test."⁵⁷ *Aguilar* and its progeny⁵⁸ established that there was a "basis of knowledge" prong, which could be satisfied by a statement from the informant as to precisely how he came by his information or sometimes by inference flowing from the great number of details provided by the informant, and a "veracity" prong, which could be met on the basis of the informant's past good performance or by virtue of his admissions against penal interest. The Court also made it apparent that partial corroboration of the informant's tale was of significance, though the two-pronged approach was not sufficiently developed that it could be said exactly how this corroboration was to be taken into account or, more particularly, whether

53. *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

54. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

55. Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971).

56. 378 U.S. 108 (1964).

57. As it was later called in *Spinelli v. United States*, 393 U.S. 410, 413 (1969).

58. These cases and the reaction to them by the lower courts is more fully discussed in Wayne R. LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1.

corroboration was an alternative means of satisfying both or only one of the two prongs.

So matters stood when the Supreme Court in the 1983 case of *Illinois v. Gates*⁵⁹ unfortunately decided to dismantle this structure rather than build upon it. That case marks the abandonment of the two-pronged test in favor of an amorphous "totality of the circumstances" approach which the Court supported with a series of sophistical propositions. One, the claim that the "totality of the circumstances approach is far more consistent with our prior treatment of probable cause" as a "'practical, nontechnical conception,'" "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules,"⁶⁰ is nothing but a red herring. No one had ever contended that the *Aguilar* formula would eventually reduce probable cause to "a neat set of legal rules." Rather, it provided a structure for probable cause inquiries and, if not rigidly applied, allowed sufficient room for assessment of the unique facts of the particular case.

The second proposition in *Gates*, that the new approach was justified by the fact that affidavits "are normally drafted by nonlawyers" and warrants are issued "by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause,'"⁶¹ asserts facts which cut in exactly the opposite direction. As Justice White pointed out in his separate opinion, that laymen police and magistrates must often make the critical probable cause determination in the first instance is all the more reason for the Court "to provide more precise guidance."⁶²

The *Gates* Court's third proposition, "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review,"⁶³ is a truism which lends no support to *Gates*, a decision which discourages not only *de novo* review but any meaningful review whatsoever. Proposition four, the *in terrorem* that closer scrutiny of affidavits than *Gates* requires might prompt police to "resort to warrantless searches,"⁶⁴ is equally unpersuasive, for the longstanding rule that a somewhat less demanding probable cause test applies in with-warrant cases⁶⁵ means there is nothing to be gained by police acting without, rather than with, a warrant when an officer entertains any doubts about the sufficiency of his information. The fifth proposition, that if *Aguilar* survived, anonymous tips "would be of greatly diminished value in

59. 462 U.S. 213 (1983).

60. *Id.* at 230-32.

61. *Id.* at 235.

62. *Id.* at 274.

63. *Id.* at 236.

64. *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

65. *United States v. Ventresca*, 380 U.S. 102 (1965).

police work,"⁶⁶ ignores the fact that before *Gates*, such tips often prompted police surveillance and investigation uncovering uncontrovertible probable cause.

As for the *Gates* Court's final proposition, that the two prongs of *Aguilar* should not have "independent status," so that now "a deficiency in one may be compensated for . . . by a strong showing as to the other,"⁶⁷ it contains a fatal flaw. A "common-sense decision" on probable cause, to take the Court's language,⁶⁸ necessitates attention to *both* veracity and basis of knowledge, and to treat a strong showing of one as curing a deficiency in the other makes a mockery of the Fourth Amendment's probable cause requirement. The preferred method of satisfying the basis of knowledge requirement, a direct statement from the informant as to how he came by the information, is virtually worthless when it is made by an individual from the criminal milieu about whom no veracity judgment is possible. And information tendered by a person of unquestioned credibility is worth very little when no judgment is possible as to the basis of his conclusions -- whether or not, to use the Court's oft-quoted phrase, he is merely reporting "an offhand remark heard at a neighborhood bar."⁶⁹ No wonder that Justice Brennan was moved to declare in his *Gates* dissent that "today's decision threatens to 'obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'"⁷⁰

A somewhat different question about the Fourth Amendment's probable cause standard is whether it calls for the same amount of evidence in all circumstances. For many years the Court tended to view the Fourth Amendment "as a monolith,"⁷¹ which was an unhealthy state of affairs, for not all searches and seizures involve comparable intrusions. The inevitable tension produced by that approach made it appear that only by watering down the meaning of probable cause across the board could the Court avoid placing unrealistic limits upon the police in certain situations. So it is that one of the Supreme Court's most significant contributions to Fourth Amendment jurisprudence has been its recognition that probable cause is a variable concept.

