Criminal Procedure: Undergraduate Edition

CRIMINAL PROCEDURE: UNDERGRADUATE EDITION

CHRISTOPHER E. SMITH

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PART I
INTRODUCTION

What Is This Book?

This book introduces criminal procedure law in the United States, with a focus on the "investigation" stage of the criminal justice system. Specifically, the book focuses on legal constraints placed upon police and prosecutors, constraints largely derived from Supreme Court interpretations of the Fourth, Fifth, and Sixth Amendments to the Constitution. Major topics include searches and seizures, warrants and when they are required, interrogations, witness identifications of suspects, and the right to counsel during various stages of investigation and prosecution.

At the end of the semester, students should have a solid foundation in the "black-letter law" of criminal procedure. This material is tested on the bar examination, and it is the sort of information that friends and family will expect lawyers to know, even lawyers who never practice criminal law. For example, a lawyer lacking basic familiarity with the *Miranda* Rule risks looking foolish at Thanksgiving dinner. In addition, the legal issues covered in this book relate to some of the most intense ongoing political and social debates in the country. The law governing stop-and-frisk procedures, for example, is

not merely trivia one should learn for an exam. It affects the lives of real people. The reliability of eyewitness identifications affects the likelihood of wrongful convictions, a phenomenon persons of all political persuasions oppose. In short, policing and prosecution affect everyone in America, and an informed citizen—especially a lawyer—should understand the primary arguments raised in major controversies in criminal procedure law.

To be sure, understanding the holdings of major cases is essential to more nuanced participation in these debates, and this book devotes the bulk of its pages to Supreme Court opinions, which your authors have edited for length. (To save space, we have omitted internal citations, as well as portions of court opinions, without using ellipses to indicate our edits.) The book then aims to go beyond the information available in majority opinions, concurrences, and dissents. To do so, it includes supplementary material on developments in law and policy. For example, advances in technology raise questions about precedent concerning what counts as a "search" under Fourth Amendment law. The book also provides perspectives on the practical implications of Supreme Court decisions, perspectives often given scant attention by the Justices. For example, state courts have grappled with scientific evidence about witness reliability that has not yet been addressed in Supreme Court opinions resolving due process challenges related to identifications.

Further, in addition to helping students identify situations in

which constitutional rights may have been violated, the book explores what remedies are available for different violations. For a criminal defendant, the most desirable remedy will normally be exclusion of evidence obtained though illegal means—for example, drugs found in a defendant's car or home during an unlawful search. Contrary to common misconceptions among the general public, however, not all criminal procedure law violations result in the exclusion of evidence. Students will read the leading cases on the exclusionary rule, confronting arguments on when the remedy of exclusion—which quite often requires that a guilty person avoid conviction—is justified by the need to encourage adherence by law enforcement to the rules presented in this book concerning searches, seizures, interrogations, and so on. Your authors have attempted to create a book that presents material clearly and does not hide the ball. Students who read assigned material should be well prepared for class, armed with knowledge of what rules the Supreme Court has announced, along with the main arguments for and against the Court's choices.

The remainder of this Introduction consists of further effort by your authors to convince you of the importance of the material presented later in the book. Many students possess this book because they are enrolled in a required course or know that this material is tested on the bar exam. Others of you plan to practice criminal law. Still others study criminal procedure to learn more about important societal

controversies. Regardless, your authors do not take your attention for granted.

A Note on the Text

Universities exist to promote the search for knowledge and to transmit human knowledge to future generations. Public universities in particular have a tradition of sharing knowledge with the broader populace, not merely their own students, and they also have a tradition of providing excellent education at affordable prices. This book exists to further these important missions of the University of Missouri. Designed by MU professors, it suits the pedagogical preferences of its authors. Available at no cost, it reduces students' cost of attendance.

In addition, this book is available under a Creative Commons license, meaning that anyone—inside or outside the university—can use it to study criminal procedure and can share it at will. Faculty at other universities are free to adopt it. The project was inspired, in part, by an article one of your authors published in 2016, calling on law schools and law faculty to create free casebooks for students.1 It turned out that calling upon others to create books did not in itself produce these books. Your authors have since become the change they wished to see in legal education. Because the book is new—and is the first casebook produced by either of

your authors—student feedback is especially welcome. Future students will benefit from any improvements.

To increase the book's value as a free resource, the text when possible contains links to sources at which students can learn more at no cost. For example, Supreme Court cases are freely available online, and anyone who wishes to read the full unedited version of any case may do so. (Even when a link has not been provided, when naming cases we usually have included a full citation, which should allow students easy access to free versions of the text.) Your authors have edited cases so that reading assignments would be kept reasonable for a one-semester course; however, there is always more to learn.

In addition, this book aims to go beyond providing a "nutshell" summary of American criminal procedure law. From time to time, particularly when assigned cases raise issues about which there are important ongoing debates in American society, the readings will investigate these issues in greater depth than might be possible were the text confined to opinions written by Supreme Court Justices. More than one hundred years ago, Roscoe Pound—then dean of the University of Nebraska College of Law, later dean at Harvard—published the great legal realist article "Law in Books and Law in Action."[2] If this book is successful, students will spend time considering the practical effects—the law in action—of the opinions contained in Supreme Court reporters.

KEY CONSTITUTIONAL LANGUAGE: 4TH, 5TH, 6TH, 8TH, & 14TH AMENDMENTS

The Key Constitutional Language

The U.S. Constitution was drafted as an effort to combine the original states into one nation under a workable governing system. The Constitution replaced the original unifying document created after the Revolutionary War for independence from Great Britain, known as the Articles of Confederation, because many regarded the Articles of Confederation as providing too little authority for the national government. The national government needed greater ability to regulate the economy and to provide for national defense by obligating states to cooperate and help each other as one country. Prior to the ratification of the Constitution, states often regarded themselves as very separate entities and that were not fully committed to a unified whole. After the Constitution was ratified, creating the United States of

America and designing the details of the nation's governing system, concerns arose about whether the document provided enough protection for the rights of individuals. As a result, the Bill of Rights was drafted and ultimately added ten Amendments to the Constitution in 1791, the first eight of which specified legal protections for individuals, known to us as "constitutional rights", that define the relationship of individuals to government. "Rights", in a legal sense, are entitlements for individuals that the government is not supposed to violate. Over the course of subsequent decades, additional Amendments have been added to the Constitution. Of particular importance are the Amendments added after the Civil War, especially the Fourteenth Amendment (1868) that contains the rights to due process of law and equal protection of the laws.

In this course, students will focus on Supreme Court cases arising from a handful of constitutional provisions. Five Amendments to the Constitution of the United States are reprinted here (four in full, one in part) for your convenience. Note how the description of rights in these Amendments contain many vague terms, such as "unreasonable search" and "cruel and unusual punishment". These terms require interpretation when disputes arise about their meaning. Judges have the authority to interpret these terms and thereby clarify—and change—the meanings of constitutional rights:

Amendment IV

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.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Savvy students will have noticed that the constitutional provisions reprinted above lack definitions for terms such as "unreasonable", "search", "seizure", "probable cause", "put in jeopardy", "due process of law", "confronted with the witnesses against him", and "Assistance of Counsel". The remainder of this book is, essentially, a summary of the Supreme Court's ongoing efforts to provide the missing definitions.

Briefing a Judicial Opinion (otherwise known as creating a "brief" or "case brief")

When lawyers and law students read a judicial opinion (often referred to with the shorthand word "case") that decides a legal dispute and provides reasoning for that decision, they try to boil the case down to a single page of organized notes that highlight the key features of the decision. Writing a good case brief involves the development of skill and analytical ability that comes from practice—by consistently creating these notes for every judicial opinion read for a course on Criminal Procedure. When doing case briefs for the first time, it is highly likely that a student will write too much or too little. There is no magical secret for writing a perfect brief. Indeed, individuals may differ in their own preferences about how much information to have in a brief. The important point is that the process of writing briefs will force the student to focus attentively on the details of the case and provide a quick reference to use during class discussions and when preparing for exams without going back to read the entire judicial opinion again.

Judges write their opinions for an audience of lawyers and

judges, not for average citizens, not even for college educated members of the public. They use words and phrases that may be unfamiliar to people who did not attend law school. When you see an unfamiliar word: Look it up in an online dictionary!

Look at the elements of the generic sample brief below. When you read judicial opinions and write a one-page brief with essential information from a case, you first need the name of the case, the year it was decided, and the court that issued the opinion. Also note which judge or Supreme Court justice wrote the majority opinion. This will help you over time as you begin to recognize the approach to constitutional interpretation and values of specific Supreme Court justices. Then a very brief summary of the relevant FACTS in the case. Next, you need to formulate the question that is the ISSUE in the case. For this course, the issue should tie the facts to the part of the Constitution (including the Amendments in the Bill of Rights) that is alleged to be violated by a government action. The next element is the statement of the HOLDING. The holding is the rule that is reinforced, refined, or created by the judges' decision in the case. Then you should briefly describe the REASONING of the majority opinion, as well as the separate reasoning of any Concurring (agreeing with the outcome) or Dissenting (disagreeing with the outcome) opinions. Read the judicial opinions in the U.S. Supreme Court case of *Safford School District v. Redding* (2009). Write a case brief and then compare your case brief with the very simple case brief presented for the Redding case.

GENERIC CASE BRIEF

JONES V. SMITH (1986) U.S. Supreme Court

"Score"—vote of the justices: 5-4

Majority opinion author: Justice James

Facts: brief summary of specific events leading to case

Issue: question that is the focus of the case that links the facts to the part of the Constitution being interpreted

Holding: rule of the case that answers the question—written out as a rule, not just "yes" or "no"

Reasoning: reasons for decisions

Concurring opinion(s): author and reasoning

Dissenting opinion(s): author and reasoning

SAFFORD UNIFIED SCHOOL DISTRICT V. REDDING (2009)

Supreme Court of the United States

Safford Unified School District #1 v. April Redding

Decided June 25, 2009 – 557 U.S. 364

Justice SOUTER delivered the opinion of the Court.

The issue here is whether a 13–year–old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution.

I

The events immediately prior to the search in question began in 13–year–old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400–mg pills, and one over-the-counter blue naproxen 200–mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her

jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against Safford Unified School District # 1, Wilson, Romero, and Schwallier for conducting a strip search in violation of Savana's Fourth Amendment rights. The individuals (hereinafter petitioners) moved for summary judgment, raising a defense of qualified immunity. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. A closely divided Circuit sitting en banc, however, reversed. We granted certiorari and now affirm in part, reverse in part, and remand.

II

The Fourth Amendment "right of the people to be secure in their persons ... against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search.

In *T.L.O.*, we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search" and held that for searches by school officials "a careful balancing of governmental and private

interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." ***

III

A

***On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa

answered, "'I guess it slipped in when *she* gave me the IBU 400s.'" When Wilson asked whom she meant, Marissa replied, "'Savana Redding.'" Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls

with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

B

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her

clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved

for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.

***

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

....there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what was missing from the suspected facts that

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

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

[The Court found qualified immunity warranted for Wilson, Romero, and Schwallier because "the cases viewing school strip searches differently from the way we see them are

numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law." The case was remanded for resolution of the question of liability for the school district.]

Justice THOMAS, concurring in the judgment in part and dissenting in part.

By declaring the search unreasonable in this case, the majority has "'surrender[ed] control of the American public school system to public school students'" by invalidating school policies that treat all drugs equally and by second-guessing swift disciplinary decisions made by school officials. The Court's interference in these matters of great concern to teachers, parents, and students illustrates why the most constitutionally sound approach to the question of applying the Fourth Amendment in local public schools would in fact be the complete restoration of the common-law doctrine of *in loco parentis*.

***

In the end, the task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common

sense is not a judicial monopoly or a Constitutional imperative.

Only then will teachers again be able to "'govern the[ir] pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn'" by making "'rules, giv[ing] commands, and punish[ing] disobedience'" without interference from judges. By deciding that it is better equipped to decide what behavior should be permitted in schools, the Court has undercut student safety and undermined the authority of school administrators and local officials. Even more troubling, it has done so in a case in which the underlying response by school administrators was reasonable and justified. I cannot join this regrettable decision. I, therefore, respectfully dissent from the Court's determination that this search violated the Fourth Amendment.

Notes, Comments, and Questions

April Redding sued the Safford Unified school district on behalf of her daughter, Savana. During the oral argument, some of the Justices asked questions that betrayed their lack of knowledge about modern middle school life. Justice Scalia, for example, inquired about some of the items classified as contraband at Savana's school. He said learning that a "black marker pencil" was contraband "astounded" him. Told by counsel that students use such markers "for sniffing," Justice

Scalia replied, "Oh, is that what they do? ... They sniff them? ... Really?"

Justice Breyer, after trying to pin down the facts concerning how Savana was searched—and after suggesting that underwear might be a sensible place to hide pills—reminisced on his own school days.

"In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay?"

He continued, "And in my experience, too, people did sometimes stick things in my underwear."

The audience burst into laughter, and he clarified: "Or not *my* underwear. Whatever. ... I was the one who did it? I don't know."

Dahlia Lithwick, who covered the case for *Slate*, predicted as follows after the oral argument:

"When constitutional historians sit down someday to compile the definitive *Supreme Court Concordance of Not Getting It*, the entry directly next to Lilly Ledbetter ('Court fails utterly to understand realities of gender pay discrimination') will be Savana Redding ('Court compares strip searches of 13-year-old girls to *American Pie*-style locker-room hijinks'). After today's argument, it's plain the court will overturn a 9th Circuit Court of Appeals opinion finding a school's decision to strip-search a 13-year-old girl unconstitutional. That the school in question was looking for a prescription pill with the mind-altering force of a pair of

Advil—and couldn't be bothered to call the child's mother first—hardly matters."

Having read the Court's opinion, we know that Lithwick's prediction was not correct. Justice Breyer, he of the hijinks memories, joined an eight-Justice majority finding that the school's behavior violated the Fourth Amendment. Although there was broad consensus for finding a violation, a smaller majority of Justices denied Savana money damages, holding that the school officials were protected by "qualified immunity,"

SAMPLE CASE BRIEF

(Simple case brief)

SAFFORD SCHOOLS V. REDDING (2009) U.S. Supreme Court

"Score" 8-1

Majority opinion author: Justice David Souter

Facts: A middle school student reported that fellow student Marissa Glines was giving prescription strength Ibuprofen to other students. The day planner carried by Glines was found to contain pills. Glines denied any knowledge of the pills and said she was given the dayplanner by Savana Redding. Redding also denied knowledge of the pills. School officials searched Reddings' belongings and then ordered Redding to disrobe and shake out her underwear in front of school officials. No pills were found in her possession. Her family sued the school officials over the intrusive search.

Issue: Did school officials violate teenage student Redding's Fourth Amendment right against "unreasonable searches" by requiring the student to disrobe and shake out her underwear

in front of school officials based solely on a report from another student that Redding possessed and distributed the prescription-strength version of over-the-counter pain pills?

Holding: Yes, school officials violated teenage student Redding's Fourth Amendment right against "unreasonable searches" by requiring the student to disrobe and shake out her underwear in front of school officials based solely on a report from another student that Redding possessed and distributed the prescription-strength version of over-the-counter pain pills.

Reasoning: Searches are reasonable under the Fourth Amendment when, after balancing the government's interest and the individual's privacy interest, the government interest is stronger. Redding suffered a significant intrusion based solely on a statement from another student and no specific evidence that contraband was hidden on her body. The other student's statement justified a search of a backpack and other belongings because of the important need to protect students from drugs, but did not provide enough justification to require disrobing and examining underwear.

Concurring opinion(s): (Justice Clarence Thomas concurred with the part of the opinion-omitted above—that concluded school officials could not be sued for money damages due to qualified immunity).

Dissenting opinion(s): Justice Thomas: school officials did not violate the student's Fourth Amendment right because they stand in the place of parents while students are at school

and must protect students' health and safety. School officials, parents, and school board members should determine policies and practices at schools—judges should not make those decisions.

PART II

WHY IS CRIMINAL PROCEDURE SO IMPORTANT?

In this 1936 unanimous opinion by Chief Justice Charles Evans Hughes, the Supreme Court reviewed a criminal case from Mississippi. Students will see immediately why the actions of police, prosecutors, and judges upset the Supreme Court Justices.

BROWN V. MISSISSIPPI (1936)

Supreme Court of the United States

Ed Brown v. Mississippi

Decided Feb. 17, 1936 — 297 U.S. 278 (1936)

MR. CHIEF JUSTICE HUGHES delivered the [unanimous] opinion of the Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934 and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on

the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that defendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of

error, considered the federal question, and decided it against defendants' contentions. Two judges dissented. We granted a writ of certiorari.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right.

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said: 'After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced.' There is no dispute as to the facts upon this point, and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred), showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities, we quote this part of his opinion in full, as follows:

"The crime with which these defendants, all ignorant

negroes, are charged, was discovered about 1 o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields,

were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that

is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and, as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the

judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at 9 o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel, they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at 9 o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would

have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding."***

The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the

traditions and conscience of our people as to be ranked as fundamental." The state may abolish trial by jury.3 It may dispense with indictment by a grand jury and substitute complaint or information. But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.... It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.****

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established

and specially set up and claimed, and the judgment must be reversed.

Notes, Comments, and Questions

As noted in the footnote we added to the *Brown* opinion, the Court included a statement about jury trials that is no longer accurate.States are required to provide trial by jury for crimes punishable by more than six months' imprisonment. See *Duncan v. Louisiana*, 391 U.S. 145 (1968). In 1936, the Supreme Court had not yet "incorporated" many provisions from the Bill of Rights against the states, meaning that the states were free to ignore them. For purposes of this course, students should presume that constitutional provisions apply with equal force against the states and the federal government, unless instructed otherwise. One key criminal procedure provision not incorporated is the right to indictment by a grand jury. See *Hurtado v. California*, 110 U.S. 516 (1884). In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Court unanimously held that the Excessive Fines Clause of the Eighth Amendment is incorporated against the states. This continues the decades-long trend of incorporating the Bill of Rights through the Fourteenth Amendment.

Students may find one procedural aspect of *Brown* particularly upsetting, in addition to the terrible conduct that agents of the state committed against the defendants: After the defendants were convicted, they appealed to the highest court

of their state, and the state court *affirmed the convictions*. Two dissenting members of that court set forth at length the terrible conduct—so carefully that the Supreme Court of the United States would later cut and paste much of the dissent. Whatever one's position on theories related to federalism, one cannot avoid the conclusion that at least in this case, a state's justice system was sorely in need of federal supervision. Throughout this course, students will notice an ongoing debate about how much Supreme Court oversight is necessary to protect Americans from police officers, prosecutors, and judges behaving badly. The Court's assessment has changed over time, and justices serving together often disagree.

WHAT TO LOOK FOR WHEN READING CASES

As the semester progresses, students will learn to answer two key questions presented in every single criminal procedure case: First, were someone's rights (usually constitutional rights) violated? Second, if so, so what?

Answering the first question requires knowledge of the Supreme Court's decisions interpreting the Fourth, Fifth, and Sixth Amendments to the Constitution, among other provisions. For example, the Court has considered over several cases—decided over several decades—what counts as a "search" for purposes of the Fourth Amendment. It has debated what the Due Process Clauses of the Fifth and Fourteenth Amendments require of police officers conducting interrogations. And it has weighed how to protect the right to counsel guaranteed by the Sixth Amendment to all criminal defendants.

Answering the second question— "So what?"—requires knowledge of the remedies the Supreme Court has provided for violations of the rights of criminal suspects and defendants. For a defendant, the most desirable remedy is often the exclusion of evidence obtained illegally. When the "exclusionary rule" applies, evidence gained during an

unlawful search or interrogation, for example, may become unavailable to prosecutors, which may lead to the dismissal of criminal charges. The proper scope of the exclusionary rule has been hotly debated for decades, and even its existence is not taken for granted by everyone on the Supreme Court. When exclusion of evidence is not available, the best remedy may be money damages, although that remedy has its own shortcomings. Students will learn the basics of when various remedies are available for violations of criminal procedure rules.

In a sense, the rules governing searches, seizures, interrogations, and so on can be considered the "substantive" law of criminal procedure. These rules constitute the bulk of most criminal procedure courses, and this one is no exception. Questions in this category include: When do police need a warrant? When must police give "*Miranda* warnings"? What must states provide for criminal defendants too poor to hire a lawyer?

The remedies are what one might call the "procedural" aspect of criminal procedure law. Questions in this category include: If police executing a search warrant break down someone's door without justification, can the homeowner exclude evidence found during the ensuing search? Does the answer change if the warrant was somehow defective? When can prosecutors use confessions obtained in violation of the *Miranda* Rule? The portion of assigned readings explicitly devoted to remedies is far less than that given to "substantive"

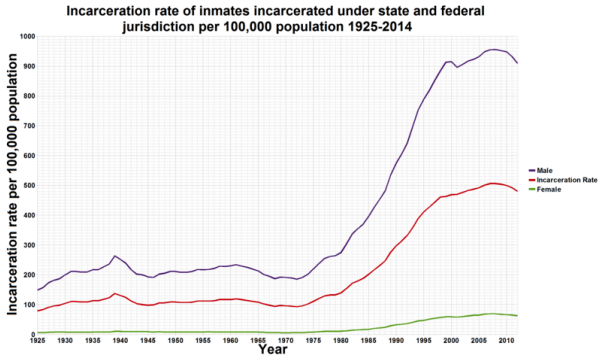
criminal procedure rights. Keep in mind, however, that rights without remedies are largely worthless,[1] and those students who one day prosecute crimes or represent defendants will care deeply about the practical consequences of Supreme Court doctrine.

[1] Don't take our word for it. Sir John Holt, the Lord Chief Justice of England, wrote in *Ashby v. White* (1703), "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." 14 St. Tr. 695, 92 Eng. Rep. 126, 136. Fans of Latin put it this way: "ubi jus ibi remedium."

THE SCOPE OF THE CRIMINAL JUSTICE SYSTEM

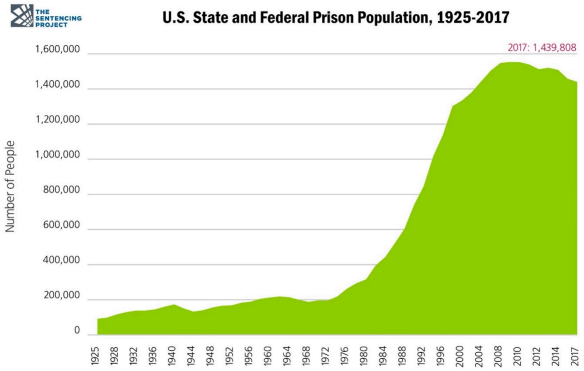
Before returning to the meat of criminal procedure law, let us consider for a moment just how large and important a system is being governed by nine Justices interpreting a handful of ancient clauses.

Beginning around 1970, the United States began a massive increase in incarceration. Between 1980 and 2010, the incarceration rate more than doubled. Despite a small drop in incarceration over the past decade, as of early 2018 the United States incarcerated about 2.3 million people, including inmates at prisons, local jails, and juvenile facilities, among other places. This chart (released to the public domain via Wikimedia Commons) shows how the incarceration rate (essentially, the number of inmates per 100,000 U.S. residents) was relatively flat for decades through the 1960s, began rising after 1970, and then increased rapidly after 1985. The rate has decreased slightly over the past few years.



Missouri's 2018 incarceration rate (859 per 100,000 residents) is higher than the U.S. as a whole (698) and is tenth-highest among states. The states with the highest incarceration rates in 2018 were Mississippi (1,039), Louisiana (1,052), and Oklahoma (1,079). The states with the lowest rates were Rhode Island (361), Vermont (328) and Massachusetts (324). Even these states have higher incarceration rates than most countries, including Turkey (287), Iran (284), South Africa (280), Israel (265), New Zealand (220), Singapore (201), Poland (199), Jamaica (138), Iraq (126), France (102), and Ireland (81).[1] The overall U.S. rate exceeds every other country in the world.

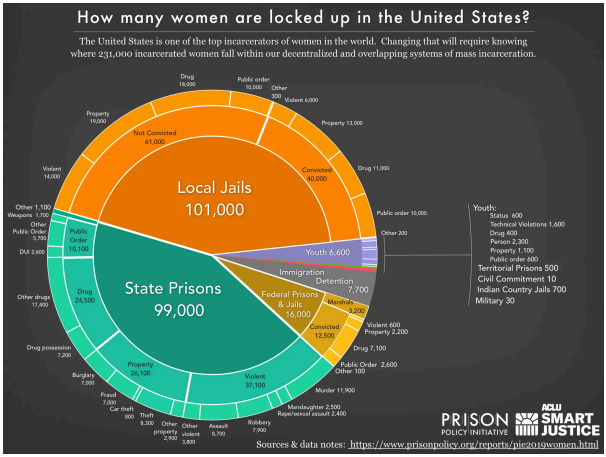
The next chart (provided courtesy of The Sentencing Project) shows the raw numbers of prisoners in America. Note that this does not include inmates in jails or juvenile facilities.



In Missouri, about 50,000 people are incarcerated, with 32,000 in state prisons, 11,000 in local jails, 5,600 in federal prisons, and 1,000 in facilities for youths.[2] Nationwide, the total prison and jail population as of December 31, 2016 was 2,162,400.[3] In addition, 4,537,100 persons were under supervision—on parole or probation—creating a total correctional system population of 6,613,500. Missouri's total correctional population was 105,900.

Because states house the overwhelming bulk of U.S. prisoners, state budgets fund the overwhelming bulk of U.S. correctional expenses. In 1985—just before the American prison population began its sharp increase—states spent a combined $6.7 billion on corrections. By 1990, the cost had risen to $16.9 billion. It was $36.4 billion in 2000, $51.4 billion in 2010, and $57.7 billion in 2016.[4]

The next chart (provided courtesy of the Prison Policy Initiative) shows where incarcerated women are housed and what offenses led them to confinement.