One illustration of this development is the Court's acceptance in some instances of a lesser quantum of individualized suspicion, as in *Terry v. Ohio*.⁷²

66. *Illinois v. Gates*, 462 U.S. 213, 237 (1983).

67. *Id.* at 233.

68. *Id.* at 238.

69. *Spinelli v. United States*, 393 U.S. 410, 417 (1969).

70. *Gates*, 462 U.S. at 291.

71. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1979).

72. 392 U.S. 1 (1968).

"By balancing the need to search against the invasion which the search entails,"⁷³ the Court concluded that a brief on-the-street seizure does not require as much probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion.⁷⁴ The *Terry* case also "dissipated the notion that the search and seizure provisions of the Fourth Amendment are subject to verbal manipulation,"⁷⁵ and thus the Court has wisely declined in later cases to permit *Terry* to be used to justify more substantial detentions merely because they are not called arrests.⁷⁶ However, the Court has correctly utilized the *Terry* formula for other lesser intrusions, such as brief detention of luggage.⁷⁷

In another category of cases, the Court has allowed a search or seizure to be made without any individualized suspicion at all. This result has been reached where there exists a rather extraordinary public interest to be satisfied and it also appears the limited intrusion involved is tolerable if those subjected to it are not arbitrarily selected. A leading case of this genre is *Camara v. Municipal Court*,⁷⁸ holding that nonconsensual safety inspections of residential premises may be conducted without any facts tending to show that code violations exist within particular premises, provided it is first shown to a magistrate that the premises were selected pursuant to neutral criteria derived from a pre-existing legislative or administrative inspection scheme.⁷⁹ This sensible but somewhat different type of balancing test has also been used where the minimal intrusion is directed only at those who are self-selected by their choice of location. The Supreme Court has thus approved the operation of highway checkpoints at which all vehicles are stopped for brief questioning of the occupants about their possible illegal alienage,⁸⁰ for check into the driver's sobriety,⁸¹ or for examination of driver's license and vehicle registration.⁸²

A third category of seizures and searches without traditional probable cause

73. *Id.* at 21.

74. For a more extended assessment of *Terry*, see Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters* and *Beyond*, 67 MICH. L. REV. 39 (1968).

75. Remarks of Justice Walter V. Schaefer at the Institute of Continuing Legal Education program on "Criminal Law and the Constitution: The Expanding Revolution," Ann Arbor, Michigan (July 19, 1968).

76. *Dunaway v. New York*, 442 U.S. 200 (1979).

77. *United States v. Place*, 462 U.S. 696 (1983).

78. 387 U.S. 523 (1967).

79. For a more extended assessment of *Camara*, see Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

80. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

81. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

82. *Delaware v. Prouse*, 440 U.S. 648 (1979).

is of the "piggy-back" variety: that is, the search or seizure is permitted, even absent any probable cause as to it, because it accompanied a lawful seizure or search. The leading case of this type is *United States v. Robinson*,⁸³ where the Court held that the "general authority" to search a person incident to a lawful custodial arrest was "unqualified" -- that is, was permitted incident to every such arrest without regard to the likelihood the search would uncover evidence or weapons. The use of such a "bright-line" rule in lieu of a more sophisticated but less comprehensible test surely makes sense in some circumstances, and *Robinson* is such a case. The police activity at issue there involves relatively minor intrusions into privacy, occurs with great frequency, and virtually defies on-the-spot rationalization on the basis of the facts of the individual case.⁸⁴

But the Supreme Court has been too ready to utilize this "piggy-back" theory in situations where it is not needed, as illustrated by *New York v. Belton*,⁸⁵ holding a warrantless search without traditional probable cause may be conducted of the entire passenger compartment of a vehicle simply because an occupant of that vehicle has just been arrested.⁸⁶ For one thing, there is no need for such a rule, as ascertaining when a vehicle interior is actually under the continuing control of an arrestee, as was required before *Belton*,⁸⁷ is not difficult. For another, the *Belton* decision invites subterfuge; as Justice Stevens correctly noted, now an officer may opt to make a custodial arrest "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation."⁸⁸

When searches or seizures are permitted on grounds other than the circumstances of the particular case, the existence of police regulations may play a significant part in ensuring a constitutional scheme. Thus in the *Camara* safety inspection case the Court declared that what was needed as a substitute for traditional probable cause was a showing that "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."⁸⁹ Similarly, in the "piggy-back" type case of *Colorado v. Bertine*,⁹⁰ upholding inventory of vehicles incident to the arrest of their operators, the Court declared that "reasonable police regulations relating

83. 414 U.S. 218 (1973).

84. For a more complete analysis of *Robinson*, see Wayne R. LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The *Robinson* Dilemma, 1974 SUP. CT. REV. 127.

85. 453 U.S. 454 (1981).

86. *Id.* at 460; For a more extended criticism of *Belton*, see Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT.L. REV. 307, 324-33 (1982).

87. By application to vehicles of *Chimel v. California*, 395 U.S. 752 (1969).

88. *Robbins v. California*, 453 U.S. 420, 452 (1981) (Stevens, J., dissenting).

89. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

90. 479 U.S. 367 (1987).

to inventory procedures administered in good faith satisfy the Fourth Amendment."⁹¹

Unfortunately, the Supreme Court has failed to follow through on this wise approach. For example, *Camara's* progeny -- the Court's several cases recognizing such inspections can be conducted of various business activities -- reveal that the Court does not *really* require conformance with administrative regulations assuring nonarbitrariness. In the 1987 case of *New York v. Burger*,⁹² for example, as the dissenters sadly noted, the majority upheld an inspection scheme which "failed to provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search."⁹³ The *Bertine* case is itself another striking example of this breakdown. The Court, though seeming to demand police regulations sufficient to ensure against arbitrary impoundment and inventory procedures, upheld the Boulder, Colorado system though it conferred total discretion on the police as to when to impound an arrestee's car in lieu of leaving it at the scene or turning it over to another person. In these and many other cases, the Supreme Court has failed to give the governing police regulations the kind of "hard look" it has demanded in the administrative law area, all to the detriment of Fourth Amendment rights.⁹⁴

As for my last overarching question -- when is a warrant required? -- it is useful to begin with the understanding that while the Fourth Amendment proscribes "unreasonable searches and seizures" and then states that "no Warrants shall issue" except as specified, it says absolutely nothing about whether lack of a warrant ever makes a search or seizure "unreasonable." The Supreme Court has nonetheless long expressed a strong preference for searches and seizures pursuant to warrant.⁹⁵ This is understandable, as the warrant process permits the critical probable cause determination to be made in relatively calm circumstances by a judicial officer, who is presumably more knowledgeable on these matters than the cop on the beat. And even if this judicial scrutiny is not all it is cracked up to be, the pre-search or pre-seizure

91. *Id.* at 374.

92. 482 U.S. 691 (1987).

93. *Id.* at 723.

94. For elaboration of this conclusion, see Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990).

95. The warrant process, the Court instructs, "interposes an orderly procedure" involving "judicial impartiality," *United States v. Jeffers*, 342 U.S. 48, 51 (1951), whereby a "neutral and detached magistrate," *Johnson v. United States*, 333 U.S. 10, 14 (1948), can make "informed and deliberate determinations," *Aguilar v. Texas*, 378 U.S. 108, 110 (1964), on the issue of probable cause. To leave such decisions to the police is to allow "hurried action," *Id.*, by those "engaged in the often competitive enterprise of ferreting out crime," *Johnson*, 333 U.S. at 14.

memorialization of the facts being relied upon ensures against post hoc manipulation of them in an effort to conceal inadequacies in a factual basis. But, while the Supreme Court has asserted "that the police must, whenever practicable, obtain advance judicial approval of searches and seizures,"⁹⁶ this is far from being an accurate portrayal of current law or practice.⁹⁷