[The PPI also has a chart entitled "The Whole Pie," which covers *all* incarcerated persons, male and female. Although we lack permission to include the chart in this book, students may (and should) find it online:https://www.prisonpolicy.org/reports/pie2019.html.]

The likelihood of imprisonment is not distributed evenly among different groups of Americans. Women constitute about half of the total U.S. population but only 7 percent of the total prison population. Racial disparities are also stark. In 2016, state and federal jails and prisons housed (out of a total of 1,458,173 inmates) 486,900 black inmates (41 percent of the total), 439,800 white inmates (39 percent of the total), and 339,300 Hispanic inmates (17 percent of the total).[5] According to Census data taken around the same time (July 1, 2017), 77 percent of Americans described themselves as white alone (no other race), 13 percent as black or African American alone, 3 percent as two or more races, and 18 percent as Hispanic or Latino.[6] Although the demographic

definitions—particularly for deciding who counts as Hispanic—used in various surveys are not always identical, the results are clear. Black and Hispanic Americans are significantly overrepresented among prisoners.

Despite the high U.S. incarceration rate, most Americans will never serve time. Instead, the majority of Americans encounter the justice system through their interactions with police officers. U.S. law enforcement agencies employ about 650,000 officers at the local, state, and federal level. That works out to about one officer for every 500 Americans. In 2014, officers performed about 11.2 million arrests. As was noted for incarceration, arrest rates exhibit disparities by race and sex. The 2014 arrests included 7,771,915 arrests of whites and 3,115,383 of blacks. About 3 million of the arrests were of women, compared to 8.2 million arrests of men. Young men are especially likely to be arrested.[7]

When suspects are arrested and prosecuted, states often provide legal counsel because the defendants otherwise could not afford it. In Missouri, the fiscal year 2018 budget allocates $46.3 million for the public defender system, which represents about $7.13 per Missourian. The per capita expense on indigent defense varies tremendously among states. For example, in 2017 Wisconsin spent $86 million, or $14.83 per resident. That same year Texas spent $37 million, or $1.31 per resident.

[1] *See* Prison Policy Institute, "States of Incarceration: The

Global Context 2018," *at* https://www.prisonpolicy.org/global/2018.html

[2] *See* Prison Policy Initiative, "Missouri Profile."

[3] For national statistics, see Bureau of Justice Statistics, "Correctional Populations in the United States, 2016" (April 2018, NCJ 251211).

[4] *See* Sentencing Project, "Trends in U.S. Corrections."

[5] *See* Bureau of Justice Statistics, "Prisoners in the United States" (January 2018, NCJ 251149).

[6] *See* US Census Bureau, "Quick Facts."

[7] For arrest data, see Bureau of Justice Statistics, "Arrest Data Analysis Tool."

1.

A FEW RECENT CASES

A Few Recent Cases

We will return now to the discussion we set aside after reading *Brown v. Mississippi*.

"Yes, yes," one might say, "the criminal justice system is important. As a nation we spend immense sums on police, prosecution, and prisons. And back in 1934, some goons in Mississippi abused criminal defendants, which required intervention by the Supreme Court. What about today?"

This is a fair question; otherwise, we would not have placed it in the mouths of our hypothetical students. We expect that by the end of the semester, few if any students will question whether police and prosecutors still require judicial oversight. The amount and proper form of that oversight will almost surely remain contested—indeed, the Justices themselves contest these issues every year—but the principle is likely to win near unanimous assent. To assuage skepticism without delay, however, we will present some evidence now.

In 2013, the State of California freed Kash Delano Register, whom the state had imprisoned for 34 years for a murder he

did not commit.12 Mr. Register had been convicted on the basis of false identification testimony, and the lawyers who won his release produced proof that police and prosecutors had concealed from Register's trial defense team evidence of his innocence, including reports of eyewitnesses who would have contradicted the testimony of prosecution witnesses, along with evidence of how police had used threats of unrelated criminal prosecution to pressure the witnesses against Register. Absent the work of students and faculty at Loyola Law School in Los Angeles, Register might remain incarcerated today. Prosecutors opposed his release until 2013. In 2016, the Los Angeles City Council approved a $16.7 million settlement payment to Register.13 The city has paid tens of millions of dollars in other recent settlements related to police conduct.14

In 2012, the State of Missouri released George Allen, Jr., whom the state had imprisoned for 30 years for a St. Louis rape and murder he did not commit.15 Although prosecutors could not explain how Allen could have travelled from his University City home to the murder scene—St. Louis was paralyzed that day by a 20-inch snowstorm—a jury eventually convicted Allen on the basis of his confession. Decades after his conviction, new lawyers for Allen—from the Bryan Cave law firm and the Innocence Project—produced evidence that police had elicited a false confession from Allen, who was mentally ill. Missouri courts found that prosecutors withheld exculpatory evidence, including lab results, fingerprint

records, and information about bizarre interrogation tactics such as hypnosis of a key witness. Allen died in 2016, and the City of St. Louis and Allen's family settled his civil rights lawsuit in 2018 for $14 million.

The National Registry of Exonerations, maintained by the University of Michigan, lists 2,253 exonerations, representing "more than 19,790 years lost."16 Because it covers only exonerations, it does not include cases in which misconduct is uncovered in time to prevent a wrongful conviction.

In 2015, the *Wall Street Journal* reported that America's "10 cities with the largest police departments paid out $248.7 million" in 2014 in settlements and court judgements in police misconduct cases.17 Students should keep in mind that because so much misconduct cannot be remedied through monetary damages, numbers likes these understate the problem.

Chicago has settled several multi-million-dollar cases in recent years. Examples include: "A one-time death row inmate brutally beaten by police: $6.1 million. An unarmed man fatally shot by an officer as he lay on the ground: $4.1 million."18 Another involved an officer who "posted messages on his Facebook page falsely calling [a] teen a drug dealer and criminal" and officers handcuffing this same teen without cause. (Settlement around $500,000.) More recent cases include "a police officer [who] pointed a gun at [the plaintiff's] 3-year-old daughter's chest during a 2013 raid of the family's

Chicago home" and a man who spent about 20 years in prison after being framed.19

As the *Baltimore Sun* noted—in its 2014 report of how the "city has paid about $5.7 million since 2011 over lawsuits claiming that police officers brazenly beat up alleged suspects"—the "perception that officers are violent can poison the relationship between residents and police."20 The newspaper observed:

"Over ... four years, more than 100 people have won court judgments or settlements related to allegations of brutality and civil rights violations. Victims include a 15-year-old boy riding a dirt bike, a 26-year-old pregnant accountant who had witnessed a beating, a 50-year-old woman selling church raffle tickets, a 65-year-old church deacon rolling a cigarette and an 87-year-old grandmother aiding her wounded grandson."

In multiple jurisdictions, class action lawsuits about unlawful strip searches have yielded large payments. In 2010, the Cook County (Illinois) Board of Commissioners agreed to a $55 million settlement with suspects stripped-searched at Cook County Jail. New York City reached a $50 million settlement in 2001 and another one for $33 million in 2010, both related to searches in city jails such as Rikers Island. Similar settlements (for smaller amounts) have been reached in places such as Kern County, California; Burlington County, New Jersey; and Washington, D.C.. Massachusetts officials settled a suit concerning the Western Massachusetts Regional Women's Correctional Center, agreeing to prohibit male

guards from continuing their practice of videotaping the strip searches of female inmates.

Less sensational issues (nonetheless important to those involved) include the ongoing debate over "stop-and-frisk" tactics nationwide, in addition to racial profiling of motorists. These practices affect persons whose involvement with the criminal justice system might otherwise be fairly minimal. In New York City, a federal court found that NYPD officers violated the Fourth Amendment by performing unreasonable searches and seizures and further found that police violated the Equal Protection Clause of Fourteenth Amendment by stopping and frisking New Yorkers in a racially discriminatory manner.21 In Missouri, annual reports by the Attorney General regularly find racial disparities in vehicle stops.22 According to the 2017 report, black motorists were far more likely to be stopped, despite police finding contraband less often when stopping black motorists than when stopping white motorists. "African-Americans represent 10.9% of the driving-age population but 18.7% of all traffic stops .... The contraband hit rate for whites was 35.5%, compared with 32.9% for blacks and 27.9% for Hispanics. This means that, on average, searches of African-Americans and Hispanics are less likely than searches of whites to result in the discovery of contraband."

In sum, the incidence of police and prosecutorial misconduct is not limited to dusty case files from the old Confederacy.

Meanwhile, crime remains a serious problem, one America has struggled with since colonial times. Since the 1800s, the United States has had a much higher murder rate than European countries otherwise similar to us in measures of economic power and educational attainment. Then, beginning around 1965, the U.S. homicide rate increased dramatically.23 Although the increase was not uniform (different decades saw different trends, and different locations experienced trends differently), the United States as a whole suffered a big increase in crime from the mid-1960s through the early-1990s, with the nationwide homicide rate peaking at around 10 per 100,000 persons. Since then, crime has dropped significantly, returning over twenty years to what was observed in the early 1960s.24 By 2000, the homicide rate had dropped to around 5.5 per 100,000, which is close to the current rate.25 In other words, American crime rates remain well above those of Western Europe, Canada, and Australia, but they are far better than American rates of a generation ago. The sharp increase in crime between the 1960s and 1990s may explain in part the rapid increase in American incarceration, as politicians offered "tough-on-crime" solutions. The causes of the huge increase in crime beginning around 1965, as well as of the subsequent decrease, are hotly disputed.26 In any event, crime remains an important political and social issue in America. Court decisions about how police may behave will be better understood if given broader social context. For example, judicial decisions that prevent the convictions of undisputedly

guilty defendants may be unpopular among voters, and voters elect the politicians who appoint and confirm Supreme Court Justices. Further, Justices may recognize their relative lack of expertise in the fields of policing and criminology, and they may hesitate to mandate practices (or to prohibit practices) without thoughtfully considering how their decisions could affect ongoing national efforts to fight crime. The debate over how much the Court should meddle in the affairs of police departments is a thread that runs through the course material.

PART III

KEY CASES FOR INCORPORATION (NATIONALIZATION) OF THE BILL OF RIGHTS

Remember: create a one-page case brief for each judicial opinion that you are assigned to read in the course, including case briefs for judicial opinions that have been edited so that they are very short.

The case excerpts that follow briefly trace the history of the Bill of Rights and how individual rights originally written to protect people against the federal government eventually came to provide protections against the actions of state and local governments, too.

BARRON V. CITY OF BALTIMORE (1833)

Barron v. Baltimore, 32 U.S. 243 (1833)

JOHN BARRON, survivor of JOHN CRAIG, for the use of LUKE TIERNAN, Executor of JOHN CRAIG,
v.
The MAYOR and CITY COUNCIL OF BALTIMORE.

January Term, 1833

[Syllabus: clerk's summary of the case] ....Craig & Barron, of whom the plaintiff was survivor, were owners of an extensive and highly productive wharf, in the eastern section of Baltimore, enjoying, at the period of their purchase of it, the deepest water in the harbor. The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of

Baltimore, diverted from their accustomed and natural course, certain streams of water which flow from the range of hills bordering the city, and diverted them, partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, embankments and other artificial means, purposely adapted to bend the course of the water to the wharf in question. These streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth, which they deposited along, and widely in front of the wharf of the plaintiff. The alleged consequence was, that the water was rendered so shallow that it ceased to be useful for vessels of an important burden, lost its income, and became of little or no value as a wharf. ***

***On all points, the decision of Baltimore county court was against the defendants, and a verdict for $4500 was rendered for the plaintiff. An appeal was taken to the court of appeals, which reversed the judgment of Baltimore county court, and did not remand the case to that court for a further trial. From this judgment, the defendant in the court of appeals prosecuted a writ of error to this court. [32 U.S. 243, 245] ***

[The plaintiff argues...]2. ...3. That this exercise of authority [by Baltimore in its construction of roads] was repugnant to the [C]onstitution of the United States, contravening the fifth article of the amendments [i.e., 5th Amendment] to the constitution, which declares that 'private property shall not be taken for public use, without just compensation;'.***

Chief Justice John MARSHALL, delivered the opinion of the court.

***The plaintiff in error contends, that it comes within that clause in the fifth amendment to the constitution, which inhibits the taking of private property for public use, without just compensation. He insists, that this amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct

governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

***

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and could have been applied by themselves. A convention could have been assembled by the discontented state, and the required improvements could have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being, as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.

Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government-not against those of the local governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private

property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. ***

NOTES: The decision in *Barron v. Baltimore* provided a baseline understanding of the original purpose of the Bill of Rights: to protect people against actions by the national government alone, not actions by state and local governments. The ratification of the Fourteenth Amendment after the Civil War added new language that lawyers used to try to persuade the Supreme Court that provisions of the Bill of Rights should also provide protection against state and local governmental actions. The Fourteenth Amendment was very clearly intended to provide protection against states (and localities, which are subdivisions of states) by saying: "No State shall...." But the rights listed in the Amendment that are protected against state action are not as specifid as many of the rights listed in the Bill of Rights. Instead, they are vaguely stated rights that require interpretation by judges: states must respect the "privileges and immunities of citizenship"; "due process of law" is required before states deprive anyone of "life, liberty, or property"; and states must provide "equal protection of the laws."

In a series of individual cases filed throughout the 150- year period following the ratification of the Fourteenth Amendment, lawyers sought to convince the Supreme Court that individual components within the Bill of Rights should

also be protected from state infringement by considering these individual rights as part of the "due process of law" to which people are entitled. Not all of these claims were initially successful, but over time most provisions of the Bill of Right were "incorporated" into the Fourteenth Amendment for application against state action. Thus, the process of incorporating individual rights from the Bill of Rights into the coverage of the Fourteenth Amendment's Due Process Clause served to "nationalize" many constitutional rights so that they apply everywhere within the country as protections against actions by all levels of government.

HURTADO V. CALIFORNIA (1884)

U.S. Supreme Court

Hurtado v. California, 110 U.S. 516 (1884)

March 3, 1884

[Syllabus: summary by clerk] The constitution of the state of California adopted in 1879, in article 1, 8, provides as follows: 'Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.'***. Section 809 of the Penal Code is as follows: 'When a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable, an

information charging the defendant with such offense. The information shall [110 U.S. 516, 518] be in the name of the people of the state of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense.'

In pursuance of the foregoing provision of the constitution, and of the several sections of the Penal Code of California, the district attorney of Sacramento county, on the twentieth day of February, 1882, made and filed an information against the plaintiff in error, charging him with the crime of murder in the killing of one Jose Antonio Stuardo. Upon this information, and without any previous investigation of the cause by any grand jury, the plaintiff in error was arraigned on the twenty-second day of March, 1882, and pleaded not guilty. A trial of the issue was thereafter had, and on May 7, 1882, the jury rendered its verdict, in which it found the plaintiff in error guilty of murder in the first degree. On the fifth day of June, 1882, the superior court of Sacramento county, in which the plaintiff in error had been tried, rendered its judgment upon said verdict, that the said Joseph Hurtado, plaintiff in error, be punished by the infliction of death, and the day of his execution was fixed for the twentieth day of July, 1882. From this judgment an appeal was taken

JUSTICE MATTHEWS (the opinion of the Court)

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant

to that clause of the fourteenth article of amendment to the constitution of the United States, which is in these words: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that 'due process of law,' when applied to prosecutions for felonies, which is secured and guarantied by this provision of the constitution of the United States, and which accordingly it is forbidden to the states, respectively, to dispense with in the administration of criminal law. The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the states has been imposed by the fourteenth amendment to the constitution of the United States. ***

[I]t is maintained on behalf of the plaintiff in error that the phrase 'due process of law' is equivalent to 'law of the land,' as found in the twenty-ninth chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right... it has now been added as an additional security to the individual against oppression by the states themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged

felonies is an essential part of due process of law, in order that he may not be harassed and destroyed by prosecutions founded only upon private malice or popular fury.

***The real syllabus of the passage quoted [from a prior case] is that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account as not due process of law. The answer was, however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. [110 U.S. 516, 529] But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

***Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is,

as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments. ***For these reasons, finding no error therein, the judgment of the supreme court of California is affirmed.

JUSTICE JOHN HARLAN, dissenting.

***As I cannot agree that the state may, consistently, with due process of law require a person to answer for a capital offense, except upon the presentment or indictment of a grand jury, and as human life is involved in the judgment rendered here, I do not feel at liberty to withhold a statement of the reasons for my dissent from the opinion of the court.

***[The authors of the 14th Amendment] perceived no reason why, in respect of those rights, the same limitations should not be imposed upon the general government that had been imposed upon the states by their own constitutions. Hence the prompt adoption of the original amendments, by the fifth of which it is, among other things, provided that 'no person shall be deprived of life, liberty, or property without due process of law.' This language is similar to that of the clause of the fourteenth amendment now under examination.

That similarity was not accidental, but evinces a purpose to impose upon the states the same restrictions, in respect of proceedings involving life, liberty, and property, which had been imposed upon the general government.

'Due process of law,' within the meaning of the national constitution, does not import one thing with reference to the powers of the states and another with reference to the powers of the general government. If particular proceedings, conducted under the authority of the general government, and involving life, are prohibited because not constituting that due process of law required by the fifth amendment of the constitution of the United States, similar proceedings, conducted under the authority of a state, must be deemed illegal, as not being due process of law within the meaning of the fourteenth amendment. The words 'due process of law,' in the latter amendment, must receive the same interpretation they had at the common law from which they were derived, and which was given to them at the formation of the general government. What was that interpretation? [110 U.S. 516, 542] In seeking that meaning we are, fortunately, not left without authoritative directions as to the source, and the only source, from which the necessary information is to be obtained.

***It is said by the court that the constitution of the United States was made for an undefined and expanding future, and that its requirement of due process of law, in proceedings involving life, liberty, and property, must be so interpreted as

not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives, by information, which suggests that the state which adopts it has entered upon an era of progress and improvement in the law of criminal procedure. ***

NOTES: The Hurtado case provides an example of an attorney trying to convince the Supreme Court to recognize against the states the Fifth Amendment right to be indicted by a grand jury by declaring that the grand jury right is part of the Fourteenth Amendment right to due process, and therefore applies to protect individuals in state court proceedings. The Supreme Court majority did not agree. However, Justice Harlan agreed and his dissenting opinion argued that the intent of the Fourteenth Amendment was to provide individuals with the same protection against state and local actions that they enjoyed against federal actions. Harlan's argument did not carry the day, but over the course of more than ten decades, the Supreme Court gradually included many rights from the Bill of Rights—but not all rights—against state and local infringement.

Beginning with Gitlow v. New York (1925), in which the Supreme Court said that the First Amendment right to freedom of speech is protected from state and local

infringement by the Fourteenth Amendment Due Process Clause, the Court decided other First Amendment cases similarly protecting free press and religious rights during the 1930s.

PALKO V. CONNECTICUT (1937)

U.S. Supreme Court

Palko v. Connecticut

302 U.S. 319 (1937)

JUSTICE BENJAMIN CARDOZO delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter, the State of Connecticut, with the permission of the judge presiding at

the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State v. Palko*, 121 Conn. 669, 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case, he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and, in so doing, to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection, the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states,

but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State.

We have said that, in appellant's view, the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.***

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81, 277 U. S. 86. The Fifth Amendment provides also that no

person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 106, 211 U. S. 111, 211 U. S. 112. *Cf. Snyder v. Massachusetts*, supra, p. 291 U. S. 105; *Brown v. Mississippi*, 297 U. S. 278, 297 U. S. 285. The Sixth Amendment calls for a jury trial in criminal cases, and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U. S. 90; *Maxwell v. Dow*, 176 U. S. 581; *New York Central R. Co. v. White*, 243 U. S. 188, 243 U. S. 208; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U. S. 226, 262 U. S. 232. As to the Fourth Amendment, one should refer to *Weeks v. United States*, 232 U. S. 383, 232 U. S. 398, and, as to other provisions of the Sixth, to *West v. Louisiana*, 194 U. S. 258.

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, *De Jonge v. Oregon*, 299 U. S. 353, 299 U. S. 364; *Herndon v. Lowry*, 301 U. S. 242, 301 U. S. 259; or the like freedom of the press, *Grosjean v. American Press Co.*, 297 U. S. 233; *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 283 U. S. 707; or the free exercise of religion, *Hamilton v. Regents*, 293 U. S. 245, 293 U. S. 262; *cf.*

Grosjean v. American Press Co., supra; Pierce v. Society of Sisters, 268 U. S. 510; or the right of peaceable assembly, without which speech would be unduly trammeled, *De Jonge v. Oregon, supra; Herndon v. Lowry*, supra; or the right of one accused of crime to the benefit of counsel, *Powell v. Alabama*, 287 U. S. 45. In these and other situations, immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." .... Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey*, supra. This too might be

lost, and justice still be done. Indeed, today, as in the past, there are students of our penal system who look upon the immunity as a mischief, rather than a benefit, and who would limit its scope, or destroy it altogether. [Footnote 3] No doubt there would remain the need to give protection against torture, physical or mental. *Brown v. Mississippi*, supra. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These, in their origin, were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor Justice would exist if they were sacrificed.... This is true, for illustration, of freedom of thought, and speech.

***Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must

be the next inquiry, and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert v. Louisiana*, supra. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us, and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.... This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding judge, *State v. Carabetta*, 106 Conn. 114, 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.***

The judgment is

Affirmed.

MR. JUSTICE BUTLER dissents. *(Justice Butler merely noted that he "dissents"—meaning he disagreed with the*

majority's decision. But he did not write an opinion to explain the reasons for his disagreement with the majority opinion)

NOTES: In *Palko v. Connecticut*, Justice Cardozo put forward a "test" so that judges can know which rights in the Bill of Rights apply against the states and which rights in the Bill of Rights only apply against the federal government. As indicated by Cardozo, the rights that apply against the states are "of the very essence of a scheme of ordered liberty...[;] [the rights that embody] a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Obviously, this "test" is not easy to apply. It directs judges to decide if certain rights are "fundamental" and essential to a society that protects liberty. Cardozo's test was very influential and justices made reference to it in their opinions for decades after the *Palko* decision. (But not all justices agreed that this was the proper test for deciding which rights to incorporate and apply throughout the nation against states and localities.)

ADAMSON V. CALIFORNIA (1947)

Adamson v. California, 332 U.S. 46 (1947)

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

MR. JUSTICE REED delivered the opinion of the Court.

The appellant, Adamson, a citizen of the United States, was convicted, without recommendation for mercy, by a jury in a Superior Court of the State of California of murder in the first degree. After considering the same objections to the conviction that are pressed here, the sentence of death was affirmed by the Supreme Court of the state. 27 Cal. 2d 478, 165 P.2d 3. Review of that judgment by this Court was sought and allowed under Judicial Code § 237; 28 U.S.C. § 344. The provisions of California law which were challenged in the state proceedings as invalid under the Fourteenth Amendment to the Federal Constitution are those of the state constitution and penal code in the margin. They permit the failure of a defendant to explain or to deny evidence against him to be

commented upon by court and by counsel, and to be considered by court and jury. The defendant did not testify. As the trial court gave its instructions and the District Attorney argued the case in accordance with the constitutional and statutory provisions just referred to, we have for decision the question of their constitutionality in these circumstances under the limitations of § 1 of the Fourteenth Amendment.

The appellant was charged in the information with former convictions for burglary, larceny and robbery and pursuant to § 1025, California Penal Code, answered that he had suffered the previous convictions. This answer barred allusion to these charges of convictions on the trial. Under California's interpretation of § 1025 of the Penal Code and § 2051 of the Code of Civil Procedure, however, if the defendant, after answering affirmatively charges alleging prior convictions, takes the witness stand to deny or explain away other evidence that has been introduced, "the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony." ... This forces an accused who is a repeated offender to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant.

In the first place, appellant urges that the provision of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" is a fundamental national privilege or immunity protected against state

abridgment by the Fourteenth Amendment or a privilege or immunity secured, through the Fourteenth Amendment, against deprivation by state action because it is a personal right, enumerated in the federal Bill of Rights.

We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or to deny by his testimony any evidence or facts in the case against him" would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government, and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*, 7 Pet. 243... ***

***Nothing has been called to our attention that either the

framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. *Palko* held that such provisions of the Bill of Rights as were "implicit in the concept of ordered liberty," p. 302 U. S. 325, became secure from state interference by the clause. But it held nothing more.

Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 99-114; *Palko v. Connecticut*, *supra,* p. 302 U. S. 323. ***

We find no other error that gives ground for our intervention in California's administration of criminal justice.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

Less than ten years ago, Mr. Justice Cardozo announced as settled constitutional law that, while the Fifth Amendment, "which is not directed to the states, but solely to the federal government," provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-crimination: "in prosecutions by a state, the exemption will fail if the state elects to end it." *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 322, 302 U. S. 324. Mr. Justice Cardozo spoke for the Court, consisting of Mr.

Chief Justice Hughes, and McReynolds, Brandeis, Sutherland, Stone, Roberts, Black, JJ. (Mr. Justice Butler dissented.) The matter no longer called for discussion; a reference to *Twining v. New Jersey*, 211 U. S. 78, decided thirty years before the *Palko* case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best — comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for forty years, the *Twining* case should not now be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

***Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court — a period of seventy years — the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those

who would have to be included among the greatest in the history of the Court, but — it is especially relevant to note — they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society, and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are "narrow or provincial" would deem essential to "a fair and enlightened system of justice." *Palko v. Connecticut,* 302 U. S. 319, 302 U. S. 325. To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville's phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains "nor shall any State

deprive any person of life, liberty, or property, without due process of law," was a way of saying that every State must thereafter initiate prosecutions through indictment by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. ***

MR. JUSTICE BLACK, dissenting.