The Court has long recognized that the police may forego a warrant when confronted with "exigent circumstances." Illustrative is *Schmerber v. California*,⁹⁸ holding no warrant was needed to take a blood sample from an apparently intoxicated driver because the percentage of alcohol in the blood would be significantly diminished if testing was delayed until a warrant could be obtained. But the Court's exigent circumstances assessments have been erratic at best, as is shown by *Vale v. Louisiana*.⁹⁹ Police were outside Vale's house intending to arrest him because his bail had been raised on a prior charge when they saw Vale come out and apparently make a drug sale to a motorist. They arrested Vale on his porch and briefly looked around inside; his brother and mother then entered the premises, following which the police searched for and found Vale's drug stash therein. The Supreme Court rejected the state's claim of exigent circumstances.¹⁰⁰ For one thing, said the Court, "no one else was in the house when [the police] first entered,"¹⁰¹ but that comment is inexplicable absent any hint by the Court that the police, having preceded the mother and brother into the house, could have barred their entry until a warrant was obtained and executed. Even more bizarre is the Court's assertion the police could have obtained "a search warrant as well"¹⁰² when they got arrest warrants regarding Vale's bail increase, as the probable cause to search for drugs arose moments before the search. Even the *Vale* Court's statement of what *would* amount to exigent circumstances -- where the items to be seized are "in the process of destruction"¹⁰³ -- seems flawed; lower courts have found it so unrealistically narrow that they have in the main not accepted it as controlling.

The *Vale* decision is as sophistic in one direction as *Chambers v. Maroney*,¹⁰⁴ decided the same day, is in the other. *Chambers* held there were

96. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

97. See Robert M. Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231 (1983); Robert M. Bloom, *Warrant Requirement - The Burger Court Approach*, 53 U. COLO. L. REV. 691 (1982).

98. 384 U.S. 757 (1966).

99. 399 U.S. 30 (1970).

100. *Id.* at 34.

101. *Id.* at 34.

102. *Id.* at 35.

103. *Id.* at 35.

104. 399 U.S. 42 (1970).

exigent circumstances justifying a warrantless search of a car although, in point of fact, at the time of the search the car was securely held in police custody and the former occupants were all under arrest and unable to gain access to it. The commentators had a "field day" with the blatantly false assertion of exigencies in *Chambers*,¹⁰⁵ and some years later the Court acknowledged that its no-warrant rule for vehicles was instead based upon another consideration: "the diminished expectation of privacy which surrounds the automobile."¹⁰⁶ This notion that the protections of the warrant process are unnecessary when lesser Fourth Amendment interests are threatened is also to be found in some of the other decisions of the Court. Thus, no warrant is needed to make an arrest in a public place,¹⁰⁷ but judicial approval is required for an "extended restraint of liberty following arrest."¹⁰⁸ Similarly, no warrant is needed when only the defendant's possessory interest in his effects is in jeopardy,¹⁰⁹ but a warrant is generally needed when possession will not be further interrupted or delayed but an intrusion into the privacy of the defendant's effects is contemplated.¹¹⁰

The Supreme Court is on solid ground in not requiring resort to the warrant process in all instances where genuine exigent circumstances are lacking. A greatly expanded warrant system -- that is, one which truly adhered to the principle that arrest and search warrants are required whenever practicable -- might convert that process into somewhat of a mechanical routine, one in which the judiciary would "not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exists grounds for a search."¹¹¹ But, the trouble with the Supreme Court's decisions on the warrant question is that they often depart from any requirement of exigent circumstances without confronting head on the proposition I just stated, resulting in an absence of principles helpful in later cases. Consider this sequence of cases. First comes *Chambers*,¹¹² best understood as supporting the proposition that cars are not private enough to deserve the protections of a warrant requirement. That was followed by *United States v. Chadwick*,¹¹³ holding

105. See, e.g., Vivian Deborah Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127 (1980); Jean McCann Nathan, Comment, *The Automobile Exception: A Contradiction in Fourth Amendment Principles*, 17 SAN DIEGO L. REV. 933 (1980); Gene W. Gardner, Note, *The Automobile Exception to the Warrant Requirement: Speeding Away from the Fourth Amendment*, 82 W. VA. L. REV. 637 (1980).

106. *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

107. *United States v. Watson*, 423 U.S. 411 (1976).

108. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

109. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

110. *Walter v. United States*, 447 U.S. 649 (1980).

111. LAWRENCE P. TIFFANY, ET AL., *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* 120 (Frank J. Remington ed., 1967).

112. *Chambers v. Maroney*, 399 U.S. 421 (1970).

113. 433 U.S. 1 (1977).