The appellant was tried for murder in a California state court. He did not take the stand as a witness in his own behalf. The prosecuting attorney, under purported authority of a California statute, Cal.Penal Code, § 1323 (Hillyer-Lake, 1945), argued to the jury that an inference of guilt could be drawn because of appellant's failure to deny evidence offered against him. The appellant's contention in the state court and here has been that the statute denies him a right guaranteed by the Federal Constitution. The argument is that (1) permitting comment upon his failure testify has the effect of compelling him to testify, so as to violate that provision of the Bill of Rights contained in the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself", and (2) although this provision of the Fifth Amendment originally applied only as a restraint upon federal courts, *Barron v. Baltimore,* 7 Pet. 243, the Fourteenth

Amendment was intended to, and did, make the prohibition against compelled testimony applicable to trials in state courts.

***The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. ***

My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed, its submission and passage persuades me that one of the chief objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the constitutional rule that case had announced. This historical purpose has never received full consideration or exposition in any opinion of this Court interpreting the Amendment.***

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

While in substantial agreement with the views of MR. JUSTICE BLACK, I have one reservation and one addition to make.

I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the

Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.***

NOTES: A decade after the *Palko* decision, the *Adamson* case shows the majority using the *Palko* test to reject a claim that the Fifth Amendment protection against compelled self-incrimination should be applicable to the states through the Fourteenth Amendment Due Process Clause. The *Adamson* opinions are interesting because Justice Black argues in dissent that the Fourteenth Amendment was intended to apply the entire Bill of Rights to the states. And Justice Murphy's dissent, while endorsing Black's view, also argues that there could be other rights not listed in the Bill of Rights that also apply to the states through the Due Process Clause. Justice Frankfurter wrote his concurring opinion specifically to reject the dissenters' argument that the entire Bill of Rights should be incorporated in the Due Process Clause and applied to the states.

DUNCAN V. LOUISIANA (1968)

Duncan v. Louisiana, 391 U.S. 145 (1968)

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

MR. JUSTICE WHITE delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law, simple battery is a misdemeanor, punishable by a maximum of two years' imprisonment and a $300 fine. Appellant sought trial by jury, but, because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed, the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $10. Appellant sought review in the Supreme Court of Louisiana, asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "[n]o error of law in the ruling

complained of," denied appellant a writ of certiorari. Pursuant to 28 U.S.C.§ 1257(2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. ...

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial, the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that, just before getting in the car, appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

I

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses.

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "*fundamental principles of liberty and justice which lie at the base of all our civil and*

political institutions,'" Powell v. Alabama, 287 U. S. 45, 287 U. S. 67 (1932); whether it is "basic in our system of jurisprudence," In re Oliver, 333 U. S. 257, 333 U. S. 273 (1948), and whether it is "a fundamental right, essential to a fair trial," Gideon v. Wainwright, 372 U. S. 335, 372 U. S. 343-344 (1963); Malloy v. Hogan, 378 U. S. 1, 378 U. S. 6 (1964); Pointer v. Texas, 380 U. S. 400, 380 U. S. 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. Since we consider the appeal before us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

The history of trial by jury in criminal cases has been frequently told. [Footnote 15] It is sufficient for present purposes to say that, by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta***

Jury trial came to America with English' colonists, and

received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 — resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" — was the declaration:

"That trial by jury is the inherent and invaluable right of every British subject in these colonies."

***The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us in many cases, of the benefits of Trial by Jury," and to his "transporting us beyond Seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded:

"The Trial of all Crimes. except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The constitutions adopted by the original States guaranteed

jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court. ***

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.

***The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary, but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard

against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.***

***The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that, in the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial — or any particular trial — held before a judge alone is unfair or that

a defendant may never be as fairly treated by a judge as he would be by a jury. Thus, we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial. However, the fact is that, in most places, more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.***

[Footnote 14] (*Other footnotes have been edited out of the case but this is an important footnote that explains the test Justice White used to support his conclusion*)

In one sense, recent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 325 (1937), stated:

"The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. . . . Few would be so narrow or

provincial as to maintain that a fair and enlightened system of justice would be impossible without them."

The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U. S. 643 (1961); that state prosecutors may not comment on a defendant's failure to testify, *Griffin v. California*, 380 U. S. 609 (1965), and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson v. California*, 370 U. S. 660 (1962). Of immediate relevance for this case are the Court's holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. *See* cases cited in nn. 8-12 *supra*. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal

system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. *See, e.g., Maxwell v. Dow*, 176 U. S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process — the supporting framework and the subsidiary procedures — are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth

Amendment to defendants tried in state courts. With this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson v. California*, 332 U. S. 46, 332 U. S. 68. In that dissent, at 332 U. S. 90, I took the position, contrary to the holding in *Twining v. New Jersey*, 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. ***

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal Justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth

Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old, and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.***

NOTES: The *Duncan* decision illustrates a number of important points.

First, look at the flimsy basis for this criminal prosecution. It is a reminder that there is nothing about "law"and courts that ensures these aspects of the governing system are utilized to advance justice. Here, the law was used in a segregated county to ensure that racial discrimination was preserved and that whites in positions of authority could use courts to enforce inequality and unequal treatment. Racial discrimination has been a key characteristic of the American criminal justice throughout the history of the United States. Unfortunately, social science research on police stops, searches, prosecution decisions, use of force by police, and sentencing shows that racial discrimination continues to exist in many American jurisdictions. Such improper denials of equal justice under law may be less visible and obvious than they were in *Brown v. Mississippi* (1936) and *Duncan v. Louisiana* (1968), but they continue to be a problem for the attainment of the justice system's professed ideals.

Second, Justice White's majority opinion lists a variety of rights that had been incorporated in the two decades after the decision in *Adamson v. California*. In a number of individual cases, the Supreme Court declared that individual rights in the Bill of Rights were incorporated into the Due Process Clause of the Fourteenth Amendment and thereby applied to protect individuals against actions by state and local officials. Most of the rights affecting criminal justice were incorporated by the Supreme Court during the 1960s. Two additional rights were incorporated four decades later in the twenty-first century, *McDonald v. City of Chicago* (2010), incorporating the Second Amendment right to own firearms, and *Timbs v. Indiana* (2019), incorporating the Eighth Amendment protection against excessive fines. As of 2022, several provisions of the Bill of Rights have not been incorporated and therefore only protect individuals against the actions of the federal government: Third Amendment protection against quartering troops in people's homes; Fifth Amendment protection requirement of indictment by grand jury to charge serious crimes; Seventh Amendment jury trial right in civil lawsuits; Eighth Amendment protection against excessive bail.

Third, Justice White's opinion applied the Palko principle to determine that the Sixth Amendment right to trial by jury was incorporated into the Fourteenth Amendment Due Process Clause for application to state court proceedings. Yet, in Footnote 14—that appears at the end of White's majority opinion (the other footnotes have been edited out of the case

opinions presented above)—White indicated that he was using an altered version of Cardozo's Palko test. Instead of asking whether the right to trial by jury is fundamental and essential to liberty in a hypothetical society, White made his judgement on behalf of the Court majority by determining that the right to trial by jury is fundamental and essential to liberty in American society, based on the traditions brought to North America from British legal practices.

PART IV

FOURTH AMENDMENT: WHAT IS A SEARCH?

What Is a Search? The Basics

The Fourth Amendment is short, just 54 words, and it reflects the desires of those who wrote and ratified it to protect Americans against unreasonable government intrusion into their lives. The Amendment mentions some of the more important aspects of a person's life—her house, her papers, her effects, even her "person," that is, her body—and declares that government agents may not unreasonably search or seize those things. Here is the text:

"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."

These words have inspired arguments about their meanings. For example, what counts as a "house" and thereby merits protection from unreasonable searches? Is it limited to physical buildings in which people live, or is some area outside the structure included? We will see later that the Court eventually defined the concept of "curtilage," which is an outdoor area that the Court treats as part of the "house."

Over the coming weeks, students will encounter vigorous debate over the meaning of "reasonable." When is it reasonable for a police officer to stop and frisk a pedestrian about whom the officer has suspicion? When is it reasonable for police to search cars without warrants? For now, we will set aside the concept of reasonableness for one simple reason: Before something can be an "unreasonable search," it must first be a "search." The cases assigned for this chapter concern the definition of "search" for purposes of Fourth Amendment jurisprudence. (Similarly, before something can be an "unreasonable seizure," it must first be a "seizure." We will consider the definition of "seizure" later in the semester.)

To key elements are important for understanding the concept of a "search" and judges' approach to deciding whether actions by government—especially the police as government officials—violate the Fourth Amendment's protection against "unreasonable searches." First, the existence of a government action that is defined as a search is typically defined as an intrusion that violates an individual's "reasonable expectation of privacy." If someone is walking in

the open down a public sidewalk and a police officer watches the person from across the street, that is not a search. It would not be reasonable for an individual to consider it an intrusion for someone to see them when they have placed themselves in a public place that is visible to others. On the other hand, if a police officer pressed her face against the window of a house in order to try to look through a narrow opening in a close curtain, that is quite different with respect to it impact on an individual's reasonable expectation of privacy.

Second, judges generally evaluate claims about Fourth Amendment violations through a balancing test that asks whether the individual's interest in privacy in a specific situation outweighs the importance of the government's interest in intruding on the individual's expectation of privacy. Thus, when people boarding a commercial flight must walk through a metal detector, the government's interest in preventing people from bringing weapons or bombs on planes—in order to prevent hijackings and other life-threatening dangers—outweighs the minimal intrusion of having a machine detect whether an individual is carrying a weapon under her clothing. By contrast, if school officials strip search students looking for missing pencil, the government's interest in a low-value, non-dangerous item would not justify such a severe intrusion on the students' reasonable expectation of privacy. Thus, this latter example would violate Fourth Amendment rights.

FLORIDA V. JARDINES (2013)

Supreme Court of the United States

Florida v. Joelis Jardines

Decided March 26, 2013 – 569 U.S. 1

Justice SCALIA delivered the opinion of the Court.

We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

I

In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway

or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by ... tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after

informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search.

We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment.

II

[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the

right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends."

Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion. While law enforcement officers need not "shield their eyes" when passing by the home "on public thoroughfares," an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

We have recognized that "the knocker on the front door is

treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics.

Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

The government's use of trained police dogs to investigate the home and its immediate surroundings is a "search" within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

Notes, Comments, and Questions

Does the outcome change if the dog is sniffing the door of an apartment instead of a home? Consider a police officer who is investigating an individual for methamphetamine production. The individual lives on the third floor of an apartment building. The police officer leads a dog to the third-floor hallway; the dog sniffs several doors in the hallway without alerting. While sniffing the suspect's door, the dog alerts to the presence of drugs. Search or no search? Why or why not? See *State v. Edstrom*, 916 N.W.2d 512, 515 (Minn. 2018), *cert. denied*, 139 S. Ct. 1262 (2019).

PART V

FOURTH AMENDMENT: WHAT IS A SEARCH? SOME SPECIFICS

As the cases make clear, the word "search" for purposes of the Fourth Amendment does not have its normal English meaning, that is, something to the effect of "try to find something" or "look for something." Instead, the Supreme Court has created a legal term of art. Some activities that one might normally describe with the word "search" (such as looking through someone's garbage in the hope of finding something interesting) turn out not to count as "searches" in Fourth Amendment jurisprudence. Students should consider when reading these cases whether the Court's reasoning is persuasive. Further, they should consider whether a unifying set of principles can be found that (at least most of the time) allows one to predict whether a given activity will count as a

"search." Absent such a set of principles, it may appear that the Court's doctrine in this area is somewhat arbitrary.

Not all Fourth Amendment "searches" involve physical intrusion into an area in which someone enjoys a reasonable expectation of privacy. In the next case, the Court applies this principle to the use of thermal imaging technology.

KYLLO V. UNITED STATES (2001)

Supreme Court of the United States

Danny Lee Kyllo v. United States

Decided June 11, 2001 — 533 U.S. 27

Justice SCALIA delivered the opinion of the Court.

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

I

In 1991 Agent William Elliott of the United States Department of the Interior came to suspect that marijuana was being grown in the home belonging to petitioner Danny Kyllo, part of a triplex on Rhododendron Drive in Florence, Oregon.

Indoor marijuana growth typically requires high-intensity lamps. In order to determine whether an amount of heat was emanating from petitioner's home consistent with the use of such lamps, at 3:20 a.m. on January 16, 1992, Agent Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex. Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was. Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home, and the agents found an indoor growing operation involving more than 100 plants. Petitioner was indicted on one count of manufacturing marijuana. He unsuccessfully moved to suppress the evidence seized from his home and then entered a conditional guilty plea.

The Court of Appeals for the Ninth Circuit remanded the case for an evidentiary hearing regarding the intrusiveness of thermal imaging. On remand the District Court found that the Agema 210 "is a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; it "did not show any people or activity within the walls of the structure"; "[t]he device used cannot penetrate walls or windows to reveal conversations or human activities"; and "[n]o intimate details of the home were observed." Based on these findings, the District Court upheld the validity of the warrant that relied in part upon the thermal imaging, and reaffirmed its denial of the motion to suppress. A divided Court of Appeals initially reversed, but that opinion was withdrawn and the panel (after a change in composition) affirmed, with Judge Noonan dissenting. The court held that petitioner had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home and even if he had, there was no objectively reasonable expectation of privacy because the imager "did not expose any intimate details of Kyllo's life," only "amorphous 'hot spots' on the roof and exterior wall." We granted certiorari.

II

"At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from

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

On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent....but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in *California v. Ciraolo*, 476 U.S. 207 (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

***We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless "the individual manifested a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search.

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological

enhancement of ordinary perception from such a vantage point, if any, is too much. ***

We have said that the Fourth Amendment draws "a firm line at the entrance to the house." That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

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

***

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

There is, in my judgment, a distinction of constitutional magnitude between "through-the-wall surveillance" that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand. The Court has crafted a rule that purports to deal

with direct observations of the inside of the home, but the case before us merely involves indirect deductions from "off-the-wall" surveillance, that is, observations of the exterior of the home. Those observations were made with a fairly primitive thermal imager that gathered data exposed on the outside of petitioner's home but did not invade any constitutionally protected interest in privacy. Moreover, I believe that the supposedly "bright-line" rule the Court has created in response to its concerns about future technological developments is unnecessary, unwise, and inconsistent with the Fourth Amendment.

I

There is no need for the Court to craft a new rule to decide this case, as it is controlled by established principles from our Fourth Amendment jurisprudence. One of those core principles, of course, is that "searches and seizures *inside a home* without a warrant are presumptively unreasonable." But it is equally well settled that searches and seizures of property in plain view are presumptively reasonable. "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" That is the principle implicated here.

While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance,"

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

Indeed, the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented, as was the case here. Additionally, any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces. Such use of the senses would not convert into an unreasonable search if, instead, an adjoining neighbor allowed an officer onto her property to verify her perceptions with a sensitive thermometer. Nor, in my view, does such observation become an unreasonable

search if made from a distance with the aid of a device that merely discloses that the exterior of one house, or one area of the house, is much warmer than another. Nothing more occurred in this case.

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

***

Notes, Comments, and Questions

The *Kyllo* majority reasoned in 2001 (in a case about police conduct that occurred in 1991) that the use of thermal imaging constituted a search because the technology was "not in general public use."

Today, however, the general public has many uses for

thermal imaging, from HVAC performance testing to hunting to wildlife rescue to evaluating the performance of kitchen devices.

Agema Infrared Systems, the Swedish corporation that manufactured the "Agema Thermovision 210" at issue in *Kyllo*, was acquired by FLIR Systems Inc. in 1998. Headquartered in Oregon, FLIR now sells a $200 thermal imaging camera (the "FLIR ONE") that can attach to a smartphone, with fancier versions available for higher prices. According to the FLIR product page, one can use the FLIR ONE to "[f]ind problems around the home fast, like where you're losing heat, how your insulation's holding up, electrical problems, and water damage – all of which are point-and-shoot easy to find." It also suggests, "See in the dark and explore the natural world safely with the FLIR ONE. Watch animals in their natural habitat and even use it to find your lost pet ... or what they might have left behind in the yard." Another suggested use from the advertisement: "Detecting tiny variations in heat means that you can see in total darkness, create new kinds of art, and discover new things about your world every day... or help your child with their science fair experiment."

Consider a police officer who uses such a device to investigate a suspected drug-grower's home. He sees images consistent with growing drugs. He shows the images to a judge, who grants a search warrant. Officers find drugs in the

house, and prosecutors have charged the owner with drug crimes. Search or no search? Why or why not?

In January 2020, the City Counsel of Bessemer, Michigan voted to purchase "an odor-detecting device as a means of addressing growing complaints about marijuana odor." The device is called a "Nasal Ranger," and the company that sells it describes it as "the 'state-of-the-art' in field olfactometry for confidently measuring and quantifying odor strength in the ambient air." According to St. Croix Sensory, Inc., "The portable Nasal Ranger Field Olfactometer determines ambient odor Dilution-to-Threshold (D/T) concentration objectively with your trained nose." If a Bessmer police officer stands on a public sidewalk and uses the Nasal Ranger to detect marijuana odors emanating from a house, is that a search? Why or why not?

* * *

PART VI

FOURTH AMENDMENT: WHAT IS A SEARCH? MORE SPECIFICS

The Fourth Amendment protects the people's "persons, houses, papers, and effects." While this language is quite broad, it does not include everything someone might possess or wish to protect from intrusion. For example, if one owns agricultural land far from any "house," that land is not a person, a house, a paper, or an effect. Police searches of such land, therefore, are not "searches" regulated by the Fourth Amendment. The Court has attempted to define the barrier separating the "curtilage" (an area near a house that is treated as a "house" for Fourth Amendment purposes) from the "open fields" (which enjoy no Fourth Amendment protection).

Notes, Comments, and Questions

In both *Oliver* and *Dunn*, police walked onto someone's land without permission. In describing the "open fields doctrine," the *Oliver* Court stated: "The "open fields" doctrine, first enunciated by this Court in *Hester v. United States*, 265 U.S. 57 (1924), permits police officers to enter and search a field without a warrant."

Consider whether that statement is truly accurate. Is it truly lawful for police to wander uninvited on the open fields of suspects? Perhaps it would be more accurate to state: "Police should not do this, but if they do, the Fourth Amendment has nothing to say about it." The *Hester* case cited by the Court in *Oliver* may provide a clue. In the syllabus, the Court describes police witnesses who "held no warrant and were trespassers on the land." By definition, trespassers are violating the law. We do not call it a "trespass" when someone walks on the property of another to visit as an invited guest, or to knock on the door and leave literature about religion or politics, or to execute a valid search warrant.

If officers who find useful (and admissible) evidence while trespassing in the open fields of suspects are breaking the law, should they be punished? Is it plausible to believe that they will be? If, as seems more likely, police departments would laud such behavior rather than condemning it, does that raise questions about the sensibility of the open fields doctrine?

At common law, the crimes of arson and burglary (which

are both crimes against the dwelling), defined "house" as both a dwelling house and buildings located within the curtilage. Fourth Amendment law essentially imports this principle.

So what is curtilage? Curtilage is: "The land or yard adjoining a house, usually within an enclosure. Under the Fourth Amendment, the curtilage is an area usually protected from warrantless searches." *Black's Law Dictionary* (11th ed. 2019).

Because the Court treats the curtilage surrounding a home as part of a "house" for Fourth Amendment purposes, police officers normally cannot walk on to curtilage and look around with neither permission nor a warrant. In response to this restriction, police have flown over houses and curtilage, using their eyes and cameras to gain information relevant to criminal investigations.

Notes, Comments, and Questions

Supreme Court precedent strongly suggests that as long as police pilots obey the law (such as FAA regulations on minimum altitudes), the "reasonable expectation of privacy test" will not prevent police from flying over a home.

Diligent defense counsel may wish to examine whether state or local laws restrict overflights more strictly than FAA regulations. Especially as remote-controlled helicopters (*a.k.a.*

"drones") become widely available at low prices, police can easily fly camera-toting aircraft over the homes of suspects. If a municipality prohibits such conduct by the general public, then perhaps police who violate local ordinances will also violate reasonable expectations of privacy.

What are the limits for observations from the air? Consider an officer who uses a drone equipped with a video camera to monitor a suspect through his bedroom window. There is nothing to suggest that drones flying in neighborhoods are sufficiently rare; a drone with streaming video can be purchased for about $60 at Target. Search or no search? Why or why not? Does the outcome change if there is a local ordinance limiting the public's use of drones to public spaces?

* * *

In the next case, the Court turned its attention to the use of dogs during traffic stops, in which motorists are detained involuntarily.

ILLINOIS V. CABALLES (2005)

Supreme Court of the United States

Illinois v. Roy I. Caballes

Decided Jan. 24, 2005 – 543 U.S. 405

Justice STEVENS delivered the opinion of the Court.

Illinois State Trooper Daniel Gillette stopped respondent for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, respondent's car was on the shoulder of the road and respondent was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested respondent. The entire incident lasted less than 10 minutes.

Respondent was convicted of a narcotics offense and

sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any "'specific and articulable facts'" to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation."

The question on which we granted certiorari is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop." Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about respondent that might have triggered a modicum of suspicion.

[T]he Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside respondent's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because

the shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." Respondent concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although respondent argues that the error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert *only* to contraband, the record contains no evidence or findings that support his argument. Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to

establish probable cause to conduct a full-blown search of the trunk.

Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

The judgment of the Illinois Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice SOUTER, dissenting.

I would hold that using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground. I would accordingly affirm the judgment of the Supreme Court of Illinois, and I respectfully dissent.

At the heart both of *Place* and the Court's opinion today is the proposition that sniffs by a trained dog are *sui generis* because a reaction by the dog in going alert is a response to nothing but the presence of contraband. Hence, the argument goes, because the sniff can only reveal the presence of items devoid of any legal use, the sniff "does not implicate legitimate privacy interests" and is not to be treated as a search.

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are "generally reliable" shows

that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.***

Justice GINSBURG, with whom Justice SOUTER joins, dissenting. [OMITTED]

SEARCH REVIEW: WHAT IS A SEARCH?

Fourth Amendment: What Is a Search?

Before moving to the next chapter, students may wish to review the definition of "search" by considering these examples. Instructions: Write "is," "is not," or "may be" in each blank. If your answer is "may be," jot down in the margin why you are unsure. Each problem is independent of all other ones.

1. If a police officer uses a car to follow a suspect who is driving from home to work, that _____ a search.
2. If a police officer flies a helicopter fifty feet above the ground and uses binoculars to look into a house window, that _____ a search.
3. If a police officer rifles through a suspect's paper recycling before the sanitation department collects it (and removes an itemized credit card bill), that

_____ a search.

4. If a police officer borrows a rare super-sensitive microphone from the CIA and points it at a living room window from across the street, thereby capturing the window vibrations and listening to the conversations of people inside, that _____ a search.
5. If a police department deploys officers in shifts 24/7 to watch a house, writing down the description of everyone who comes and goes, that _____ a search.
6. If a police officer chases a robbery suspect from the scene of a bank robbery, and the officer follows the sprinting subject into a nearby house, that _____ a search.

PART VII

FOURTH AMENDMENT: PROBABLE CAUSE AND REASONABLE SUSPICION

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause." Accordingly, warrants (and the searches that followed in the wake of their issuance) have been challenged on the ground that police did not provide sufficient evidence when obtaining the warrants from judges. In addition, the Court has held that in several common situations, police may conduct searches and seizures without a warrant, but only with probable cause. In *Illinois v. Gates*, the Court set forth a new standard for when an informant's tip provides probable cause to justify a search or arrest.

ILLINOIS V. GATES (1983)

Supreme Court of the United States

Illinois v. Lance Gates

Decided June 8, 1983 – 462 U.S. 213

Justice REHNQUIST delivered the opinion of the Court.

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

Cortez, 449 U.S. 411, 418 (1981) regarding "particularized suspicion," is also applicable to the probable cause standard:

"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; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons.

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

showing as to the other, or by some other indicia of reliability.

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case. Unlike a totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

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Notes, Comments, and Questions

The *Gates* Court rejects the *Aguilar-Spinelli* test's insistence on using two specific measures to compose a (somewhat) mathematical formula for probable cause. As the Court explains, the existence of probable cause will not be found by entering "veracity" and "basis of knowledge" into a formula which yields the total weight of evidence presented to a magistrate.

As the Court puts it:

"This totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a 'practical, nontechnical conception.'"

When police have probable cause to believe either (1) that evidence of crime will be found in a particular place or (2) that a certain person has committed a crime, important police action becomes lawful that would have remained unlawful absent probable cause. One important example involves vehicle stops; police may stop a car based on probable cause to believe that its driver has committed a traffic law violation. It is widely believed that many officers use this power for reasons other than traffic enforcement—for example, stopping drivers who violate trivial traffic rules in the hope of discovering

evidence of more serious lawbreaking. In addition, some critics of police allege that at least some officers use their traffic-stop authority in ways that constitute unlawful discrimination, such as on the basis of race. Based on these beliefs and allegations, motorists have sought review of vehicle stops, justified by probable cause, on the basis of police officers' "real" or "true" reasons for conducting the stops. The Court has resisted engaging in such review.

THE PHENOMENON OF "DRIVING WHILE BLACK (OR BROWN)"

For decades, observers have documented that black and brown drivers are more likely than white drivers to be stopped by police, a phenomenon sometimes described as "Driving While [Black/Brown]" or "DWB." (Similar observations have been made about which pedestrians police choose to stop and frisk, a topic to which we will return.) U.S. Senator Tim Scott (R-S.C.) described in a 2016 speech his experiences as a black motorist, along with incidents in which Capitol police questioned whether he really was a member of the Senate.27 Reporting that he had been stopped by police while driving seven times over the prior year, he asked colleagues to "imagine the frustration, the irritation the sense of a loss of dignity that accompanies each of those stops."

Noting that in most of the incidents, "[He] was doing nothing more than driving a new car, in the wrong neighborhood, or some other reason just as trivial," he said, "I have felt the anger, the frustration, the sadness and the humiliation that comes with feeling that you're being targeted for nothing more than just being yourself."

After being stopped by Capitol police, Sen. Scott received apologies on multiple occasions from police leadership. Most Americans, however, lack the social capital possessed by Senators and cannot expect that sort of response to complaints.

Although the cause of "DWB" stops is disputed, the existence of the phenomenon is well-documented,28 as are its effects on relations between police departments and minority communities. For example, one of your authors once attended an event in St. Louis at which a leader of the St. Louis City police said that certain St. Louis County police departments treat minority residents so badly, City police have trouble getting cooperation from potential witnesses, impeding the City department's ability to solve serious crimes.

Robert Wilkins, now a federal appellate judge, was a plaintiff in 1990s litigation related to DWB stops in Maryland. A 2016 CBS News interview in which he describes his experiences is available here: https://www.youtube.com/watch?v=pYsl6AQBZn4

In the spring and summer of 2020, police treatment of members of minority communities—especially African Americans—once again received a national spotlight. The May 2020 killing of George Floyd by police in Minneapolis and the March 2020 killing of Breonna Taylor by police in Louisville aroused particular indignation, inspiring protests across the country. Police response to protests in some cities, including

violence captured on video, inspired further calls for reform, along with more radical proposals.

As you read subsequent chapters, consider how Supreme Court criminal procedure decisions affect how police departments interact with communities they exist to serve. For example, does the Court's Fourth Amendment doctrine encourage police officers to act in ways that build confidence among community members? When police officers violate rules set forth by the Court, do existing legal remedies encourage better future behavior? If you are unhappy with the state of policing, how might things be improved? If instead you think policing is going fairly well, to what do you attribute the discontent exhibited during the 2020 protests?

One purpose of this book is to help you consider questions like these. Recall, however, that most Americans will never attend law school. Knowledge of criminal procedure doctrine among the public is sketchy at best. If Americans better understood Supreme Court doctrine related to the Fourth, Fifth, and Sixth Amendments, do you think they would have more or less faith in the criminal justice system? Why? After finishing this book, answer these questions again and examine whether your own opinions have changed.

A recent study of policing in Ohio strongly suggests that the disparities demonstrated during Wilkins's lawsuit exist today, at least in some American jurisdictions.

The extreme racial disparities found in nonmoving traffic violations (*i.e.*, driving under suspension and without a

seatbelt) among blacks in Cleveland and Shaker, offenses that are generally detected either through electronic surveillance or once a traffic stop has been made, are consistent with Meehan and Ponder's conclusion that, "officers must be 'hunting' for, or clearly noticing, African American drivers," in these jurisdictions. This practice among law enforcement officers creates a "self-fulfilling prophecy," in that if black motorists are disproportionately surveilled, stopped, and cited for traffic offenses by police, its cumulative effect can help explain the disproportionate number of blacks that ultimately have their driver's licenses suspended. And given the strong inducements to drive noted earlier, a considerable segment of these motorists continue to drive, are eventually caught again, and this cycle only repeats itself, with escalating legal and financial consequences accruing to the motorist.

Ronnie A. Dunn, *Racial Profiling: A Persistent Civil Rights Challenge Even in the Twenty-First Century*, 66 Case W. Res. L. Rev. 957, 991 (2016) (quoting Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling of African American Motorists,* 19 Just. Q. 399, 399-400 (2002).

What other constitutional provisions might be violated by pretextual stops? For example, what if police stop only Catholics, or only Hispanics, or only vehicles with bumper stickers supporting political candidates or causes offensive to the officer making the stop?

PART VIII

FOURTH AMENDMENT: SEIZURES AND ARRESTS

In this chapter, we consider the Court's definition of "seizure" for Fourth Amendment purposes. The common meaning of "seizure"—to take possession of a thing or person by force or by legal process—provides some insight to the term's meaning in constitutional law. But as is true for other terms of art, such as "search," the dictionary definition is not identical to the doctrinal meaning. We also consider when police may conduct arrests.

What Is a Seizure?

Just as something cannot be an "unreasonable search" without being a "search," something cannot be an "unreasonable seizure" without being a "seizure." Arrests are easily deemed "seizures" of the persons arrested. A variety of less invasive police tactics, however, have required more subtle analysis.

UNITED STATES V. MENDENHALL (1980)

Supreme Court of the United States

United States v. Sylvia L. Mendenhall

Decided May 27, 1980 – 446 U.S. 544

Mr. Justice STEWART announced the judgment of the Court and delivered an opinion, in which Mr. Justice REHNQUIST joined.29

The respondent was brought to trial in the United States District Court for the Eastern District of Michigan on a charge of possessing heroin with intent to distribute it. She moved to suppress the introduction at trial of the heroin as evidence against her on the ground that it had been acquired from her through an unconstitutional search and seizure by agents of the Drug Enforcement Administration (DEA). The District Court denied the respondent's motion, and she was convicted

after a trial upon stipulated facts. The Court of Appeals reversed. We granted certiorari.

I

At the hearing in the trial court on the respondent's motion to suppress, it was established how the heroin she was charged with possessing had been obtained from her. The respondent arrived at the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles early in the morning on February 10, 1976. As she disembarked from the airplane, she was observed by two agents of the DEA, who were present at the airport for the purpose of detecting unlawful traffic in narcotics. After observing the respondent's conduct, which appeared to the agents to be characteristic of persons unlawfully carrying narcotics, the agents approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket. The respondent produced her driver's license, which was in the name of Sylvia Mendenhall, and, in answer to a question of one of the agents, stated that she resided at the address appearing on the license. The airline ticket was issued in the name of "Annette Ford." When asked why the ticket bore a name different from her own, the respondent stated that she "just felt like using that name." In response to a further question, the respondent indicated that she had been

in California only two days. Agent Anderson then specifically identified himself as a federal narcotics agent and, according to his testimony, the respondent "became quite shaken, extremely nervous. She had a hard time speaking."

After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request. The office, which was located up one flight of stairs about 50 feet from where the respondent had first been approached, consisted of a reception area adjoined by three other rooms. At the office the agent asked the respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead." She then handed Agent Anderson her purse, which contained a receipt for an airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles. The agent asked whether this was the ticket that she had used for her flight to California, and the respondent stated that it was.

A female police officer then arrived to conduct the search of the respondent's person. She asked the agents if the respondent had consented to be searched. The agents said that she had, and the respondent followed the policewoman into a private room. There the policewoman again asked the respondent if she consented to the search, and the respondent

replied that she did. The policewoman explained that the search would require that the respondent remove her clothing. The respondent stated that she had a plane to catch and was assured by the policewoman that if she were carrying no narcotics, there would be no problem. The respondent then began to disrobe without further comment. As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed both to the policewoman. The agents then arrested the respondent for possessing heroin.

II

Here the Government concedes that its agents had neither a warrant nor probable cause to believe that the respondent was carrying narcotics when the agents conducted a search of the respondent's person. It is the Government's position, however, that the search was conducted pursuant to the respondent's consent, and thus was excepted from the requirements of both a warrant and probable cause. Evidently, the Court of Appeals concluded that the respondent's apparent consent to the search was in fact not voluntarily given and was in any event the product of earlier official conduct violative of the Fourth Amendment. We must first consider, therefore, whether such conduct occurred, either on the concourse or in the DEA office at the airport.

A30

[I]f the respondent was "seized" when the DEA agents approached her on the concourse and asked questions of her, the agents' conduct in doing so was constitutional only if they reasonably suspected the respondent of wrongdoing. But "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

We conclude that 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. 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. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

On the facts of this case, no "seizure" of the respondent occurred. 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. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

***

[In a concurrence joined by Chief Justice Burger and Justice Blackmun, Justice Powell wrote that the Court should not decide whether the agents "seized" Mendenhall because the courts below had not considered it. Further, he argued that if the encounter did constitute a seizure, it was justified because the circumstances provided "reasonable suspicion."]

Mr. Justice WHITE, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS join, dissenting.

***

Whatever doubt there may be concerning whether Ms. Mendenhall's Fourth Amendment interests were implicated during the initial stages of her confrontation with the DEA agents, she undoubtedly was "seized" within the meaning of the Fourth Amendment when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip-search of her person. [T]he nature of the intrusion to which Ms. Mendenhall was subjected when she was escorted by DEA agents to their office and detained there for questioning and a strip-search was so great that it "was in important respects indistinguishable from a traditional arrest." Although Ms. Mendenhall was not told that she was under arrest, she in fact was not free to refuse to go to the DEA office

and was not told that she was. Furthermore, once inside the office, Ms. Mendenhall would not have been permitted to leave without submitting to a strip-search.31

The Court recognizes that the Government has the burden of proving that Ms. Mendenhall consented to accompany the officers, but it nevertheless holds that the "totality of evidence was plainly adequate" to support a finding of consent. On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority.

Since the defendant was not present to testify at the suppression hearing, we can only speculate about her state of mind as her encounter with the DEA agents progressed from surveillance, to detention, to questioning, to seclusion in a private office, to the female officer's command to remove her clothing. Nevertheless, it is unbelievable that this sequence of events involved no invasion of a citizen's constitutionally protected interest in privacy. The rule of law requires a different conclusion.

Notes, Comments, and Questions

The Court in *Mendenhall* stated that a person is seized if "a reasonable person [in his situation] would have believed that he was not free to leave." As a result, lawyers and others have

recommended that if someone is approached by police and wishes either to avoid or to end the encounter, a useful tactic is to ask, "Am I free to leave?" If the answer is "yes," then the person may leave without further discussion. If the answer is "no," then the person should stay—a reasonable person in the situation would not feel free to go. A person told "no" can later challenge the interaction as an unlawful seizure. At a minimum the encounter should be considered a "seizure;" the debate will be about its legality. (An equivalent tactic is to ask, "Am I being detained?" An answer of "no" indicates permission to leave. "Yes" indicates a seizure.)

Consider the following scenario:

Police approach a suspect (who had recently parked his car) and ask to speak to him. The suspect agrees. The officer asks for identification, and the suspect produces a driver's license. Before returning the license, the officer asks for and receives permission to search the suspect's vehicle. Is that search the product of valid consent given by a suspect who had not been "seized" during the encounter? Or, instead, did the officer detain the suspect by retaining his driver's license, thereby creating a situation in which a reasonable person would not feel free to leave? See *United States v. De La Rosa*, 922 F.2d 675, 678 (11th Cir. 1991); *id*. at 680-81 (Clark, J., dissenting on this question).32

Now imagine a slightly different scenario: Police lawfully stop a car and ask the driver for his license, which is provided.

Before returning the license, officers ask for permission to search the car. Is this scenario different from the prior one in any material way? See *United States v. Thompson*, 712 F.2d 1356, 1360-61 (11th Cir. 1983).

ATWATER V. CITY OF LAGO VISTA (2001)

Supreme Court of the United States

Gail Atwater v. City of Lago Vista

Decided April 24, 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.

I

A

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 "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." 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, "[y]ou'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.

B

Atwater and her husband, petitioner Michael Haas, filed suit in a Texas state court 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.

***

II

***

...[S]he asks us to mint a new rule of constitutional law on the understanding that when historical practice fails to speak

conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness. Atwater accordingly argues for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless 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. 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.

[C]omplications 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, between those for which conviction could result in commitment and those for which it could not. 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.

***

Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." 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.

IV

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. She admits that neither she nor her children were wearing seatbelts. 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," as she says in her brief, 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.

The Court recognizes that the arrest of Gail Atwater was a "pointless indignity" that served no discernible state interest and yet holds that her arrest was constitutionally permissible. Because the Court's position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent.

A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure. When a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable.

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. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well.33 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.

***

Because a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on "the degree to which it is needed for the promotion of legitimate governmental interests." In light of the availability of citations to promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.

The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable. Atwater readily admits—as she did when Officer Turek pulled her over—that she violated Texas' seatbelt law. While Turek was justified in stopping Atwater, neither law nor reason supports his decision to arrest her instead of simply giving her a citation.

The officer's actions cannot sensibly be viewed as a permissible means of balancing Atwater's Fourth Amendment interests with the State's own legitimate interests.

***

Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of "an epidemic of unnecessary minor-offense arrests." But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. 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.

The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness. I respectfully dissent.

Notes, Comments, and Questions

The result in *Atwater* may exemplify a maxim popularized by Justice Antonin Scalia, who once observed during a speech, "A lot of stuff that's stupid is not unconstitutional." Justice Scalia added that during a prior speech, he had proposed that all federal judges should receive a stamp with the words "STUPID BUT CONSTITUTIONAL" that could be used on complaints; then someone sent him one. Scalia, like others expressing similar sentiments, was known to argue that if you wish to prohibit stupid (but constitutional) conduct, you should contact your legislature, not federal judges.

If students encounter examples in this book of disagreeable police (or prosecutorial) conduct that the Court has deemed constitutional, they may wish to ask themselves two questions: (1) Is it plausible that a legislature can solve the problem that the Court has declined to solve, and (2) what specific suggestions might I have for my legislator? Most students are far more likely to become legislators than Supreme Court Justices.

TENNESSEE V. GARNER (1984)

U.S. Supreme Court

Tennessee v. Garner, 471 U.S. 1 (1984)

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to

answer a "prowler inside call." Upon arriving at the scene, they saw a woman standing on her porch and gesturing toward the adjacent house. [Footnote 1] She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and about 5′ 5″ or 5′ 7″ tall. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that, if Garner made it over the fence, he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that

"[i]f, after notice of the intention to arrest the defendant, he

either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

Tenn.Code Ann. 40-7-108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140-144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. *Id*. at 57.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. 1983 for asserted violations of Garner's constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

***

The [U.S.] Court of Appeals reversed and remanded. 710

F.2d 240 (1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment, and is therefore constitutional only if "reasonable." The Tennessee statute failed as applied to this case, because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes — "the facts, as found, did not justify the use of deadly force under the Fourth Amendment." *Id*. at 246. Officers cannot resort to deadly force unless they "have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large."

***

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States v. Mendenhall*, 446 U. S. 544 (1980), there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E.g., United States v. Watson*, 423 U. S. 411 (1976). Petitioners and appellant argue that, if this requirement is satisfied, the Fourth Amendment

has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure,

"[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."

***

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. *Cf. Delaware v. Prouse, supra*, at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. *See infra* at 18-19. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. *See Schumann v. McGinn*, 307 Minn. 446, 472, 240 N.W.2d 525, 540 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat

to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

***

Note: Members of the public, including students, often assume that if police improperly use excessive force and thereby cause injuries or deaths, the police actions violate the 8th Amendment prohibition on cruel and unusual punishments. In fact, excessive use of force by the police constitutes an "unreasonable seizure" in violation of the 4th Amendment, as discussed in *Tennessee v. Garner*. The 8th Amendment Cruel and Unusual Punishments Clause only protects people who are being "punished" and the Supreme Court has limited the definition of punishment to mean people who have been convicted and sentenced for committing a crime. People against whom police officers use force are criminal suspects—or innocent bystanders—who have not been convicted of any crime. Thus, the 4th Amendment applies rather than the 8th Amendment.

To further illustrate the point about the narrow definition of "punishment" in order to apply the 8th Amendment, in

1977 the Supreme Court issued its decision in *Ingraham v. Wright*. At a junior high school in Florida, a student was given 20 "licks" with a wooden paddle by an assistant principal for being slow in responding to a teacher's instructions. The paddling caused injuries that kept the student out of school for several days. Even though the student was being "punished" in any conventional usage of the word, the Supreme Court said that he was not being "punished" according to the meaning of the 8th Amendment which applies only to punishments imposed for criminal convictions. The Supreme Court ruled against the student's claim that the arbitrary paddlings administered by school officials violated the Cruel and Unusual Punishments Clause or the Due Process Clause, for not giving students a hearing to challenge any evidence against them and tell their side of the story.

PART IX

FOURTH AMENDMENT: WARRANTS

Warrants

The Court has stated repeatedly that searches conducted without a warrant are presumptively "unreasonable" and, accordingly, are presumptive violations of the Fourth Amendment. Although one can argue whether the Court truly enforces a "warrant requirement"—*see* Justice Thomas's dissent in *Groh v. Ramirez* below—one cannot deny the importance of valid warrants to a huge range of police conduct. For example, absent exceptional circumstances (such as officers chasing a fleeing felon), police normally must have a valid warrant to search a residence without the occupant's permission.

To be valid, a warrant must obey the Fourth Amendment's command that "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." This portion of the Amendment is known as the

"Warrant Clause." It requires: (1) that the evidence presented to the issuing judge or magistrate be sufficient to qualify as "probable cause," (2) that the officers bringing the evidence to the judge or magistrate swear or affirm that the evidence is true to the best of their knowledge, (3) that the warrant specify where officers can search, and (4) that the warrant specify what things or persons officers may look for and may seize if found.

In addition, the Court has held that only a "neutral and detached magistrate" may issue a warrant. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). That means the judge or magistrate must be independent of law enforcement; a state attorney general cannot issue warrants. In *Connally v. Georgia*, 429 U.S. 245 (1977), the Court held that a justice of the peace who received payment upon issuing a warrant, but no fee upon denying a warrant application, was not "neutral and detached."

RICHARDS V. WISCONSIN (1997)

Supreme Court of the United States

Steiney Richards v. Wisconsin

Decided April 28, 1997 – 520 U.S. 385

Justice STEVENS delivered the opinion of the [unanimous] Court.

In *Wilson v. Arkansas*, we held that the Fourth Amendment incorporates the common law requirement that police officers entering a dwelling must knock on the door and announce their identity and purpose before attempting forcible entry. At the same time, we recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," and left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."

In this case, the Wisconsin Supreme Court concluded that police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation. In so doing, it reaffirmed a pre-*Wilson* holding and concluded that *Wilson* did not preclude this *per se* rule. We disagree with the court's conclusion that the Fourth Amendment permits a blanket exception to the knock-and-announce requirement for this entire category of criminal activity. But because the evidence presented to support the officers' actions in this case establishes that the decision not to knock and announce was a reasonable one under the circumstances, we affirm the judgment of the Wisconsin court.

I

On December 31, 1991, police officers in Madison, Wisconsin, obtained a warrant to search Steiney Richards' motel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of motel rooms in Madison. The police requested a warrant that would have given advance authorization for a "no-knock" entry into the motel room, but the Magistrate explicitly deleted those portions of the warrant.

The officers arrived at the motel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team. With him were several plainclothes officers and at least one man in

uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

Richards sought to have the evidence from his motel room suppressed on the ground that the officers had failed to knock and announce their presence prior to forcing entry into the room. The trial court denied the motion, concluding that the officers could gather from Richards' strange behavior when they first sought entry that he knew they were police officers and that he might try to destroy evidence or to escape. The judge emphasized that the easily disposable nature of the drugs the police were searching for further justified their decision to identify themselves as they crossed the threshold instead of announcing their presence before seeking entry. Richards appealed the decision to the Wisconsin Supreme Court and that court affirmed.

The Wisconsin Supreme Court did not delve into the events underlying Richards' arrest in any detail, but accepted the following facts: "[O]n December 31, 1991, police executed a search warrant for the motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41(1m) (1991-92). They did not knock and announce prior to their entry. Drugs were seized."

II

We recognized in *Wilson* that the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." It is indisputable that felony drug investigations may frequently involve both of these circumstances. The question we must resolve is whether this fact justifies dispensing with case-by-case evaluation of the manner in which a search was executed.

The Wisconsin court explained its blanket exception as necessitated by the special circumstances of today's drug culture, and the State asserted at oral argument that the blanket exception was reasonable in "felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs." But creating exceptions to the knock-and-announce rule based on

the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.

First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a *per se* exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth

Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

III

Although we reject the Wisconsin court's blanket exception to

the knock-and-announce requirement, we conclude that the officers' no-knock entry into Richards' motel room did not violate the Fourth Amendment. We agree with the trial court that the circumstances in this case show that the officers had a reasonable suspicion that Richards might destroy evidence if given further opportunity to do so.

***

Notes, Comments, and Questions

When police "knock and announce," they are often not obligated to wait very long before forcing entry. In *United States v. Banks*, 540 U.S. 31 (2003), the Court found that a "15-to-20-second wait before a forcible entry" was justified by the circumstances, and federal courts have approved even shorter wait times.34 Short wait times are especially likely to be deemed reasonable if officers are searching for drugs and hear no response after knocking and announcing. The necessary time officers must wait before "reasonably" breaking a door varies depending on factors such as what police seek, the anticipated dangerousness of persons likely to be on the premises, and how persons react to the arrival of officers.

The 2017 news that federal agents conducted a no-knock raid against Paul Manafort, the former presidential campaign manager for Donald Trump, inspired new interest in the phenomenon of no-knock entries and the breaking of doors by police. Although some commentators suggested that such

raids are unusual, it would have been more accurate to say that such raids are unusual for suspects like Paul Manafort. In drug cases, no-knock raids are not unusual at all.35

Students interested in what happens when police execute warrants, particularly without knocking and announcing, may appreciate Radley Balko's book *Rise of the Warrior Cop* (2013). Balko observed:

> Today in America SWAT teams violently smash into private homes more than one hundred times per day. The vast majority of these raids are to enforce laws against consensual crimes.36 In many cities, police departments have given up the traditional blue uniforms for "battle dress uniforms" modeled after soldier attire. Police departments across the country now sport armored personnel carriers designed for use on a battlefield. ... They carry military-grade weapons. Most of this equipment comes from the military itself. Many SWAT teams today are trained by current and former personnel from special forces units.37

Balko notes also that despite the Supreme Court's guidance concerning no-knock raids—that is, holdings that the Fourth Amendment limits the use of such tactics—"the police officers interviewed for this book unanimously told me that beginning in about the mid-1980s, judges almost never denied their requests for a search warrant" and that "knock-and-announce requests were never a problem."38

In March 2020, no-knock warrants gained national attention after police in Louisville, Kentucky shot and killed

Breonna Taylor, a 26-year-old emergency room technician. Police entered her apartment soon after midnight on March 13, under authority of a no-knock warrant issued by a judge. Taylor's boyfriend, Kenneth Walker, said later that when police entered, he and Taylor believed they were victims of a burglary and did not know that the persons entering their home were police officers. Officers said later that they did knock and announce. After police entered, Walker shot at the officers, hitting one in the leg. Police fired back, killing Taylor. She was shot at least eight times. The warrant had been issued as part of an investigation into drug sales. No drugs were found in Taylor's apartment. Taylor's death was one of several—including the May 2020 killing of George Floyd by police in Minneapolis—that inspired nationwide protests. Louisville officials announced new policies relating to no-knock warrants in the wake of protests. In addition, some have argued that under existing law set forth in *Wilson* and *Richards*, the no-knock warrant in Taylor's case was not lawfully issued. (In August 2022, the U.S. Department of Justice announced that four officers involved in executing the warrant at Taylor's residence would face criminal charges for violating her civil rights, use of excessive force, and obstructing justice by creating a false cover story about the events that led to Taylor's death).

If mere presence during the execution of a search warrant does not justify the search of a person, it follows that mere presence surely does not justify arresting everyone present. To

reinforce this message, the Legal Bureau of the New York Police Department issued a bulletin in 2013 to this effect.39 In response to the question, "May a police officer arrest all persons found in a location during the execution of a search warrant?," the bulletin answered, "No. An individual's mere presence in a search location does not establish probable cause to arrest."

Note that while police may detain persons present at the location to be searched, they may not detain persons who happened to be at the location earlier but have already left before police arrive to execute the warrant. In *Bailey v. United States*, 568 U.S. 186 (2013), the Court held that the rule of *Michigan v. Summers*, 452 U.S. 692 (1981) applies only to those in "the immediate vicinity of the premises to be searched." The Court explained, "Because detention is justified by the interests in executing a safe and efficient search, the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place." In *Bailey*, officers had followed two men 0.7 miles after seeing them leave the building officers had been about to search. The Court found the detention unreasonable. In a dissent, Justice Breyer complained that "immediate vicinity" was not defined by the majority.

Notes, Comments, and Questions

One issue is the question of when a warrant goes "stale." A

warrant based upon probable cause to believe that contraband or suspects will be found in a certain place becomes less reliable over time. To pick an extreme example, if police receive a warrant in 2018 to search a particular house for a suspect, news that the suspect died in 2019 would make it unreasonable for police to execute the warrant in 2021. Actual cases will present closer questions. For example, a warrant to search for drugs recently delivered to the house of a dealer might go stale relatively quickly because the dealer is likely to sell the drugs soon. By contrast, courts have found that collectors of child pornography rarely destroy their material, meaning that warrants to search their computers for illicit images do not go stale. Similarly, a warrant to search an accountant's office for documents proving a client's tax fraud would probably remain "fresh" for a long time.

A 2010 raid on a Columbia, Missouri home illustrates the issue. Police had an eight-day-old warrant to search the house of Jonathan Whitworth for drugs. The raid went poorly, and officers shot two dogs, killing one. Officers pointed guns at Whitworth's wife and her seven-year-old daughter. While some contraband was found, police did not discover evidence of significant drug dealing.40 Whitworth and his family sued the police, alleging among other things that the warrant was stale when executed. Although the court dismissed the lawsuit, Columbia police adopted new policies in response to outcry over the incident.41 (A video of the raid—which is unpleasant

to watch—is available online: https://www.youtube.com/watch?v=WF2nM9wsBYs)

SAMPLE STATE APPLICATION FOR WARRANTS

Example of Search Warrant Form

Reprinted below is a form used by courts in Missouri when issuing warrants.