Chambers inapplicable to the search of other containers, such as the 200-pound footlocker in that case. Those two cases cannot be fully reconciled, and thus trouble was to be expected when the *Chambers* and *Chadwick* rules collide, as they do when police search a container found within a car. As to this, the Court held in the 1979 case of *Arkansas v. Sanders*¹¹⁴ that when there was probable cause as to the container only, as there (where a suspected drug courier placed his suitcase into the trunk of a taxi), then the *Chadwick* warrant rule for containers applies. The Court next held in the 1982 case of *United States v. Ross*¹¹⁵ that the *Chambers* no-warrant rule for cars applies to a search of an in-car container when there is probable cause as to the vehicle generally, which made some sense because otherwise police would proceed, perhaps unnecessarily, first to search all of the car except the container before seizing it and going for a warrant. But then, this past Term, in *California v. Acevedo*,¹¹⁶ the *Sanders* case was overruled on the unconvincing ground that the *Sanders-Ross* distinction was too difficult for police to apply, so now police may search containers in cars without a warrant whether the probable cause is general or specific. This prompted concurring Justice Scalia to observe that though the Court keeps pretending there is a "general requirement" that warrants be obtained whenever possible, this requirement is now "riddled with exceptions."¹¹⁷ He then cogently commented: "There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."¹¹⁸ Amen!

That concludes my Fourth Amendment "checkup" except for a few final observations. There is no denying the fact that many of the Fourth Amendment issues with which the Supreme Court has struggled in recent years have been extremely complex and difficult; in this brief overview I have only been able to note some of the major trends and themes. But this summary does show, I believe, that the Fourth Amendment is not in perfect health. On the positive side, I would be inclined to say that even though one might quarrel with particular applications of these notions, two most worthwhile developments are those which produced a variable probable cause test and which recognized that warrants-whenever-possible is not always the best policy. But those two important contributions to Fourth Amendment jurisprudence serve to highlight just how mistaken some of the Court's other moves have been. Watering down the probable cause standard generally, as in *Gates*, was especially unnecessary once the Court expressly recognized that various lesser-than-ordinary intrusions could be justified upon a quantum of evidence short of that which would

114. 442 U.S. 753 (1982).

115. 456 U.S. 798 (1982).

116. 111 S. Ct. 1982 (1991).

117. *Id.* at 1992.

118. *Id.* at 1993.

otherwise be necessary to establish probable cause. And departing from the traditional probable cause approach in favor of what the Court likes to call "standard police procedures" is difficult to accept so long as the Court refrains from any realistic inquiry into whether governing police regulations actually exist and, if they do, whether they sufficiently cabin the discretion of the police.

Moreover, the two favorable trends I have just noted also serve to reflect just how unfortunate it is that the Court has circumscribed the boundaries of the Fourth Amendment as it has. Such cases as the *Miller-Riley*¹¹⁹ series fail to recognize that privacy should not be viewed as "a discrete commodity, possessed absolutely or not at all,"¹²⁰ and that there is a critical difference between revealing bits and pieces of information sporadically to a small and often select group for a limited purpose and a focused police examination of the totality of that information. In like fashion, the recent *Bostick*¹²¹ and *Hodari D.*¹²² cases (if not *Royer* itself) insufficiently protect the Fourth Amendment interests in freedom of action and personal security. Instead of chipping away at the "searches" and "seizures" concepts in the Fourth Amendment, the Court needs to recall and take to heart the admonition in the very early *Boyd* case that "unconstitutional practices get their first footing" by "the obnoxious thing in its mildest and least repulsive form."¹²³

For some years, it has been the conventional wisdom that the United States Supreme Court, because it is remote from the public clamor for tougher law enforcement, is the ultimate bulwark of the protections in the Bill of Rights. The state courts, on the other hand, are too close to the "war on crime" and too susceptible to public influence to be counted on when the chips are down.¹²⁴ But one can only wonder if that is an apt description today. Recall the two seizure-of-person cases from last Term that I discussed -- *Bostick* and *Hodari D.* As the dissent in each case dolorously notes, it is the Supreme Court itself which, in the apparent interest of escalating the "war on crime," has circumscribed Fourth Amendment rights to a narrower compass than theretofore generally recognized by state courts.

Certainly that must change if we are to realize the hope, as expressed by Justice Brennan just a few years ago, "that in time this or some later Court will restore these precious [Fourth Amendment] freedoms to their rightful place as

119. *United States v. Miller*, 425 U.S. 435 (1976); *Florida v. Riley*, 488 U.S. 445 (1989).

120. *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

121. *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

122. *California v. Hodari D.*, 111 S. Ct. 1547 (1991).

123. *Boyd v. United States*, 116 U.S. 616, 635 (1885).

124. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970).

a primary protection for our citizens against overreaching officialdom."¹²⁵
Only then can we give the Fourth Amendment a clean bill of health.

125. *United States v. Leon*, 468 U.S. 897, 960 (1984) (Brennân, J., dissenting).