FORM NO. 39A

SEARCH WARRANT AUTHORIZING SEARCH FOR STOLEN PROPERTY

STATE OF MISSOURI)

) ss.

COUNTY OF _____)

IN THE MAGISTRATE COURT OF _____ COUNTY

THE STATE OF MISSOURI TO ANY PEACE OFFICER IN THE STATE OF MISSOURI:

WHEREAS a complaint in writing, duly verified by oath, has been filed with the undersigned Judge of this court, stating that heretofore the following described personal property, to-

wit: _____ of the goods and chattels of _____, has been unlawfully stolen, and it further appears from the allegations of said complaint that said property is being kept or held in this county and state at and in _____

_____

_____

_____

;

NOW, THEREFORE, these are to command you that you search the said premises above described within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and, if said above described property or any part thereof be found on said premises by you, that you seize the same and take same into your possession, making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises searched, and that you thereafter return the property so taken and seized by you, together with a duly verified copy of the inventory thereof and with your return to this warrant to this court to be herein dealt with in accordance with law. Witness my hand and seal of this court on this _____ day of _____, 19___.

_____

JUDGE OF SAID COURT

* * *

[The material below appears on the reverse side of the form.]

RETURN AND INVENTORY

I, _____, being a peace officer within and for the aforesaid county, to-wit: _____, do hereby make return to the above and within warrant as follows: that on the _____ day of _____, 19___, and within ten days after issuance of said warrant, I went to the location and premises described therein and searched the same for personal property described therein, and that upon said premises I discovered the following personal property described in the warrant which I then and there took into my possession (here inventory of property taken):

_____

_____

_____

_____

_____

_____

_____; that I made this inventory in the presence of the person from whose possession I took said property (that there

was no person present from whose possession said property was taken); that I delivered to such person a receipt for the property taken, together with a copy of this warrant (that, there being no person in possession of said property present on said premises, I left a copy of this warrant with a receipt for the property taken, in a conspicuous place on said premises); that I have now placed said property so taken in the possession of this court.

_____

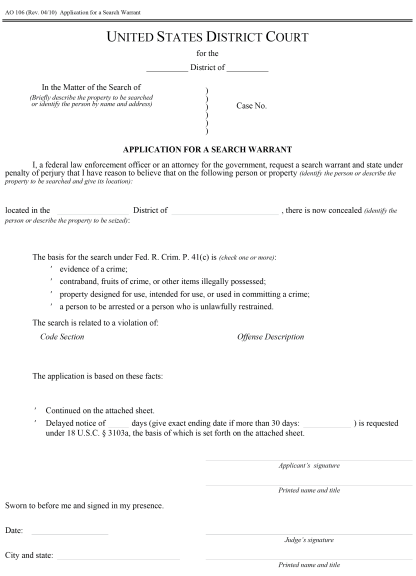
Subscribed and sworn to before me this_____ day of _____, 19___.

_____

CLERK, MAGISTRATE COURT

SAMPLE FEDERAL APPLICATION FOR WARRANTS

Sample Search Warrant Application Form (available online)



AO 106 (Rev. 04/10) Application for a Search Warrant

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

) Case No.

APPLICATION FOR A SEARCH WARRANT

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location)*:

located in the _____ District of _____ , there is now concealed *(identify the person or describe the property to be seized)*:

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more)*:

- ' evidence of a crime;
- ' contraband, fruits of crime, or other items illegally possessed;
- ' property designed for use, intended for use, or used in committing a crime;
- ' a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section *Offense Description*

The application is based on these facts:

' Continued on the attached sheet.

' Delayed notice of _____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

Applicant's signature

Printed name and title

Sworn to before me and signed in my presence.

Date: _____

Judge's signature

City and state: _____

Printed name and title

PART X

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PERMISSIBLE WARRANTLESS SEARCH SITUATIONS)

Warrant Exceptions or Permissible Warrantless Search Situations

The Court has stated repeatedly over the decades that searches and seizures conducted without warrants are presumptively unlawful. The Court has also, however, created several

exceptions to the warrant requirement. We will spend the next several chapters exploring these exceptions.

One way to think about situations in which warrantless searches are permissible is to place these situations in categories. One common way to categorize these situations is presented in the following list:

- Plain View Doctrine (evidence in plain view of officer in location where officer is legally permitted to be)
- Automobile Searches (depending on circumstances, warrants are not required for certain automobile searches)
- Searches Incident to a Lawful Arrest (after arresting an individual, officers can search the individual and look around the immediate area of the arrest to make sure there is no weapon within reach of the individual and no evidence that the arrestee might destroy)
- Consent Searches (individuals with authority over a location or apparent authority over a location can give a consent to a warrantless search if the consent is voluntary)
- Exigent Circumstances (officers can conduct searches without a warrant in urgent situations with immediate risks of danger to the officers or others, or certain risks of immediate loss of evidence that would occur through the delay involved in getting a warrant)
- Special Needs Beyond the Normal Purposes of Law

Enforcement, also known as the "Special Needs" category for searches, with the searches limited in nature based on the justification for the search (border entry points, airports, drug testing of certain categories of people, entry points for sporting events and concerts, drunk driving and immigration checkpoints, DNA tests of arrestees for violent crimes, etc.)

- Stop and Frisk searches based on officers' observations of potential criminal conduct and dangerousness of an individual; often called "Terry searches" after the original Supreme Court decision in *Terry v. Ohio* (1968)
- Administrative Searches, typically for health and safety purposes, such as building code inspections, restaurant inspections for compliance with public health codes, etc.

For every warrant exception, students should consider: (1) when the exception applies and (2) what the exception allows police to do. In particular, students should note whether probable cause is necessary for the exception to apply and, if not, what other quantum of evidence is required.

In this chapter, we consider the "plain view exception" and the "automobile exception," each of which has grown over time. In our first case, the Court considered both exceptions.

THE PLAIN VIEW EXCEPTION (PLAIN VIEW DOCTRINE)

The Plain View Exception

The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be. The plain view doctrine was established by the Supreme Court in:42

Notes, Comments, and Questions

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court stated that the "plain view exception" existed but did not justify the search at issue in the case. In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court explained the plain view exception further. As the *Hicks* Court sets forth, the plain view exception can apply only if an officer conducts a seizure (1) while the

officer is somewhere the officer has the lawful right to be (e.g., while on a public sidewalk, or inside a house executing a warrant) and (2) the officer has probable cause to believe that the object is subject to seizure. Objects are subject to seizure if they are contraband or are otherwise evidence of, fruits of, or instrumentalities of a crime. ("Contraband" refers to items that are unlawful to possess, such as illegal drugs.) In *Hicks*, an officer was lawfully inside a house and spotted an object the officer believed to be stolen. But because the officer lacked probable cause to support his belief upon picking up the item, the officer's seizure of the object (a stolen stereo) was deemed outside the scope of the exception—that is, it was unlawful.

In *Horton v. California*, 496 U.S. 128 (1990), the Court expanded the scope of the plain view exception by removing the "inadvertence requirement" set forth in Justice Stewart's plurality opinion in *Coolidge*. Although the *Horton* Court described *Coolidge* as "binding precedent," it held that the inadvertence requirement was not "essential" to the Court's result in *Coolidge*. As the *Horton* majority put it, for the exception to apply, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." In addition, "not only must the item be in plain view; its incriminating character must also be 'immediately apparent.'"

THE AUTOMOBILE EXCEPTION

The Automobile Exception

In the early 2000s, hip hop mogul Jay-Z released "99 Problems," a song that concerned—among other things—the law governing when police may search the vehicles of criminal suspects. The song recounts a conversation between the rapper and a police officer who pulled him over in 1994.

> Officer: Do you mind if I look around the car a little bit?
>
> Jay-Z: Well, my glove compartment is locked, so is the trunk and the back,
>
> And I know my rights so you go'n need a warrant for that
>
> Officer: Aren't you sharp as a tack, some type of lawyer or something
>
> Or somebody important or something?"
>
> Jay-Z: Nah I ain't pass the bar but I know a little bit ...43

Professor Caleb Mason published an essay in 2012 that

examines "99 Problems" in great detail, focusing particularly on its relevance to criminal procedure.[44]

> If this Essay serves no other purpose, I hope it serves to debunk, for any readers who persist in believing it, the myth that locking your trunk will keep the cops from searching it. Based on the number of my students who arrived at law school believing that if you lock your trunk and glove compartment, the police will need a warrant to search them, I surmise that it's even more widespread among the lay public. But it's completely, 100% wrong.
>
> There is no warrant requirement for car searches. The Supreme Court has declared unequivocally that because cars are inherently mobile (and are pervasively regulated, and operated in public spaces), it is reasonable under the Fourth Amendment for the police to search the car–the whole car, and everything in the car, including containers–whenever they have probable cause to believe that the car contains evidence of crime. You don't have to arrest the person, or impound the vehicle. You just need probable cause to believe that the car contains evidence of crime. So, in any vehicle stop, the officers may search the entire car, without consent, if they develop probable cause to believe that car contains, say, drugs.
>
> All the action, in short, is about probable cause. Warrants never come into the picture. The fact that the trunk and glove compartments are locked is completely irrelevant. Now, Jay-Z may have just altered the lyrics for dramatic effect, but that would be unfortunate insofar as the song is going to reach many more people than any criminal procedure lecture, and everyone should really

> know the outline of the law in this area. What the line should say is: "You'll need some p.c. for that."

In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), the Court decided "whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein." For the majority, the question was straightforward. In an opinion joined by six other Justices, Justice Sotomayor wrote: "Because the scope of the automobile exception extends no further than the automobile itself, it did not justify Officer Rhodes' invasion of the curtilage. Nothing in this Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant. Such an expansion would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and '"untether"' the exception '"from the justifications underlying"' it." The Court rejected the idea "that the automobile exception is a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage."

Justice Alito dissented sharply, quoting Charles Dickens: "If that is the law, [a character in *Oliver Twist*] exclaimed, 'the law is a ass—a idiot.'" Justice Alito noted, "If the motorcycle had been parked at the curb, instead of in the driveway, it is undisputed that Rhodes could have searched it without obtaining a warrant." He found it bizarre that search became

"unreasonable" "[b]ecause, in order to reach the motorcycle, [the officer] had to walk 30 feet or so up the driveway of the house rented by petitioner's girlfriend, and by doing that, ... invaded the home's 'curtilage.'"

PART XI

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 2)

SEARCH INCIDENT TO A LAWFUL ARREST

Warrant Exception: Searches Incident to a Lawful Arrest

When police perform a lawful arrest, they are allowed to search the arrestee. The permissible scope of such searches—known as searches incident to lawful arrest ("SILA")—has been the subject of multiple Supreme Court cases. No warrant is required for a SILA.45

For a search to be justified as a SILA: (1) there must have been an arrest, (2) the arrest must have been "lawful," and (3) the search must be "incident" to the arrest—that is, close in time and space to the arrest.

Later in the semester, we will study when arrests are permitted. For now, note that because police often need no warrant to arrest a suspect, a SILA can sometimes result from two distinct warrant exceptions. The first allows the underlying arrest, and the second allows the ensuing search.

CHIMEL V. CALIFORNIA (1969)

Supreme Court of the United States

Ted Steven Chimel v. California

Decided June 23, 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. In some rooms the search was relatively cursory. In the master bedroom and sewing room, however, the officers directed the petitioner's wife to open drawers and "to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." 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.

***

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.

***

In the next case, the Court made clear that a search cannot be "incident to a lawful arrest" if no one is arrested.

KNOWLES V. IOWA (1998)

Supreme Court of the United States

Patrick Knowles v. Iowa

Decided Dec. 8, 1998 – 525 U.S. 113

Chief Justice REHNQUIST delivered the opinion of the Court.

An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. We answer this question "no."

Knowles was stopped in Newton, Iowa, after having been clocked driving 43 miles per hour on a road where the speed limit was 25 miles per hour. The police officer issued a citation to Knowles, although under Iowa law he might have arrested him. The officer then conducted a full search of the car, and under the driver's seat he found a bag of marijuana and a "pot

pipe." Knowles was then arrested and charged with violation of state laws dealing with controlled substances.

Before trial, Knowles moved to suppress the evidence so obtained. He argued that the search could not be sustained under the "search incident to arrest" exception because he had not been placed under arrest. At the hearing on the motion to suppress, the police officer conceded that he had neither Knowles' consent nor probable cause to conduct the search. He relied on Iowa law dealing with such searches.

[Under Iowa law at the time, when an officer was authorized to arrest someone for a traffic offense but instead issued a citation, "the issuance of a citation in lieu of an arrest" did "not affect the officer's authority to conduct an otherwise lawful search."]

***

[W]e [have] noted the two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. But neither of these underlying rationales for the search incident to arrest exception is sufficient to justify the search in the present case.

***

[T]he authority to conduct a full field search as incident to an arrest [is] a "bright-line rule," which [is] based on the concern for officer safety and destruction or loss of evidence, but which [does] 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. The judgment of the Supreme Court of Iowa is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

When the Court decided *Riley v. California* in 2014, it considered facts about a "container" that would have been unimaginable in 1973. Just a few decades ago, no arrestee had in his pocket a mini-computer full of private data, much less one capable of connecting to even more powerful computers with vast repositories of additional private information. Today, most arrestees carry such devices. The question before the Court was whether the rule from *Robinson* allows police to obtain data from a mobile phone found during a search incident to lawful arrest.

RILEY V. CALIFORNIA (2014)

Supreme Court of the United States

David Leon Riley v. California

Decided June 25, 2014 – 134 S. Ct. 2473

Chief Justice ROBERTS delivered the opinion of the Court.

[This] case[] raise[s] a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I

A

[P]etitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department

policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood.

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because ... gang members will often video themselves with guns or take pictures of themselves with the guns." Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that

earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. Prior to trial, Riley moved to suppress all evidence that the police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. At Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed. The court relied on [] California Supreme Court [precedent], which held that the Fourth Amendment permits a warrantless search of cell phone data incident to an arrest, so long as the cell phone was immediately associated with the arrestee's person.

The California Supreme Court denied Riley's petition for review and we granted certiorari.

II

In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

The [] case[] before us concern[s] the reasonableness of a

warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.

Although the existence of the exception for such searches has been recognized for a century, its scope has been debated for nearly as long. That debate has focused on the extent to which officers may search property found on or near the arrestee. [The Court then discussed the development of the law in *Chimel, Robinson*, and *Gant.*]

III

[We now must] decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. [The] phone[] [is]

based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "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."

On the government interest side, [the Court held in *Robinson*] that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, any privacy interests retained by an individual after arrest [are] significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search [we have previously] considered.

We therefore hold [] that officers must generally secure a warrant before conducting such a search.

A

In doing so, we do not overlook ... that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the

probability in a particular arrest situation that weapons or evidence would in fact be found." Rather than requiring [] "case-by-case adjudication" ... we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the [] exception."

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.***

2

California focus[es] primarily on ... preventing the destruction of evidence. Riley concede[s] that officers could have seized and secured [his] cell phone[] to prevent destruction of evidence while seeking a warrant. That is a sensible concession. And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

***

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, rather than a container the size of the cigarette package in *Robinson*.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell

phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data

are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely

"an inconvenience to be somehow 'weighed' against the claims of police efficiency."

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when '"the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.

In light of the availability of the exigent circumstances exception, there is no reason to believe that law enforcement officers will not be able to address some of the more extreme hypotheticals that have been suggested: a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone. The defendants here recognize—indeed, they stress—that such fact-specific threats may justify a warrantless search of cell phone data. The critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case.

Modern cell phones are not just another technological

convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

***

Notes, Comments, and Questions

Let's reconsider Jay-Z's predicament in "99 Problems." If an officer arrests Jay-Z for reckless driving after catching him driving 75 in a 55 mph zone, can the officer search the trunk for drugs?

What if instead the officer stops Jay-Z for speeding, looks up the license plate, and sees that Los Angeles County has an outstanding warrant for Jay-Z's arrest for the crime of marijuana possession. Now can the officer search the trunk?

Two additional points to consider:

When an unarrested third party is near a car, there may be authority for a "sweep" (to quickly search the vehicle for dangerous items third parties could use).

When an unarrested third party is at a house that police wish to search, police likely can secure the house temporarily as

they seek a warrant (to prevent mischief by, say, Chimel's wife). This rule applies only if police have probable cause; otherwise, they cannot obtain a warrant.

PART XII

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 3)

CONSENT

Waiving the Warrant Requirement: Consent

As is true of most constitutional rights, the right to be free from warrantless searches can be waived. Police investigations rely every day on such consent. Owners of vehicles and luggage allow officers to search their effects, and occupants of houses allow officers to enter and look around. There is no dispute about the principle that genuine consent serves as a valid substitute for a search warrant. The controversial questions include what is necessary for consent to be valid, who may provide valid consent, and whether certain police tactics render otherwise-valid consent ineffective. Consent to search must be 1) voluntary—it cannot be coerced through threats or force; 2) made by an individual with apparent or actual authority over the property to be searched. Your neighbor cannot consent to the search of your car.

Notes, Comments, and Questions

The Court addressed consent searches on Greyhound buses in *United States v. Drayton*, 536 U.S. 194 (2002). There, the Court held that police officers could board a bus and ask for permission to search the property of passengers, as long as under the totality of the circumstances the officers obtained valid consent. The majority reiterated that officers need not advise passengers of their right to leave or to refuse consent. Previously, in *Florida v. Bostick*, 501 U.S.429 (1991), the Court held that officers may approach bus passengers at random to ask questions and request their consent to searches, provided "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *See also Ohio v. Robinette*, 519 U.S. 33 (1996) (rejecting rule created by Ohio judges that required officers at traffic stops to state "'At this time you legally are free to go' or [] words of similar import" before initiating extra questioning or seeking consent to search).

Consider the following scenarios:

A police officer assigned to be a "school resource officer" at a high school confronts a student who has been sent to the principal's office for disrespectful classroom behavior. The officer says, "You must be on drugs to act so stupid. Let me see what's in that backpack, and then you can go see the

principal." If the student hands over the backpack, does the officer have valid consent to search it? Why or why not?

A police officer has probable cause to believe that drugs are being stored at a certain house. The officer, without a warrant, knocks on the door. When someone answers, the officer says, "I could get a warrant to search this house for drugs, but I'd rather save myself the trouble. If you let me look around the house and I don't find anything, I'll move on to other business. But if you refuse, I'll be back soon with a warrant, and my partner and I will search this place from top to bottom." If the person at the door admits the officer inside, does the officer have valid consent to enter and search the house? Why or why not?

ILLINOIS V. RODRIGUEZ (1990)

U.S. Supreme Court

Illinois v. Rodriguez, 497 U.S. 177 (1990)

Justice SCALIA delivered the opinion of the Court.

***

I

Respondent Edward Rodriguez was arrested in his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry to the apartment with the consent and assistance of Gail Fischer, who had lived there with respondent for several months. The relevant facts leading to the arrest are as follows .

On July 26, 1985, police were summoned to the residence of Dorothy Jackson on South Wolcott in Chicago. They were

met by Ms. Jackson's daughter, Gail Fischer, who showed signs of a severe beating. She told the officers that she had been assaulted by respondent Edward Rodriguez earlier that day in an apartment on South California. Fischer stated that Rodriguez was then asleep in the apartment, and she consented to travel there with the police in order to unlock the door with her key so that the officers could enter and arrest him. During this conversation, Fischer several times referred to the apartment on South California as "our" apartment, and said that she had clothes and furniture there. It is unclear whether she indicated that she currently lived at the apartment, or only that she used to live there.

The police officers drove to the apartment on South California, accompanied by Fischer. They did not obtain an arrest warrant for Rodriguez, nor did they seek a search warrant for the apartment. At the apartment, Fischer unlocked the door with her key and gave the officers permission to enter. They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with white powder that they believed (correctly, as later analysis showed) to be cocaine. They proceeded to the bedroom, where they found Rodriguez asleep and discovered additional containers of white powder in two open attache cases. The officers arrested Rodriguez and seized the drugs and related paraphernalia.

Rodriguez was charged with possession of a controlled substance with intent to deliver. He moved to suppress all

evidence seized at the time of his arrest, claiming that Fischer had vacated the apartment several weeks earlier and had no authority to consent to the entry. The Cook County Circuit Court granted the motion, holding that, at the time she consented to the entry, Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident," but rather an "infrequent visitor" at the apartment on South California, based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment. The Circuit Court also rejected the State's contention that, even if Fischer did not possess common authority over the premises, there was no Fourth Amendment violation if the police reasonably believed at the time of their entry that Fischer possessed the authority to consent.

***

II

The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. *Payton v. New York*, 445 U. S. 573 (1980); *Johnson v. United States*, 333 U. S. 10 (1948). The prohibition does not apply, however, to situations in which

voluntary consent has been obtained, either from the individual whose property is searched, *see Schneckloth v. Bustamonte*, 412 U. S. 218 (1973), or from a third party who possesses common authority over the premises, *see United States v. Matlock, supra*, 415 U.S. at 415 U. S. 171. The State of Illinois contends that that exception applies in the present case.

As we stated in *Matlock*, 415 U.S. at 415 U. S. 171, n. 7, "[c]ommon authority" rests "on mutual use of the property by persons generally having joint access or control for most purposes . . . ." The burden of establishing that common authority rests upon the State. On the basis of this record, it is clear that burden was not sustained. The evidence showed that, although Fischer, with her two small children, had lived with Rodriguez beginning in December, 1984, she had moved out on July 1, 1985, almost a month before the search at issue here, and had gone to live with her mother. She took her and her children's clothing with her, though leaving behind some furniture and household effects. During the period after July 1, she sometimes spent the night at Rodriguez's apartment, but never invited her friends there and never went there herself when he was not home. Her name was not on the lease, nor did she contribute to the rent. She had a key to the apartment, which she said at trial she had taken without Rodriguez's knowledge (though she testified at the preliminary hearing that Rodriguez had given her the key). On these facts, the State has not established that, with respect to the South California apartment, Fischer had "joint access or control for most

purposes." To the contrary, the Appellate Court's determination of no common authority over the apartment was obviously correct.

III

A

The State contends that, even if Fischer did not in fact have authority to give consent, it suffices to validate the entry that the law enforcement officers reasonably believed she did.

***

"[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises."

***

It is apparent that, in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government — whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure

under one of the exceptions to the warrant requirement — is not that they always be correct, but that they always be reasonable.

***

We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment, and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape. See *Archibald v. Mosel*, 677 F.2d 5 (CA1 1982).*

***

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

Dorothy Jackson summoned police officers to her house to report that her daughter, Gail Fischer, had been beaten. Fischer told police that Ed Rodriguez, her boyfriend, was her assaulter. During an interview with Fischer, one of the officers asked if Rodriguez dealt in narcotics. Fischer did not respond. Fischer did agree, however, to the officers' request to let them into Rodriguez's apartment so that they could arrest him for

battery. The police, without a warrant and despite the absence of an exigency, entered Rodriguez's home to arrest him. As a result of their entry, the police discovered narcotics that the State subsequently sought to introduce in a drug prosecution against Rodriguez.

The majority agrees with the Illinois Appellate Court's determination that Fischer did not have authority to consent to the officers' entry of Rodriguez's apartment. *Ante* at 497 U. S. 181-182. The Court holds that the warrantless entry into Rodriguez's home was nonetheless valid if the officers reasonably believed that Fischer had authority to consent.

***

Unlike searches conducted pursuant to the recognized exceptions to the warrant requirement, *see supra* at 497 U. S. 191-192, third-party consent searches are not based on an exigency, and therefore serve no compelling social goal. Police officers, when faced with the choice of relying on consent by a third party or securing a warrant, should secure a warrant, and must therefore accept the risk of error should they instead choose to rely on consent.

***

A search conducted pursuant to an officer's reasonable but mistaken belief that a third party had authority to consent is thus on an entirely different constitutional footing from one based on the consent of a third party who in fact has such authority. Even if the officers reasonably believed that Fischer had authority to consent, she did not, and Rodriguez's

expectation of privacy was therefore undiminished. Rodriguez accordingly can challenge the warrantless intrusion into his home as a violation of the Fourth Amendment.

***

———

Now imagine that two people are present when police request consent to enter a home. One person consents while the other says, "Stay out!" Consent or no consent? Why or why not? The Court addresses this issue in the next case.

GEORGIA V. RANDOLPH (2006)

Supreme Court of the United States

Georgia v. Scott Fitz Randolph

Decided March 22, 2006 – 547 U.S. 103

Justice SOUTER delivered the opinion of the Court.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's

stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

I

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug

use, but also volunteered that there were "'items of drug evidence'" in the house. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the motion, ruling that Janet Randolph had common authority to consent to the search.

***

II

To the Fourth Amendment rule ordinarily prohibiting the

warrantless entry of a person's house as unreasonable *per se*, one "jealously and carefully drawn" exception recognizes the validity of searches with the voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought or a fellow occupant who shares common authority over property, when the suspect is absent, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained. The significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

A

***

C

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without

some very good reason, no sensible person would go inside under those conditions.

Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant ... has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." [T]here is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

D

Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, the cooperative occupant's invitation adds nothing to the government's side to counter

the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.

***

III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

The judgment of the Supreme Court of Georgia is therefore affirmed.

Chief Justice ROBERTS, with whom Justice SCALIA joins, dissenting. [OMITTED]

FERNANDEZ V. CALIFORNIA (2014)

Supreme Court of the United States

Walter Fernandez v. California

Decided Feb. 25, 2014 – 571 U.S. 292

Justice ALITO delivered the opinion of the Court.

Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph* we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, we consider whether *Randolph* applies if the objecting occupant is absent when another occupant consents. Our opinion in *Randolph* took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. We therefore refuse to extend *Randolph* to the very different situation in this case, where

consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.

I

A

***

After backup arrived, the officers knocked on the door of the apartment unit from which the screams had been heard. Roxanne Rojas answered the door. She was holding a baby and appeared to be crying. Her face was red, and she had a large bump on her nose. The officers also saw blood on her shirt and hand from what appeared to be a fresh injury. Rojas told the police that she had been in a fight. Officer Cirrito asked if anyone else was in the apartment, and Rojas said that her 4–year–old son was the only other person present.

After Officer Cirrito asked Rojas to step out of the apartment so that he could conduct a protective sweep, petitioner appeared at the door wearing only boxer shorts. Apparently agitated, petitioner stepped forward and said, "'You don't have any right to come in here. I know my rights.'" Suspecting that petitioner had assaulted Rojas, the officers removed him from the apartment and then placed him under arrest. Lopez identified petitioner as his initial attacker, and petitioner was taken to the police station for booking.

Approximately one hour after petitioner's arrest, Detective

Clark returned to the apartment and informed Rojas that petitioner had been arrested. Detective Clark requested and received both oral and written consent from Rojas to search the premises. In the apartment, the police found Drifters gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, and ammunition. Rojas' young son also showed the officers where petitioner had hidden a sawed-off shotgun.

B

Petitioner was charged with robbery, infliction of corporal injury on a spouse, cohabitant, or child's parent, possession of a firearm by a felon, possession of a short-barreled shotgun, and felony possession of ammunition.

Before trial, petitioner moved to suppress the evidence found in the apartment, but after a hearing, the court denied the motion. Petitioner then pleaded *nolo contendere* to the firearms and ammunition charges. On the remaining counts—for robbery and infliction of corporal injury—he went to trial and was found guilty by a jury. The court sentenced him to 14 years of imprisonment.

***

B

While consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search, we

recognized a narrow exception to this rule in *Georgia v. Randolph*. The Court reiterated the proposition that a person who shares a residence with others assumes the risk that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." But the Court held that "*a physically present inhabitant's* express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." The Court's opinion went to great lengths to make clear that its holding was limited to situations in which the objecting occupant is present.

III

In this case, petitioner was not present when Rojas consented, but petitioner still contends that *Randolph* is controlling. He advances two main arguments. First, he claims that his absence should not matter since he was absent only because the police had taken him away. Second, he maintains that it was sufficient that he objected to the search while he was still present. Such an objection, he says, should remain in effect until the objecting party "no longer wishes to keep the police out of his home." Neither of these arguments is sound.

We first consider the argument that the presence of the objecting occupant is not necessary when the police are responsible for his absence. In *Randolph*, the Court suggested in dictum that consent by one occupant might not be

sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." We do not believe the statement should be read to suggest that improper motive may invalidate objectively justified removal. Hence, it does not govern here.

This brings us to petitioner's second argument, viz., that his objection, made at the threshold of the premises that the police wanted to search, remained effective until he changed his mind and withdrew his objection. This argument is inconsistent with *Randolph*'s reasoning in at least two important ways. First, the argument cannot be squared with the "widely shared social expectations" or "customary social usage" upon which the *Randolph* holding was based.

It seems obvious that the calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the door. When the objecting occupant is standing at the threshold saying "stay out," a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector. But when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter. Thus, petitioner's argument is inconsistent with *Randolph's* reasoning.

Second, petitioner's argument would create the very sort of practical complications that *Randolph* sought to avoid. The *Randolph* Court recognized that it was adopting a

"formalis[tic]" rule, but it did so in the interests of "simple clarity" and administrability.

***

If *Randolph* is taken at its word—that it applies only when the objector is standing in the door saying "stay out" when officers propose to make a consent search—all of these problems disappear.

Putting the exception the Court adopted in *Randolph* to one side, the lawful occupant of a house or apartment should have the right to invite the police to enter the dwelling and conduct a search. Any other rule would trample on the rights of the occupant who is willing to consent. Such an occupant may want the police to search in order to dispel "suspicion raised by sharing quarters with a criminal." And an occupant may want the police to conduct a thorough search so that any dangerous contraband can be found and removed. In this case, for example, the search resulted in the discovery and removal of a sawed-off shotgun to which Rojas' 4–year–old son had access.

Denying someone in Rojas' position the right to allow the police to enter *her* home would also show disrespect for her independence. Having beaten Rojas, petitioner would bar her from controlling access to her own home until such time as he chose to relent. The Fourth Amendment does not give him that power.

The judgment of the California Court of Appeal is affirmed.

Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

This case calls for a straightforward application of *Randolph*. The police officers in *Randolph* were confronted with a scenario closely resembling the situation presented here. After Walter Fernandez, while physically present at his home, rebuffed the officers' request to come in, the police removed him from the premises and then arrested him, albeit with cause to believe he had assaulted his cohabitant, Roxanne Rojas. At the time of the arrest, Rojas said nothing to contradict Fernandez' refusal. About an hour later, however, and with no attempt to obtain a search warrant, the police returned to the apartment and prevailed upon Rojas to sign a consent form authorizing search of the premises.

In this case, the police could readily have obtained a warrant to search the shared residence. The Court does not dispute this, but instead disparages the warrant requirement as inconvenient, burdensome, entailing delay "[e]ven with modern technological advances."

Although the police have probable cause and could obtain a warrant with dispatch, if they can gain the consent of someone other than the suspect, why should the law insist on the formality of a warrant? Because the Framers saw the neutral magistrate as an essential part of the criminal process shielding all of us, good or bad, saint or sinner, from unchecked police activity.

I would honor the Fourth Amendment's warrant

requirement and hold that Fernandez' objection to the search did not become null upon his arrest and removal from the scene. "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."

Notes, Comments, and Questions

Justice Souter, who wrote for the majority in *Randolph*, retired before *Fernandez* was decided. In addition, Justice Kennedy, who voted with the *Randolph* majority, supported the *Fernandez* majority in its limitation of the holding of *Randolph* to its unusual facts. Justice Breyer, who concurred with the Court's judgement in *Randolph* but did not endorse all of the majority's reasoning, also joined Justice Alito's majority opinion in *Fernandez*. In short, while *Randolph* remains good law, its reasoning may not have support from a current majority of the Court, and its holding is unlikely to be applied to new fact patterns.

Beyond the somewhat esoteric questions presented by *Randolph* and *Fernandez*, the broader issue of consent inspires intense disagreements. In particular, dissenting Justices question whether people can really "terminate encounters" with police officers as easily as majority opinions seems to suggest, and they argue that refusing consent is not always practical (or even possible), particularly among portions of

the populations already uneasy with police. Observers note that gender, among other factors, affects whether one has the confidence to deny consent. *See* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard,* 99 J. Crim L. & Criminology 51 (2009) (reporting on random survey of Boston residents concerning sidewalks and buses, finding that "women and young people feel less free to leave than other groups").

On the other hand, robust cooperation with police is essential to the prevention and detection of crime. If police needed a warrant every time they searched a car, bag, or house, investigations would be slowed considerably. This reality encourages Justices to avoid placing high hurdles in the path of officers who seek consent from members of the public.

The Authority of Co-Occupants and Co-Owners to Consent to Searches

Students, generally familiar with shared housing, frequently ask about the scope of authority possessed by a co-occupant to consent to searches of shared living quarters. In particular, when two or more students share a common living room and kitchen yet have individual bedrooms, can one resident of a shared apartment allow police to search the entire premises? The answer is that residents may authorize searches of areas

over which they have control, whether sole control or shared control. Accordingly, in the apartment described above, a resident could permit police to search the living room, the kitchen, and her own personal bedroom, but she would not have authority to authorize searches of someone else's bedroom.

The same principle applies to items that are shared or are lent by an owner to another person. Someone permitted to use and carry a backpack—whether the sole owner, a co-owner, or a borrower—may authorize police to search the bag.

Recall that police can rely on apparent authority—a search is reasonable as long as officers reasonably believe they receive valid consent. Nonetheless, officers should be careful when entering shared premises with consent to learn what areas are controlled by the consenting resident.

PART XIII

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 4)

Warrant Exception: Exigent Circumstances

The Court has grouped a handful of recurring situations under the umbrella term "exigent circumstances." This exception allows police to conduct searches without warrants as long as officers have probable cause to believe that one of the approved kinds of unusual situations—that is, exigent circumstances—exists. For all the categories of exigent circumstances, the Court has decided that seeking a warrant would be impossible, or at least impractical. The key categories are: (1) hot pursuit of a fleeing criminal suspect, (2) protection of public safety from immediate threats, and (3) preservation

of evidence (that officers have probable cause to believe is subject to seizure and will be found on the premises) from destruction.

We begin with hot pursuit.

EXIGENT CIRCUMSTANCES: HOT PURSUIT

Supreme Court of the United States

Warden, Maryland Penitentiary v. Bennie Joe Hayden

Decided May 29, 1967 – 387 U.S. 294

Mr. Justice BRENNAN delivered the opinion of the Court.

***

I

About 8 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland. He took some $363 and ran. Two cab

drivers in the vicinity, attracted by shouts of "Holdup," followed the man to 2111 Cocoa Lane. One driver notified the company dispatcher by radio that the man was a Negro about 5' 8" tall, wearing a light cap and dark jacket, and that he had entered the house on Cocoa Lane. The dispatcher relayed the information to police who were proceeding to the scene of the robbery. Within minutes, police arrived at the house in a number of patrol cars. An officer knocked and announced their presence. Mrs. Hayden answered, and the officers told her they believed that a robber had entered the house, and asked to search the house. She offered no objection.46

The officers spread out through the first and second floors and the cellar in search of the robber. Hayden was found in an upstairs bedroom feigning sleep. He was arrested when the officers on the first floor and in the cellar reported that no other man was in the house. Meanwhile an officer was attracted to an adjoining bathroom by the noise of running water, and discovered a shotgun and a pistol in a flush tank; another officer who, according to the District Court, "was searching the cellar for a man or the money" found in a washing machine a jacket and trousers of the type the fleeing man was said to have worn. A clip of ammunition for the pistol and a cap were found under the mattress of Hayden's bed, and ammunition for the shotgun was found in a bureau drawer in Hayden's room. All these items of evidence were introduced against respondent at his trial.

II

We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, "the exigencies of the situation made that course imperative." The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.

[T]he seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

***

Notes, Comments, and Questions

Hot pursuit allows officers to follow a fleeing felon into a house. The Court has explained that "'*hot pursuit*' means some sort of a chase, but it need not be an extended hue and cry 'in and about (the) public streets.'" *United States v. Santana*, 427 U.S. 38 (1976).

After entering a home in hot pursuit, police may look around to protect themselves, find the suspect, find weapons, etc. The Court in *Hayden* even allows an officer to search a washing machine around the time the suspect was caught elsewhere. Consider the following scenario:

Police have probable cause to arrest a suspect for a misdemeanor. The suspect flees, and police give chase. If the suspect enters a home, may police follow? Why or why not? *See Stanton v. Sims*, 571 U.S. 3 (2013) (declining to decide the question); *People v. Wear*, 893 N.E.2d 631 (Ill. 2008) (extending "hot pursuit" doctrine to misdemeanors).

In addition to its appearance in criminal procedure law, "hot pursuit" is a term of art in international law. A "backgrounder" published by the Council on Foreign Relations (CFR) describes the doctrine as follows: "The doctrine generally pertains to the law of the seas and the ability of one state's navy to pursue a foreign ship that has violated

laws and regulations in its territorial waters (twelve nautical miles from shore), even if the ship flees to the high seas." Quoting Professor Michael P. Scharf, the CFR document explained further: "It means you are literally and temporally in pursuit and following the tail of a fugitive. ... [A state] is allowed to temporarily violate borders to make an apprehension under those circumstances."

Students interested in further information can review the 1982 UN Convention on the Law of the Sea, which covers hot pursuit in Article 111, along with the 1958 Convention on the High Seas, which covers the doctrine in Article 23. Students will notice similarities among the international law doctrine and our domestic criminal procedure rule. Under each, state agents are permitted to briefly enter otherwise prohibited areas for law enforcement purposes. On the other hand, application of "hot pursuit" on land (for example, entering a foreign country to capture or kill a wanted terrorist) is disputed in international law.

In the next case, the Court considers whether a "routine felony arrest" constitutes exigent circumstances and accordingly allows warrantless entry of a home in which police have probable cause to believe the felony suspect will be found. Students should consider that even in the Bronx in 1970—the location and year of the search at issue—the crime rate was not so high that arresting a man suspected of murdering someone two days earlier during an armed robbery had become "routine." What then made this scenario different from "hot

pursuit" and other sorts of exigent circumstances in the eyes of the Justices?

WARDEN V. HAYDEN (1967)

Supreme Court of the United States

Theodore Payton v. New York

Decided April 15, 1980 – 445 U.S. 573

Mr. Justice STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

I

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. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of Criminal Procedure, and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute. He had no occasion, however, to decide whether those circumstances also would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed. The New York Court of Appeals affirmed the conviction[] of [] Payton.

Before addressing the narrow question presented by these appeals, we put to one side other related problems that are *not* presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by

exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated [] *Payton's* [] case[] as involving [a] routine arrest in which there was ample time to obtain a warrant, and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton. We also note that it [is not] argued that the police lacked probable cause to believe that [Payton] was at home when they entered. Finally, we are dealing with [an] entr[y] into [a] home[] made without the consent of any occupant.

II

***

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable

cause to associate the property with criminal activity. [T]his distinction has equal force when the seizure of a person is involved. [T]he critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ... houses ... shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

IV

***

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.

Because no arrest warrant was obtained, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

***

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless

felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

***

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long.

Notes, Comments, and Questions

Consider the "routine felony arrest" in other locations. Do the police need a search warrant to enter third party's home? Suspect's place of employment? Suspect's privately-owned business? Suspect's girlfriend's home? Suspect's parent's home?

Exigent Circumstances: Public Safety

The next category of exigent circumstances includes situations in which police believe public safety is at immediate risk. For example, when operators receive a 911 call reporting an ongoing assault, police need not seek a warrant before heading to the crime scene and, if necessary, entering a home.

Firefighters and emergency medical personnel also enter buildings without warrants to provide prompt aid. Similarly, officers who hear screams coming from a house or perceive other evidence of imminent danger may have probable cause that justifies warrantless entry. In these situations, police could not effectively "serve and protect" without an exception to the warrant requirement.

PAYTON V. NEW YORK (1980)

Supreme Court of the United States

Brigham City, Utah v. Charles W. Stuart

Decided May 22, 2006 – 547 U.S. 398

Chief Justice ROBERTS delivered the opinion of the [unanimous] 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.

I

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.

We granted certiorari in light of differences among state courts and the Courts of Appeals concerning the appropriate

Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation.

II

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, to prevent the imminent destruction of evidence, or to engage in "'hot pursuit'" of a fleeing suspect. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" 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.

***

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." "It was loud and it was tumultuous." The officers heard "thumping and crashing" and people yelling "stop, stop" and "get off me." As the trial court found, "it was obvious that ... knocking on the front door" would have been futile. 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. They found two juveniles drinking beer in the backyard. 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.

The manner of the officers' entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and "yelled in police." When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer's announcement of his presence was at least equivalent to a knock on the screen door. Indeed, it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.

Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.

* * *

The Michigan Court of Appeals affirmed, concluding that the State had not met its burden. Perhaps because one judge dissented, the Michigan Supreme Court initially granted an application for leave to appeal. After considering briefs and oral argument, however, the majority of that Court vacated its earlier order because it was "no longer persuaded that the questions presented should be reviewed by this Court."

Today, without having heard Officer Goolsby's testimony, this Court decides that the trial judge got it wrong. I am not persuaded that he did, but even if we make that assumption, it is hard to see how the Court is justified in micromanaging the day-to-day business of state tribunals making fact-intensive decisions of this kind. We ought not usurp the role of the factfinder when faced with a close question of the reasonableness of an officer's actions, particularly in a case tried in a state court. I therefore respectfully dissent.

* * *

Exigent Circumstances: Preserving Evidence from Destruction

Our next category of exigent circumstances includes situations in which police have probable cause to believe (1) that items subject to seizure are in a particular place and (2) that waiting for a warrant would put the evidence at serious risk of destruction. Common scenarios involve suspects who may be about to flush drugs down the toilet, burn documents, or tamper with electronic devices.

BRIGHAM CITY V. STUART (2006)

Supreme Court of the United States

Kentucky v. Hollis Deshaun King

Decided May 16, 2011 – 563 U.S. 452

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.

I

A

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. Gibbons had radioed that the suspect was running into the apartment on

the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, 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 "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t 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.

***

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.

***

III

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.

***

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb

testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either "'Police, police, police'" or "'This is the police.'" This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment.

The judgment of the Kentucky Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

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, nevermind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.

This case involves a principal exception to the warrant requirement, the exception applicable in "exigent circumstances." "[C]arefully delineated," the exception should

govern only in genuine emergency situations. Circumstances qualify as "exigent" when there is an imminent risk of death or serious injury, or danger that evidence will be immediately destroyed, or that a suspect will escape. The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct.

That heavy burden has not been carried here. There was little risk that drug-related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization. As the Court recognizes, "[p]ersons in possession of valuable drugs are unlikely to destroy them unless they fear discovery by the police." Nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity.

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as "'entitled to special protection.'" Home intrusions, the Court has said, are indeed "the chief evil against which ... the Fourth Amendment is directed." "'[S]earches and seizures inside a home without a warrant are [therefore] presumptively unreasonable.'" How "secure" do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds

indicative of things moving, forcibly enter and search for evidence of unlawful activity?

***

Under an appropriately reined-in "emergency" or "exigent circumstances" exception, the result in this case should not be in doubt. The target of the investigation's entry into the building, and the smell of marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police "probable cause ... sufficient ... to obtain a warrant to search the ... apartment." As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry.

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.

* * *

EXIGENT CIRCUMSTANCES: PRESERVING EVIDENCE FROM DESTRUCTION

Exigent Circumstance: Drunk Driving

Questions concerning the scope of the "exigent circumstances" exception to the warrant requirement have arisen repeatedly in the context of drunk driving cases. These cases commonly involve a special kind of evidence—alcohol in the blood of a driver—at risk of being destroyed by the body's metabolism.

KENTUCKY V. KING (2011)

Supreme Court of the United States

Missouri v. Tyler G. McNeely

Decided April 17, 2013 – 569 U.S. 141

Justice SOTOMAYOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, and an opinion with respect to Part[] III, in which Justice SCALIA, Justice GINSBURG, and Justice KAGAN join.

In *Schmerber v. California*, 384 U.S. 757 (1966), this 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." The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth

Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

I

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form,

the officer explained to McNeely 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. McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent.

***

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that ... a warrant ... provides." Absent that established justification, "the fact-specific nature of the reasonableness inquiry" demands that we evaluate each case of alleged exigency based "on its own facts and circumstances."

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances. But the State nevertheless seeks a *per se* rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is

inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It 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. This fact was essential to our holding in *Schmerber*, as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations 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. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept

the "considerable overgeneralization" that a *per se* rule would reflect.

***

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

***

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

The judgment of the Missouri Supreme Court is affirmed.

Chief Justice ROBERTS, with whom Justice BREYER and Justice ALITO join, concurring in part and dissenting in part

[Chief Justice Roberts would have provided more robust guidance to law enforcement about precisely when warrantless nonconsensual blood draws are allowed. He wrote:

"A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's 'totality of the circumstances' approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the

Court should be able to offer guidance on how police should handle cases like the one before us."

"In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant."47]

Justice THOMAS, dissenting.

[Justice Thomas argued, "Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment." He noted that all parties agreed about the "rapid destruction of evidence" that "occurs in *every* situation where police have probable cause to arrest a drunk driver."

* * *

Notes, Comments, and

Questions

The Court in *Birchfield v. North Dakota* (2016)holds implied blood-draw consent laws that result in criminal prosecution unconstitutional. What result if the implied consent law results in an administrative (rather than criminal) penalty? For example, suppose a state's implied consent law requires drivers arrested or drunk driving to consent to a breathalyzer, blood draw, saliva or urine analysis or have their license administratively revoked for one year. *See, e.g.*, 577.020, RSMo (2016).

In *Mitchell v. Wisconsin*, 139 S. Ct 2525 (2019), the Court issued a plurality opinion affirming the legality of a warrantless blood draw conducted by police after a suspect became unconscious. The plurality opinion—approved by four Justices—stated that when a driver is unconscious and cannot submit to a breath test, police may perform a blood draw under the exigent circumstances exception to the warrant requirement. The opinion relied upon *Schmerber v. California*, *Missouri v. McNeely*, and *Birchfield*. Justice Thomas, concurring in the judgment, would have held that the natural metabolism of alcohol by the human body always creates a *per se* exigency "once police have probable cause to believe the driver is drunk." Four Justices dissented, in two separate opinions.

Notes, Comments, and

Questions

In 1984, the Court prohibited police from entering a house to arrest an apparently intoxicated man who had recently driven his car off the road and stumbled home. In 2016, the Court allowed states to demand—under threat of criminal prosecution—that motorists arrested for drunk driving submit to breath tests. The home entry was "unreasonable," and demanding the breath test is "reasonable."

Students might also consider, however, that the decisions could result in part on changing attitudes toward drunk driving. What was a noncriminal violation in Wisconsin in the 1980s is now punished far more severely across the nation. Mothers Against Drunk Driving, founded in 1980 after the founder's daughter was killed in a crash involving a drunk driver, won important legislative victories beginning in 1984, when Congress acted to force states to raise their drinking ages to 21 years.48

PART XIV

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 5)

DRUNK DRIVING

MISSOURI V. MCNEELY (2013)

PART XV

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 6)

BORDER SEARCHES

Warrant Exception: Ports of Entry

When persons and items enter the United States from abroad, agents of the executive enjoy expansive authority to conduct searches and seizures without a warrant. The Court has repeatedly chosen to provide relatively little judicial oversight of the executive's use of that authority, especially when compared to oversight of common domestic policing.

We begin with the Court's approval of routine searches at the California-Mexico border. No quantum of evidence (or suspicion) is needed.

UNITED STATES V. FLORES-MONTANO (2004)

Supreme Court of the United States

United States v. Manuel Flores-Montano

Decided March 30, 2004 – 541 U.S. 149

Chief Justice REHNQUIST delivered the opinion of the [unanimous] Court.

***

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." Congress, since the beginning of our Government,

"has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.

That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 ½ fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry. Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%. In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days.

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

be more of an invasion of privacy than the search of the automobile's passenger compartment.

Justice BREYER, concurring.

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

* * *

In addition to permitting extensive suspicionless searches and seizures at international borders, the Court has permitted similar searches and seizures at checkpoints some distance from the border. The fixed checkpoint at issue in the next case was 66 miles north of the United States-Mexico border.

UNITED STATES V. MARTINEZ-FUERTE (1976)

Supreme Court of the United States

United States v. Amado Martinez-Fuerte

Decided July 6, 1976 – 428 U.S. 543

Mr. Justice POWELL delivered the opinion of the Court.

Th[is] case[] involve[s] criminal prosecutions for offenses relating to the transportation of illegal Mexican aliens. [D]efendant was arrested at a permanent checkpoint operated by the Border Patrol away from the international border with Mexico, and [] sought the exclusion of certain evidence on the ground that the operation of the checkpoint was incompatible with the Fourth Amendment. [W]hether the Fourth Amendment was violated turns primarily on whether a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the

particular vehicle contains illegal aliens. We hold today that such stops are consistent with the Fourth Amendment. We also hold that the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant.

I

A

The respondents are defendants in three separate prosecutions resulting from arrests made on three different occasions at the permanent immigration checkpoint on Interstate 5 near San Clemente, Cal. Interstate 5 is the principal highway between San Diego and Los Angeles, and the San Clemente checkpoint is 66 road miles north of the Mexican border.

The "point" agent visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt. Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the "point" agent will conclude that further inquiry is in order. He directs these cars to a secondary inspection area, where their occupants are asked about their citizenship and immigration status. The Government informs us that at San Clemente the average length of an investigation in the secondary inspection area is three to five minutes. A direction to stop in the secondary inspection area could be based on something suspicious about

a particular car passing through the checkpoint, but the Government concedes that none of the three stops at issue was based on any articulable suspicion. During the period when these stops were made, the checkpoint was operating under a magistrate's "warrant of inspection," which authorized the Border Patrol to conduct a routine-stop operation at the San Clemente location.

***

IV

It is agreed that checkpoint stops are "seizures" within the meaning of the Fourth Amendment. The defendants contend primarily that the routine stopping of vehicles at a checkpoint is invalid because *Brignoni-Ponce* must be read as proscribing any stops in the absence of reasonable suspicion. [W]e turn first to whether reasonable suspicion is a prerequisite to a valid stop, a question to be resolved by balancing the interests at stake.

A

Our previous cases have recognized that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. We note here only the substantiality of the public interest in the practice of routine stops for inquiry at

permanent checkpoints, a practice which the Government identifies as the most important of the traffic-checking operations. These checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways. And the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

B

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage without interruption," and arguably on their right to personal security. But it involves only a brief detention of travelers during which "'[a]ll that is required of

the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'"

Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion the stop itself, the questioning, and the visual inspection also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.

***

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where

it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

***

VI

In summary, we hold that stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. And our holding today is limited to the type of stops described in this opinion. "[A]ny further detention ... must be based on consent or probable cause." None of the defendants in these cases argues that the stopping officers exceeded these limitations. We reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case with directions to affirm the conviction of Martinez-Fuerte.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

Today's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures. Consistent with this purpose to debilitate Fourth Amendment protections, the Court's decision today virtually empties the Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment. I dissent.

We are told today [] that motorists without number may be individually stopped, questioned, visually inspected, and then further detained without even a showing of articulable suspicion, let alone the heretofore constitutional minimum of reasonable suspicion, a result that permits search and seizure to rest upon "nothing more substantial than inarticulate hunches." This defacement of Fourth Amendment protections is arrived at by a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure. But that method is only a convenient cover for condoning arbitrary official conduct.

***

Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process will then

inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same "suspicious" physical and grooming characteristics of illegal Mexican aliens.

Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists. To be singled out for referral and to be detained and interrogated must be upsetting to any motorist. One wonders what actual experience supports my Brethren's conclusion that referrals "should not be frightening or offensive because of their public and relatively routine nature." In point of fact, referrals viewed in context, are not relatively routine; thousands are otherwise permitted to pass. But for the arbitrarily selected motorists who must suffer the delay and humiliation of detention and interrogation, the experience can obviously be upsetting. And that experience is particularly vexing for the motorist of Mexican ancestry who is selectively referred, knowing that the officers' target is the Mexican alien. That deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee.49

In short, if a balancing process is required, the balance should be struck to require that Border Patrol officers act upon at least reasonable suspicion in making checkpoint stops. In

any event, even if a different balance were struck, the Court cannot, without ignoring the Fourth Amendment requirement of reasonableness, justify wholly unguided seizures by officials manning the checkpoints.

The cornerstone of this society, indeed of any free society, is orderly procedure. The Constitution, as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government. But to permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure."

Notes, Comments, and Questions

A police officer is 66 miles from the Canadian border. There is no checkpoint. The officer spots a car and is suspicious that it contains Canadians who are not legally in the United States.

How much evidence must the officer have to stop the car to conduct a brief investigation of its occupants?

What is your authority for your answer to the previous question? If you do not have authority to which you can refer, review the Court's opinion in *Martinez-Fuerte*. In that opinion, which mostly concerned fixed checkpoints, the Court referred to prior law concerning roving patrols.

Notes, Comments, and Questions

Students should be aware of three ongoing controversies related to border enforcement: (1) the existence and significance of an "extended border" and areas known as the "functional equivalent" of the border, (2) the treatment of electronic devices crossing the border, and (3) the treatment of persons crossing the border seeking asylum or otherwise fleeing persecution and poverty.

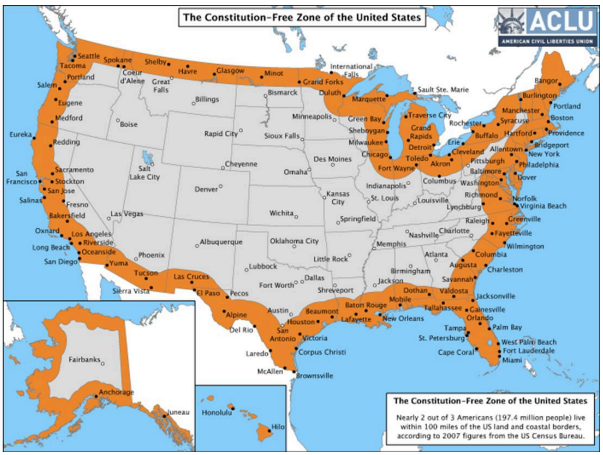
The Functional Border and Extended Border

International airports and the land immediately surrounding those airports are treated as the "functional equivalent" of the border. Accordingly, a traveler flying from England to St.

Louis could be subjected to the same searches permissible at the border itself.

More controversially, federal officials have argued that they possess search and seizure authority within 100 miles of international borders in an area known as the "extended border." *See, e.g.*, 8 C.F.R. § 287.1. If all authority granted to law enforcement at the physical border exists throughout the extended border, then people in New York City, Los Angeles, Houston, New Orleans, Seattle, Washington, D.C., and all of Florida could be subjected to suspicionless searches of their persons and effects at will. Civil libertarian organizations have accordingly decried the concept of the extended border, calling it an unlawful "Constitution-Free Zone."

The map below illustrates the ACLU's take on the extended border:



It is not clear precisely what authority federal officials claim to

possess in the extended border—official guidance documents differ, and actual practice can diverge from such documents—nor is there robust judicial guidance. In an era of increasingly-vigorous immigration enforcement, this issue is attracting more attention.

ELECTRONIC DEVICES AT OR NEAR THE BORDER

Electronic Devices at or Near the Border

Referring to Supreme Court cases granting border officials wide discretion to search persons and effects entering and leaving the United States, federal officials have claimed to have authority to inspect electronic devices at the border. Privacy advocates have argued that searches conducted under this purported authority violate the Fourth Amendment.

Although some caselaw exists on this question, *see, e.g., United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (en banc) (holding that reasonable suspicion is necessary to search electronic devices at border in certain cases); *Alasaad v. McAleenan*, 1:17-cv-11730-DJC (D. Mass. Nov. 12, 2019) (applying rule to larger class of searches); *United States v. Ickes*, 393 F.3d 501 (4th Cir. 2005) (allowing suspicionless searches), the law is not clear. Further litigation is ongoing.

In response to the risk of searches (which could expose

lawful information such as trade secrets, personal correspondence, and embarrassing literature to inspection), some international travelers have begun wiping data from their computers and other devices before entering the United States; they can then download data from the cloud after clearing immigration and customs.

TREATMENT OF REFUGEES, ASYLUM SEEKERS, AND OTHER MIGRANTS

Treatment of Refugees, Asylum Seekers, and Other Migrants

The treatment of border crossers has received significant news coverage recently. In particular, the question of how the United States may treat migrants who claim to be fleeing persecution—especially migrants entering the United States with children—has inspired intense debate. For example, U.S. Senator Kamala Harris visited the Otay Mesa Detention Facility50 near San Diego in June 2018 and called the treatment of detainees "a crime against humanity that is being committed by the United States government." As one might expect, Immigration and Customs Enforcement and Department of Homeland Security officials have disagreed with such assessments and have defended current practices as

lawful exercises of the executive's authority to enforce laws at the border. Immigration law and refugee policy are beyond the scope of this course. Students might nonetheless consider whether the Court's decisions on how the Fourth Amendment restricts (or does not restrict) executive discretion with respect to searches and seizures at the border shed light on what other border enforcement tactics are and are not (and should be or should not be) lawful.

PART XVI

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 7)

TRAFFIC CHECKPOINTS

Warrant Exception: Traffic Checkpoints

In this chapter, we consider two situations in which the Court has authorized warrantless searches: (1) checkpoints, generally aimed at protecting the public from intoxicated drivers, and (2) "protective sweeps" that police may conduct in association with an arrest. Note that sweeps are distinct from searches incident to lawful arrest and are governed by different rules.

We begin with vehicle checkpoints. Checkpoints involve stopping cars randomly—or otherwise selecting cars to stop without any specific reason to believe that the drivers are intoxicated or otherwise breaking the law or transporting items subject to seizure. Accordingly, vehicle checkpoints can be permissible only if the Court allows police seizures of persons and property without even reasonable suspicion, much less probable cause. The question is whether such seizures are "reasonable" under the Fourth Amendment.

* * *

In the next case, the Court considered whether the holding of Michigan v. Sitz—permitting roadway checkpoints to look for

drunk drivers–allows police to conduct random (suspicionless) stops of vehicles to check whether they contain illegal drugs. While a checkpoint for "drugged" drivers would almost surely have been permissible for the same reasons that the Court permitted drunk driving checkpoints, the question of a checkpoint for contraband or other evidence of crime proved more controversial.

INDIANAPOLIS V. EDMOND (2000)

Supreme Court of the United States

City of Indianapolis v. James Edmond

Decided Nov. 28, 2000 – 531 U.S. 32

Justice O'CONNOR delivered the opinion of the Court.

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

I

In August 1998, the city of Indianapolis began to operate

vehicle checkpoints on Indianapolis roads in an effort to interdict unlawful drugs. The city conducted six such roadblocks between August and November that year, stopping 1,161 vehicles and arresting 104 motorists. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs. The overall "hit rate" of the program was thus approximately nine percent.

The parties stipulated to the facts concerning the operation of the checkpoints by the Indianapolis Police Department (IPD) for purposes of the preliminary injunction proceedings instituted below. At each checkpoint location, the police stop a predetermined number of vehicles. Approximately 30 officers are stationed at the checkpoint. Pursuant to written directives issued by the chief of police, at least one officer approaches the vehicle, advises the driver that he or she is being stopped briefly at a drug checkpoint, and asks the driver to produce a license and registration. The officer also looks for signs of impairment and conducts an open-view examination of the vehicle from the outside. A narcotics-detection dog walks around the outside of each stopped vehicle.

The directives instruct the officers that they may conduct a search only by consent or based on the appropriate quantum of particularized suspicion. The officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence. The city agreed in the stipulation to operate the checkpoints in such a way as to ensure that the total

duration of each stop, absent reasonable suspicion or probable cause, would be five minutes or less.

Respondents James Edmond and Joell Palmer were each stopped at a narcotics checkpoint in late September 1998. Respondents then filed a lawsuit on behalf of themselves and the class of all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints. Respondents claimed that the roadblocks violated the Fourth Amendment of the United States Constitution and the search and seizure provision of the Indiana Constitution. Respondents requested declaratory and injunctive relief for the class, as well as damages and attorney's fees for themselves.

***

II

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an "irreducible" component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply. We have [] upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens and at a sobriety checkpoint aimed at removing drunk drivers from the road. In addition we [have] suggested that a similar type of roadblock

with the purpose of verifying drivers' licenses and vehicle registrations would be permissible. In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.

III

It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment. The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. Just as in *Place,1* an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." Rather, what principally distinguishes these checkpoints from those we have previously approved is their primary purpose.

***

We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. [E]ach of the checkpoint programs that we have approved was

designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

***

The primary purpose of the Indianapolis narcotics checkpoints is in the end to advance "the general interest in crime control." We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

***

It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety and border checkpoints that we approved in *Sitz* and *Martinez-Fuerte*. The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program. When law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.

Our holding also does not affect the validity of border

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

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

Chief Justice REHNQUIST, with whom Justice THOMAS joins, and with whom Justice SCALIA joins as to Part I, dissenting. [OMITTED]

* * *

In the next case, the Court considered a police checkpoint designed to find witnesses of a recent crime—a hit-and-run crash. Like Indianapolis v. Edmond, and unlike Michigan v. Sitz, the case involved stopping vehicles without any purpose of protecting the public from immediate hazards presented by their

drivers. However, unlike Edmond, police did not hope to find evidence of wrongdoing by the drivers; instead, they hoped to learn whether the drivers had seen wrongdoing by someone else.

ILLINOIS V. LIDSTER (2004)

Supreme Court of the United States

Illinois v. Robert S. Lidster

Decided Jan. 13, 2004 – 540 U.S. 419

Justice BREYER delivered the opinion of the Court.

This Fourth Amendment case focuses upon a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident. We hold that the police stops were reasonable, hence, constitutional.

I

The relevant background is as follows: On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a 70–year–old bicyclist. The motorist drove off without identifying himself. About one week later at about the same

time of night and at about the same place, local police set up a highway checkpoint designed to obtain more information about the accident from the motoring public.

Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer. The flyer said "ALERT ... FATAL HIT & RUN ACCIDENT" and requested "ASSISTANCE IN IDENTIFYING THE VEHICLE AND DRIVER INVOLVED IN THIS ACCIDENT WHICH KILLED A 70 YEAR OLD BICYCLIST."

Robert Lidster, the respondent, drove a minivan toward the checkpoint. As he approached the checkpoint, his van swerved, nearly hitting one of the officers. The officer smelled alcohol on Lidster's breath. He directed Lidster to a side street where another officer administered a sobriety test and then arrested Lidster. Lidster was tried and convicted in Illinois state court of driving under the influence of alcohol.

Lidster challenged the lawfulness of his arrest and conviction on the ground that the government had obtained much of the relevant evidence through use of a checkpoint stop that violated the Fourth Amendment. The trial court rejected that challenge. But an Illinois appellate court reached

the opposite conclusion. The Illinois Supreme Court agreed with the appellate court.

[W]e granted certiorari. We now reverse the Illinois Supreme Court's determination.

II

The Illinois Supreme Court basically held that our decision in *Edmond* governs the outcome of this case. We do not agree. *Edmond* involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles.

The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.

***

III

***

The relevant public concern was grave. Police were

investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.

The stop advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.

Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. Police contact consisted simply of a request for information and the distribution of a flyer. Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.

For these reasons we conclude that the checkpoint stop was constitutional.

The judgment of the Illinois Supreme Court is [r]eversed.

Notes, Comments, and Questions

The Court made clear in *Indianapolis v. Edmond* that police may not establish checkpoints to investigate whether drivers are transporting illegal drugs. Consider a department that responds as follows:

Police post signs with text like "Drug Checkpoint Ahead" on public highways. Then, after observing drivers who promptly exit the highway after passing the sign, officers investigate the drivers for drug activity. Lawful? Why or why not?

See, e.g., United States v. Williams, 359 F.3d 1019 (8th Cir. 2004) (holding that because "there was no checkpoint," *Edmond* did not apply); *United States v. Neff*, 681 F.3d 1134 (10th Cir. 2012) (holding that the fake-checkpoint ruse was lawful but that "standing alone," a driver's choice to exit after seeing the sign "is insufficient to justify even a brief investigatory detention of a vehicle"); *compare State v. Mack*, 66 S.W.3d 706 (Mo. 2002) (finding that "it is reasonable to conclude that drivers with drugs would 'take the bait' and exit" and holding that stop was reasonable in part because "the checkpoint was set up in an isolated and sparsely populated area offering no services to motorists and was conducted on an evening that would otherwise have little traffic"); *with id.* at 710 (Stith, J., dissenting) (arguing that seizure was unreasonable under *Edmond*).

If a driver exiting the highway immediately after passing a "drug checkpoint ahead" sign is not sufficient to provide reasonable suspicion to justify a vehicle stop (as the Tenth Circuit held), what else should be necessary to justify the stop? In other words, what else must an officer observe after the car exits?

This tactic has attracted attention from the surveilled community. *See, e.g.*, Steve Elliot, "Cops Set Up Fake 'Drug Checkpoint' Signs; Detain and Search Drivers Who React," *Toke Signals* (Jan. 28, 2014); TJ Green, "Fake Drug Checkpoints Are Becoming More Devious," *Weed Blog* (May 3, 2012).

PROTECTIVE SWEEPS

Warrant Exception: Protective Sweeps

Our final case for this chapter concerns "protective sweeps," which police may conduct along with an arrest to protect themselves and others from potential attackers who may be lying in wait. Students should carefully note how the protective sweeps doctrine differs from that regulating searches incident to lawful arrests.

MARYLAND V. BUIE (1990)

Supreme Court of the United States

Maryland v. Jerome Edward Buie

Decided Feb. 28, 1990 – 494 U.S. 325

Justice WHITE delivered the opinion of the Court.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective

sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing" that the area swept harbored an individual posing a danger to the officer or others. We accordingly vacate the judgment below and remand for application of this standard.

I

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for respondent Jerome Edward Buie and his suspected accomplice in the robbery, Lloyd Allen. Buie's house was placed under police surveillance.

On February 5, the police executed the arrest warrant for Buie. They first had a police department secretary telephone Buie's house to verify that he was home. The secretary spoke to a female first, then to Buie himself. Six or seven officers proceeded to Buie's house. Once inside, the officers fanned

out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

The trial court denied Buie's motion to suppress the running suit, stating in part: "The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense." The State introduced the running suit into evidence at Buie's trial. A jury convicted Buie of robbery with a deadly weapon and using a handgun in the commission of a felony.

***

II

It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been

found, including the basement. "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." There is also no dispute that if Detective Frolich's entry into the basement was lawful, the seizure of the red running suit, which was in plain view and which the officer had probable cause to believe was evidence of a crime, was also lawful under the Fourth Amendment. The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime.

III

It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures. Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other

contexts, however, where the public interest is such that neither a warrant nor probable cause is required.

Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.

***

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

IV

The type of search we authorize today is far removed from the "top-to-bottom" search involved in *Chimel*; moreover, it is decidedly not "automati[c]," but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.

V

We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. ...

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

While the Fourth Amendment protects a person's privacy interests in a variety of settings, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." The Court discounts the nature of the intrusion because it believes that the scope of the intrusion is limited. The Court explains that a protective sweep's scope is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding" and confined in duration to a period "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." But these spatial and temporal restrictions are not particularly limiting. A protective sweep would bring within police

purview virtually all personal possessions within the house not hidden from view in a small enclosed space. Police officers searching for potential ambushers might enter every room including basements and attics; open up closets, lockers, chests, wardrobes, and cars; and peer under beds and behind furniture. The officers will view letters, documents, and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dresser drawers or bathroom cupboards. While perhaps not a "full-blown" or "top-to-bottom" search, a protective sweep is much closer to it than to a "limited patdown for weapons" or a "'frisk' of an automobile."

In light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, I firmly believe that police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home. Given the state-court determination that the officers searching Buie's home lacked probable cause to perceive such a danger and therefore were not lawfully present in the basement, I would affirm the state court's decision to suppress the incriminating evidence. I respectfully dissent.

Notes, Comments, and Questions

When comparing lawful "protective sweeps" with searches incident to lawful arrest, students should note (1) the physical scope of a protective sweep will often extend beyond the area in which a SILA is permissible, (2) because sweeps are permitted only to protect against dangers to those present during the arrest, police may search only areas in which an officer may reasonably suspect a person could be found, and (3) the searches must be "cursory inspections" of those spaces.

An open question related to prospective sweeps concerns whether police may conduct them upon entering a house with consent—or in other contexts unrelated to arrests.52 Federal courts have reached divergent results.

Imagine police are investigating a brutal murder of a gang member and suspect that a rival gang is responsible. They obtain consent to enter the home of a witness in a "high-crime" neighborhood. May they "sweep" the house upon entry? Why or why not?

Consider a slightly modified version of the problem presented above. Here, police are investigating an allegation of insider trading that violates federal securities law. They obtain consent to enter the home of a witness in an exclusive gated community. May they "sweep" the house upon entry? Why or why not?

For courts permitting sweeps absent arrests, *see, e.g.*, *United*

States v. Fadual, 16 F. Supp. 3d 270 (S.D.N.Y. 2014) (holding that "under certain circumstances, law enforcement officers may engage in a protective sweep where they gained entry through consent in the first instance" but that the sweep at issue was not lawful); *United States v. Miller,* 430 F.3d 93, 95 (2d Cir. 2005) (allowing sweeps made by the police pursuant to "lawful process, such as an order permitting or directing the officer to enter for the purpose of protecting a third party"); *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) (allowing sweep of mobile home entered by police with consent). For courts holding sweeps unlawful absent an arrest, *see, e.g.*, *United States v. Torres-Castro,* 470 F.3d 992 (10th Cir. 2006) ("Following *Buie,* we held that such 'protective sweeps' are only permitted incident to an arrest."); *United States v. Waldner,* 425 F.3d 514, 517 (8th Cir. 2005) (declining the invitation to "extend *Buie* further"); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (holding search cannot be justified as protective sweep because when it occurred suspect "was *not* under arrest").

PART XVII

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 8)

SEARCHES OF STUDENTS AND PUBLIC EMPLOYEES

Warrant Exception: Searches of Students & Public Employees

Although law enforcement officers conduct the bulk of the searches and seizures covered in this book, other government agents also perform searches and seizures outside the context of normal policing. In this chapter, we consider searches of public school students and public employees.

In public schools, teachers and other school officials must conduct searches to promote safety and to foster an environment conducive to education. Yet students do not forfeit all rights at school, and some searches of students and their effects are unreasonable. (Note that because the Fourth Amendment regulates only state actors, private school students are not protected against "unreasonable" school searches, unless the government is somehow involved.)

NEW JERSEY V. T.L.O. (1985)

Supreme Court of the United States

New Jersey v. T.L.O.

Decided Jan. 15, 1985 – 469 U.S. 325

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list

of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school.

***

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

***

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as

well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search.

Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required." Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ...

action was justified at its inception[;]" second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

***

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is [r]eversed.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

***

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is *not* the same test as the "probable cause"

standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

***

And it may be that the real force underlying today's decision is the belief that the Court purports to reject—the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.

On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. I do not pretend that our traditional Fourth Amendment doctrine automatically answers all of the difficult legal questions that occasionally arise. I do contend, however, that this Court has an obligation to provide some coherent framework to resolve

such questions on the basis of more than a conclusory recitation of the results of a "balancing test." The Fourth Amendment itself supplies that framework and, because the Court today fails to heed its message, I must respectfully dissent.

* * *

Based on the standards set forth in T.L.O. and Redding, consider these potential actions by a school district:

May a school search the mobile phone of a student who was caught texting in class? Does it matter if the teachers search only to see who else was texting with the student or instead search the photos and other data on the phone? See Amy Vorenberg, Indecent Exposure: Do Warrantless Searches of a Student's Cell Phone Violate the Fourth Amendment?, 17 Berkeley J. Crim. L. 62 (2012).

What about random locker searches aimed at finding drugs? What about requiring students to use clear backpacks or to walk through metal detectors when entering the school building?

We now turn to searches of public employees. Supervisors of public employees have a duty to monitor the work of subordinates for the public interest. Beyond reducing waste, fraud, and abuse, supervisors have the day-to-day responsibility of managing staff so that offices accomplish their goals. It remains unclear what privacy rights public employees maintain at work.

In the context of a public employee whose electronic communications were searched by supervisors, the Court in 2010 avoided resolving important questions about public employee

privacy. The Court found the searches at issue "reasonable," in part, because the employee's behavior was egregious and the response of the employer unsurprising. Students should note what issues are not decided by the Court, in addition to noting the holdings.

Notes, Comments, and Questions

On the same day as *Skinner*, the Court decided *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), another case about drug testing public employees. A U.S. Customs Service program required drug testing of employees who sought promotion to jobs involving seizing illegal drugs or which required employees to carry firearms or handle classified materials. Again, the Court found the collection of urine samples to be a "search." Again, the Court upheld the policy, holding that it was "reasonable" for the government to mandate the tests because of its "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." Comparing the practice to hypothetical searches of workers at "the United States Mint ... when they leave the workplace every day," the Court concluded that the "operational realities" of the Customs Service justified the testing.

By contrast, in *Chandler v. Miller*, 520 U.S. 305 (1997), the Court struck down a Georgia law requiring that candidates

for certain state offices submit to drug tests. The state stressed "the incompatibility of unlawful drug use with holding high state office" and argued that "the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." The Court was not persuaded, concluding, "[n]othing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." The Court noted that political candidates "are subject to relentless scrutiny—by their peers, the public, and the press." The Justices stated that the suspicionless searches needed to track lower-profile employees—like those approved in *Skinner* and *Von Raab*—were not necessary for voters to vet candidates for election.

Drug Testing of Public School Students

The Court has repeatedly applied the reasoning of *Skinner* and *Von Raab* to public school policies that mandate the drug testing of certain students.

VERNONIA SCHOOL DISTRICT V. ACTON (1995)

Supreme Court of the United States

Vernonia School District 47J v. Wayne Acton

Decided June 26, 1995 – 515 U.S. 646

Justice SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

***

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in

interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

***

C

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments. We granted certiorari.

II

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." [W]hether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant [supported by probable cause]. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."

III

The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard

the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases.

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation."

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic

director with the principal's approval." Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.

***

VI

Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and

tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this districtwide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

We [] vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Justice O'CONNOR, with whom Justice STEVENS and Justice SOUTER join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a

broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affec[t] one person at a time." Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better" than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

* * *

Seven years after deciding *Vernonia*, the Court considered a public school drug testing program that went beyond athletes

and included participants in activities such as the debate team, band, and Future Farmers of America. While the district policy stated that students involved in any extracurricular activity could be tested, the record reflected that in practice testing was limited to participants in "competitive extracurricular activities." In *Board of Education, Pottawatomie County v. Earls* (2002), concerning an Dartmouth-bound honors student in the school choir who declined to be drug tests, the Supreme Court majority declared that submission to drug tests can be imposed as a condition for participation in extracurricular activities.

Notes, Comments, and Questions

Since the Court decided *Vernonia* and *Earls*, public schools have continued to explore how much of the student population can be subjected to mandatory drug testing. Although courts have not yet approved a policy mandating the testing of all students at a public school, school districts have been largely successful in requiring testing of broad portions of the student population.

Consider these examples:

Some schools have required students to submit to drug testing if they wish to park on school grounds. *See, e.g., Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000). Lawful? Why or why not?

A public technical college adopted a policy requiring that all students at the college submit to drug tests. *See Kittle-Aikeley v. Strong,* 844 F.3d 727 (8th Cir. 2016) (en banc). Lawful? Why or why not? What if the policy applied only to students in certain academic programs?

In the case of the technical college, the Eighth Circuit upheld mandatory drug testing of students enrolled in "safety-sensitive programs." Dissenting judges would have allowed testing of all students because there was no reason "to assume that [the college's] students pursuing an education in its non-safety-sensitive programs are not likewise fully impacted by the same illicit drug-abuse crisis" that justified the testing of students in safety-sensitive programs. Other courts could reach different results in similar cases.

According to a national survey of school districts, many public schools operate drug testing programs that involve random testing of all students, seemingly in excess of what the Court has allowed. *See* Chris Ringwalt *et al*., "Random Drug Testing in US Public School Districts," 98 Am. J. Pub. Health 826 (May 2008) ("28% randomly tested all students"). Further litigation on this issue seems likely.

Notes, Comments, and Questions

Re: the Supreme Court's rejection of warrantless drug testing of pregnant women at a public hospital in *Ferguson v. City of*

Charleston (2000): Although no one today would recommend use of crack cocaine by pregnant women, it turns out that much of the science behind the so-called "crack baby" epidemic has been debunked. Predictions like that of "a bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth"—from a 1989 column in the *Washington Post*—or a flood of 4 million kids whose "neurological, emotional and learning problems will severely test teachers and schools"—from a 1990 article in the *New York Times*—appear alarmist in hindsight. *See* Vann R. Newkirk II, "What the 'Crack Baby' Panic Reveals about the Opioid Epidemic," Atlantic (July 16, 2017) (noting the greater empathy extended to pregnant women using opiates than was shown to crack-addicted mothers). Legal scholars noted that in the late 1980s, a trend emerged wherein prosecutors used laws previously used to punish abuse of children after birth—such as involuntary manslaughter and delivery of drugs to a minor—to prosecute pregnant drug users. *See, e.g.*, D. M. McGinnis, Comment, "Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory," 139 U. Pa. L. Rev. 505 (1990).

In our next chapter, we consider our final selection of exceptions to the warrant requirement.

PART XVIII

FOURTH AMENDMENT: WARRANT EXCEPTIONS (PART 9)

In this chapter, we conclude our review of exceptions to the warrant requirement. In particular, we will examine: (1) inventory searches and (2) DNA tests of arrested persons.

INVENTORY SEARCHES

Warrant Exception: Inventory Searches

When police impound an illegally parked car, they may tow it to a government parking lot. Similarly, police may tow the car of a driver who is arrested for a traffic violation. These are just two of the many ways in which government agents can lawfully take possession of property. Another common scenario arises when police store the effects of a person who is jailed, keeping them until the person is released. The Court has held that government officials may search property that comes into their possession in circumstances such as these, as long as they follow proper procedures. *South Dakota v. Opperman* (1976).

Notes, Comments, and Questions

In *Illinois v. Lafayette,* 462 U.S. 640 (1983), the Court applied *Opperman* to a police search of the "purse-type shoulder bag" of "an arrested person [who] arrive[d] at a police station."

Because the search could not be deemed "incident" to the arrest, the Court considered "whether, consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect." The Court found the question fairly straightforward and resolved it as follows:

"At the stationhouse, it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed. A range of governmental interests support an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the stationhouse. A standardized procedure for making a list or inventory as soon as reasonable after reaching the stationhouse not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person. Arrested persons have also been known to injure themselves—or others—with belts, knives, drugs or other items on their person while being detained. Dangerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee's possession. The bare recital of these mundane realities justifies reasonable measures by police to limit these risks—either while the items are in police

possession or at the time they are returned to the arrestee upon his release."

Because the Court found such searches to be reasonable regardless of whether officials feared any particular bag possessed by an arrestee, the Court held that neither probable cause or any other form of individualized suspicion was needed for inventory searches of an arrestee's belongings prior to incarceration, "in accordance with established inventory procedures."

By contrast, in *Florida v. Wells*, 495 U.S. 1 (1990), the Court found that because the highway patrol lacked "standardized criteria" or an "established routine" with respect to opening closed containers while inventorying a car, officers violated the Fourth Amendment when opening a locked suitcase found in the trunk of an impounded car. The Court said such criteria were needed because of "the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." In sum, departments have wide latitude to set inventory policies and to search cars, bags, and other items pursuant to such policies. But without a preexisting policy, searches lose the presumption of reasonableness.

A former student of your authors once told a story about *Gant* drawn from the student's experience as a police officer.[53] He began by describing how police reacted to the Court's decision in *Gant*.

"Post-*Gant*, law enforcement agencies scurried to train

officers on search of automobiles incident to lawful arrest. A tool once frequently and heavily relied on, [SILA] was no longer an option for officers looking to get into vehicles without the availability of the automobile exception outlined in *Carroll*. This was particularly frustrating on pretext stops where officers would arrest local drug dealers and criminals for driver's license violations or other mundane crimes to get into vehicles where evidence of the more serious, and sometimes violent, crimes were concealed."

Police adjusted their tactics: "The response was shoring up vehicle tow, impound, and inventory policies." In other words, because police could not search nearly as many cars incident to arrest, police increased the number of cars they decided to tow after arrests.

Here is where the story gets exciting: "In 2010, Officers ... stopped a vehicle after complaints of careless and imprudent driving. The driver, 20, did not have a driver's license. Officer attempts to contact the vehicle owner to remove it from the side of the road were unsuccessful. Pursuant to department policy, officers contacted a tow truck and conducted an inventory search where they located the owner of the vehicle, mother of the driver, dead in the trunk."

As the student summed up, "Sometimes there IS a body in the trunk."

ADMINISTRATIVE SEARCHES

Warrant Exception: Administrative Searches

Our next warrant exception concerns "administrative searches," which involve government functions largely (if not entirely) unknown when the Fourth Amendment was ratified. For example, fire code and housing code inspections are important to the safety of densely populated cities. On the other hand, some might question whether inspectors should be allowed to search their homes without a warrant, perhaps even without probable cause.

Notes, Comments, and Questions

Consider a city zoning law that restricts who may live in a certain residence on the basis of family status. For example, the city code might state that no more than three unrelated persons may live in a house zoned for "single-family"

occupancy.54 In such a house, an adult could live with her four children, but four unrelated roommates could not share the house (even though the four roomates would constitute one fewer total person than the alternative group of occupants). In a neighborhood near a university campus, students might occasionally rent houses (with two or three names on a lease) and use them in a way that violates the code (for example, six students living together). If a neighborhood busybody—concerned with a perceived threat to property values or simply interested in policing how neighbors behave—calls city officials with vague reports of overoccupancy, may a judge issue a warrant allowing city officials to inspect every house in the neighborhood to see who lives there and whether they are related to one another? May such warrants issue every year—allowing searches of houses in "single-family" neighborhoods near campus—even if no one complains?

In *See v. City of Seattle,* 387 U.S. 541 (1967), decided the same day as *Camara*, the Court held that the rule of *Camara* applied to commercial warehouses. "As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."

Two decades later, however, the Court was less protective

of a business owner's right to avoid warrantless administrative searches. In *New York v. Burger*, 482 U.S. 691 (1987), the Court considered a different kind of business premises—a junkyard. After stating (somewhat implausibly) that the junkyard was a "closely regulated industry," the Court held that proprietors of such businesses have lowered expectations of privacy. That finding, combined with the state interest in supervising such industries (in this case, to combat car theft by preventing stolen parts from being bought and sold at junkyards), made the warrantless search reasonable. Students should note that the *Burger* Court went even further than the Court's decision in *Camara*. In *Camara*, the Court required inspectors to obtain a warrant, which if suspiciously similar to the detested "general warrants" of old was at least issued by a judge. In *Burger*, the Court held that New York's statute allowing for the inspection of junkyards was a "constitutionally adequate substitute for a warrant."

In a dissent joined in full by Justice Marshall and in part by Justice O'Connor, Justice Brennan argued that "Burger's vehicle-dismantling business is not closely regulated (unless most New York City businesses are)." Objecting to the Court's acceptance of the New York statute in lieu of a warrant, he argued that "the Court also perceives careful guidance and control of police discretion in a statute that is patently insufficient to eliminate the need for a warrant." Accordingly, he concluded that the decision "renders virtually meaningless

the general rule that a warrant is required for administrative searches of commercial property."

The Court revisited administrative searches in *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), deciding by a 5-4 vote that certain regulations of Los Angeles hotels violated the Fourth Amendment. In particular, the city required "hotel operators to record and keep specific information about their guests on the premises for a 90-day period" and to make the records "available to any officer of the Los Angeles Police Department for inspection ... at a time and in a manner that minimizes any interference with the operation of the business." Refusal to make the records available was a crime. Hotel operators brought a facial challenge to the regulation and prevailed.

The majority noted that it did not strike down the provisions of the regulation requiring that the records be kept, nor did it prevent officers from viewing the records by consent or by obtaining a proper administrative warrant (or with some other exception to the warrant requirement). Instead, the Court struck down only the provision forcing hotel owners to show the records on demand to any officer without a warrant, on pain of criminal prosecution—without even the opportunity for a precompliance judicial review. The Court rejected the city's argument that the regulation was valid under prior precedents related to "closely regulated industries." Perhaps retreating a bit from the broad definition of such industries in *Burger*, the *Patel* Court stated, "Over the past 45

years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise.'" Those industries are "liquor sales," "firearms dealing," "mining," and—of course—"running an automobile junkyard."

In a dissent joined by Chief Justice Roberts and Justice Thomas, Justice Scalia wrote: "[T]he Court today concludes that Los Angeles's ordinance is 'unreasonable' inasmuch as it permits police to flip through a guest register to ensure it is being filled out without first providing an opportunity for the motel operator to seek judicial review. Because I believe that such a limited inspection of a guest register is eminently reasonable under the circumstances presented, I dissent." He noted "that the motel operators who conspire with drug dealers and procurers may demand precompliance judicial review simply as a pretext to buy time for making fraudulent entries in their guest registers."

Justice Alito dissented as well, joined by Justice Thomas. Objecting in particular to the Court's finding that the regulation was *facially* invalid—as opposed to invalid in limited cases—he presented five examples of circumstances in which he believed it would be reasonable for the city to enforce the law as written. Here is one:

"Example Two. A murderer has kidnapped a woman with the intent to rape and kill her and there is reason to believe he is holed up in a certain motel. The Fourth Amendment's

reasonableness standard accounts for exigent circumstances. When the police arrive, the motel operator folds her arms and says the register is locked in a safe. Invoking [the challenged regulation], the police order the operator to turn over the register. She refuses. The Fourth Amendment does not protect her from arrest."

* * *

DNA Tests of Arrestees

We conclude with a case challenging a Maryland policy under which police collected DNA from arrestees as part of "routine booking procedure."

DNA TESTS OF ARRESTEES

Supreme Court of the United States

Maryland v. Alonzo Jay King

Decided June 3, 2013 – 569 U.S. 435

Justice KENNEDY delivered the opinion of the Court.

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

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

Salisbury rape victim. King was tried and convicted for the rape. Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.

***

II

A

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with ... a crime of violence or an attempt to commit a crime of violence; or ... burglary or an attempt to commit burglary." ....If "all qualifying criminal charges are determined to be unsupported by probable cause ... the DNA sample shall be immediately destroyed." DNA samples are also destroyed if "a criminal action begun against the individual ... does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted," or "the individual is granted an unconditional pardon."

***

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a

cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells." The procedure is quick and painless. The swab touches inside an arrestee's mouth, but it requires no "surgical intrusio[n] beneath the skin," and it poses no "threa[t] to the health or safety" of arrestees.

B

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. At issue is a standard, expanding technology already in widespread use throughout the Nation.

III

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

Virtually any "intrusio[n] into the human body" will work an invasion of "'cherished personal security' that is subject to constitutional scrutiny." The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

***

The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.'" "[T]here are virtually no facts for a neutral magistrate to evaluate." Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion."

***An assessment of reasonableness to determine the lawfulness of requiring this class of arrestees to provide a DNA sample is central to the instant case.

IV

A

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.

***

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

***

Finally, in the interests of justice, the identification of an

arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing ... would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of ... innocent people."

Because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the "governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest."

***

In sum, there can be little reason to question "the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." To that end, courts have confirmed that the Fourth Amendment allows police to take certain routine "administrative steps incident to arrest—*i.e.,* ... book[ing], photograph[ing], and fingerprint[ing]." DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is "no more than an extension of methods of identification long used in dealing with persons under arrest." In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant

government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

V

A

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

The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy. The expectations of privacy of an individual taken into police custody "necessarily [are] of a diminished scope." A search of the detainee's person when he is booked into custody may "'involve a relatively extensive exploration,'" including "requir[ing] at least some detainees to lift their genitals or cough in a squatting position."

***

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions

concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The judgment of the Court of Appeals of Maryland is reversed.

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

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

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous. [T]he Court elaborates at length the ways that the search here served the special purpose of "identifying" King. But that seems to me quite

wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest."

[I]f anything was "identified" at the moment that the DNA database returned a match, it was not King—his identity was already known. (The docket for the original criminal charges lists his full name, his race, his sex, his height, his weight, his date of birth, and his address.) Rather, what the August 4 match "identified" was *the previously-taken sample from the earlier crime.* That sample was genuinely mysterious to Maryland. King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own "identification" theory when it acknowledges that the object of this search was "to see what [was] already known about [King]." No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." (One would expect such a section to play a

somewhat larger role in the Court's analysis of the Act's purpose—which is to say, at least some *role*.) That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

So, to review: DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court's purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid ("official investigation into a crime"). Against all of that, it is safe to say that if the Court's identification theory is not wrong, there is no such thing as error.

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

Notes, Comments, and Questions

The dissent points out that the police did not really use the DNA to identify King; they used it to identify the source of sample obtained elsewhere; that is, they used the DNA test of King to match him to the pre-existing sample. In recent years, police have used DNA evidence to create profiles and search

for family matches in ancestry DNA databases. What outcome under the Fourth Amendment?

Imagine a small community where two children are murdered. Police believe they have a serial killer and obtain a confession for one of the murders from a local boy with developmental disabilities. DNA evidence proves the two victims had the same killer, but the evidence also exonerates the boy. The police want to obtain DNA samples from every male resident in the small town to find the murderer. What outcome under the Fourth Amendment? What if the police convince the entire male population to consent to giving DNA evidence; one man has a friend give DNA evidence on his behalf. Then later the friend comes forward to confess the subterfuge. Analyze whether the police can require a DNA test from the man who sent the friend in his place. (Note: This question is based on a real case from England, in which Colin Pitchfork was eventually proven to have murdered two victims: Lynda Mann and Dawn Ashworth.)

MARYLAND V. KING (2013)

PART XIX

FOURTH AMENDMENT: STOP AND FRISK

Stop & Frisk: Another Form of Warrantless Search

This chapter concerns the law enforcement tactic known as "stop and frisk." Although such conduct is less invasive than an arrest, the "stop" is nonetheless a seizure that must be "reasonable" to be lawful under the Fourth Amendment. The "frisk" is a search that also must be reasonable to be lawful.

Our reading will review (1) the basic definition of "stop and frisk" and the Court's justification for allowing it absent probable cause, (2) the difference between a stop and frisk and a full arrest (which requires probable cause), and (3) what police may do during a "*Terry* stop," as these stops and frisks have come to be known.

We begin with *Terry v. Ohio*, which sets forth the doctrine permitting "stop and frisk" in some circumstances and which has given its name to the practice.

TERRY V. OHIO (1968)

Supreme Court of the United States

John W. Terry v. State of Ohio

Decided June 10, 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. "I get more purpose to watch them when I seen their movements," he testified. 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. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. 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.

***

I

The question is whether in all the circumstances of this on-

the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure.

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.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search."

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest.

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. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.

II

***

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.

***

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

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.

III

***

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 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.

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.

***

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

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.

***

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. [Emphasis added to highlight the lengthy holding] 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 DOUGLAS, dissenting.

The opinion of the Court disclaims the existence of "probable cause." If loitering were in issue and that was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; and there is no basis for concluding that the officer had "probable cause" for believing that that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.

[P]olice officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion."

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.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

* * *

Notes, Comments, and Questions

The Court decided in *Illinois v. Caballes* that when a motorist is lawfully held for a traffic stop, police use of drug-sniffing dogs to investigate a vehicle is not a "search." In *Rodriguez v. United States,* 135 S. Ct. 1609 (2015), the Court considered whether police may lengthen a traffic stop for the purpose of conducting such a dog sniff.

A police officer pulled over Dennys Rodriguez for driving

on the shoulder of a Nebraska state highway, which is unlawful. During the stop, the officer asked Rodriguez why he had driven on the shoulder and, after receiving an answer, "gathered Rodriguez's license, registration, and proof of insurance." He then ran "a records check on Rodriguez" before returning to question Rodriguez and his passenger. Next, the officer returned to his car again, ran a records check on the passenger, and "began writing a warning ticket for Rodriguez for driving on the shoulder of the road." Rodriguez made no objection to any of this conduct.

After writing the warning ticket and presenting it to Rodriguez (along with other documents the officer had collected during the stop), the officer asked Rodriguez for permission to walk a drug dog around Rodriguez's vehicle. Rodriguez declined, and the officer ordered Rodriguez to stay put, which he did. The officer brought the dog, and when the dog "alerted to the presence of drugs," the officer searched the car and found "a large bag of methamphetamine." Rodriguez was eventually convicted of "possession with intent to distribute 50 grams or more of methamphetamine."

Rodriguez argued that the officer impermissibly extended the traffic stop—after it was essentially finished—so that he could conduct the dog sniff. Rodriguez argued further that the extension constituted an unlawful seizure. The Court agreed.

In an opinion by Justice Ginsburg, the Court wrote:

"A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,'

a routine traffic stop is 'more analogous to a so-called "*Terry* stop" ... than to a formal arrest.' Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.' Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."

The Court wrote that while activities related to traffic enforcement—such as checking a driver's license and registration—are permissible parts of a traffic stop, "[a] dog sniff, by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.' Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

The Court rejected the prosecution's argument that so long as the total length of the stop remains reasonable, an officer may extend it to conduct a dog sniff.

"The Government argues that an officer may 'incremental[ly]' prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the

stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. The reasonableness of a seizure, however, depends on what the police in fact do. In this regard, the Government acknowledges that 'an officer always has to be reasonably diligent.' How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' [A] traffic stop 'prolonged beyond' that point is 'unlawful.' The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket but whether conducting the sniff 'prolongs'—*i.e.,* adds time to—'the stop.'"

In his dissent, Justice Alito first argued that the Court should have avoided the constitutional question decided in the case because "the police officer *did have* reasonable suspicion [of illegal drug activity], and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue."55 Then, he argued that the Court's holding was baseless and impractical, suggesting that officers will delay completing the permitted activities of a traffic stop if they wish to conduct dog sniffs.

"The Court refuses to address the real Fourth Amendment

question: whether the stop was unreasonably prolonged. Instead, the Court latches onto the fact that Officer Struble delivered the warning prior to the dog sniff and proclaims that the authority to detain based on a traffic stop ends when a citation or warning is handed over to the driver. The Court thus holds that the Fourth Amendment was violated, not because of the length of the stop, but simply because of the sequence in which Officer Struble chose to perform his tasks."

"The rule that the Court adopts will do little good going forward. It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement."

The next case concerns whether during a *Terry* stop, police may demand that a suspect identify himself, under threat of prosecution if the suspect does not comply.

***

Notes, Comments, and Questions

Perceptions of Stop-and-Frisk

In *Terry v. Ohio*, the majority wrote, "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." The Court held that the "reasonable suspicion" standard struck a sensible compromise between individual liberty and law enforcement realities.

In dissent, Justice Douglas warned, "To give the police greater power than a magistrate is to take a long step down the totalitarian path." He argued that "if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country."

In the subsequent half century, the debate over stop-and-frisk tactics has remained heated. Opponents of the practice have argued that it visits humiliation on suspects for limited benefit and that police apply the tactic in a racially biased manner. For example, a federal court in New York found that the NYPD unconstitutionally focused disproportionately on black and Hispanic suspects when stopping and frisking New Yorkers. *See Floyd v. City of New York,* 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The Court of Appeals for the Second Circuit initially stayed the ruling of the district court pending appeal, but the city dropped the appeal after the election of a mayor who campaigned on a promise to comply with the district

court. *See* J. David Goodman, "De Blasio Drops Challenge to Law on Police Profiling," N.Y. Times (March 5, 2014).

The case in favor of stop-and-frisk was articulated by Heidi Grossman, New York City's lead attorney in the *Floyd* trial. She said, "Our defense is that we go to where the crime is. And once we go to where the crime is, we have our police officers keep their eyes open, make observations; and only when they make observations, do they go and make reasonable suspicion stops." She added that when police conduct stop-and-frisk in areas with high minority populations, "the majority of victims are black and Hispanics in the area. They are begging for help, and they want to be able to walk to and from work in a safe way. And so it is incumbent upon us to have our officers go out there and do their job, and keep the city safe." *See* "The Argument for Stop-and-Frisk," NPR (May 22, 2013).

For the perspective of some New Yorkers who have been repeatedly stopped and frisked and find the experience intensely unpleasant, *see* Julie Dressner & Edwin Martinez, Op-Doc: Season 1, "The Scars of Stop-and-Frisk," N.Y. Times (June 12, 2012); Ross Tuttle & Erin Schneider, "Stopped-and-Frisked: 'For Being a F**king Mutt,'" The Nation (Oct. 8, 2012) (secret recording by teen of himself being stopped, along with interview of anonymous police officer about department practices).

What are the best (most convincing) arguments in favor of allowing police to stop and frisk suspects without probable cause?

In our next chapter, we will study how the Court has defined "reasonable suspicion." A more demanding definition—vaguely close to probable cause—would narrow the set of situations in which police may "stop and frisk" suspects. A less strict definition—something beyond a mere hunch but not much further—would give greater discretion to police.

PART XX

FOURTH AMENDMENT: REASONABLE SUSPICION

Reasonable Suspicion

In this chapter we review the Court's efforts to define "reasonable suspicion," which is required for stops and frisks under *Terry v. Ohio*. Critics of stop and frisk practices complain that the Court has set too low a standard, thereby allowing law enforcement to stop pretty much anyone, particularly in neighborhoods with high crime rates. Advocates for stop and frisk counter that a stricter standard would undermine effective policework.

ILLINOIS V. WARDLOW (2000)

Supreme Court of the United States

Illinois v. William aka Sam Wardlow

Decided Jan. 12, 2000 – 528 U.S. 119

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Wardlow fled upon seeing police officers patrolling an area known for heavy narcotics trafficking. Two of the officers caught up with him, stopped him and conducted a protective patdown search for weapons. Discovering a .38-caliber handgun, the officers arrested Wardlow. We hold that the officers' stop did not violate the Fourth Amendment to the United States Constitution.

On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving

the last car of a four car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.

As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street. Nolan then exited his car and stopped respondent. He immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions. During the frisk, Officer Nolan squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered a .38-caliber handgun with five live rounds of ammunition. The officers arrested Wardlow.

The Illinois trial court denied respondent's motion to suppress, finding the gun was recovered during a lawful stop and frisk. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed. The Illinois Supreme Court held that the stop and subsequent arrest violated the Fourth Amendment. We granted certiorari and now reverse.

This case, involving a brief encounter between a citizen and a police officer on a public street, is governed by the analysis we first applied in *Terry*. In *Terry*, we held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.

Nolan and Harvey were among eight officers in a four-car caravan that was converging on an area known for heavy narcotics trafficking, and the officers anticipated encountering a large number of people in the area, including drug customers and individuals serving as lookouts. It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. 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.

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. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. 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.

***

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. No question of the propriety of the arrest itself is before us.

The judgment of the Supreme Court of Illinois is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, concurring in part and dissenting in part.

[The dissent agreed with the majority that flight from police could sometimes create cause for suspicion and thereby "by itself, be sufficient to justify a temporary investigative stop of the kind authorized by *Terry*." It agreed too that the Court was correct in not "authorizing the temporary detention of anyone who flees at the mere sight of a police officer." In other words, sometimes flight alone justifies a *Terry* stop, and sometimes it does not. "Given the diversity and frequency of possible motivations for flight, it would be profoundly unwise to endorse either *per se* rule." The dissent differed from the majority in its discussion of why innocent persons might flee from officers:]

In addition to these concerns, a reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity. And where there is criminal activity there is also a substantial element of danger–either from the criminal

or from a confrontation between the criminal and the police. These considerations can lead to an innocent and understandable desire to quit the vicinity with all speed.

Among some citizens, particularly minorities and those residing in high crime areas, there is also 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." Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.

***

"Unprovoked flight," in short, describes a category of activity too broad and varied to permit a *per se* reasonable inference regarding the motivation for the activity....

***

Nolan was part of an eight-officer, four-car caravan patrol team. The officers were headed for "one of the areas in the 11th District [of Chicago] that's high [in] narcotics traffic." The reason why four cars were in the caravan was that "[n]ormally in these different areas there's an enormous amount of people,

sometimes lookouts, customers." Officer Nolan testified that he was in uniform on that day, ***but he did not recall whether he was driving a marked or an unmarked car.*** [*emphasis added by editor*]

[The dissent quoted from *Alberty v. United States,* 162 U.S. 499, 511 (1896), as follows:]

"[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury—not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

[The dissent then concluded "that in this case the brief testimony of the officer who seized respondent does not justify the conclusion that he had reasonable suspicion to make the stop." The dissent argued that the officer's testimony was vague and could not even demonstrate that Wardlow's "flight was related to his expectation of police focus on him."]

Notes, Comments, and

Questions

The Court in *Wardlow* announced that "unprovoked flight" in a "high crime area"—particularly "an area of heavy narcotics trafficking"—justifies a *Terry* stop. It is not certain what other factors, when combined with flight, are sufficient to constitute reasonable suspicion. It seems likely, however, that once flight is part of the analysis, not much additional ground for suspicion is needed to give officers discretion to stop a suspect.

How can the officer say that Wardlow ran at the sight of police when the officer could not remember if whether the officers where in an unmarked car? Might someone run when four cars together come up a street in a group? Does the indicate the presence of police—or a gang?

What guidance does the Court give on what a "high-crime area" is? What comes to your mind as you think of high-crime areas? Would official statistics (for example, records of arrests organized by neighborhood) provide an accurate picture of which neighborhoods have the most crime? How do race and poverty play into our notions of high crime areas? Is a fraternity house (or a neighborhood of such houses, nicknamed "Greektown") a high-crime area? Why or why not?

Consider a college student fleeing a police officer who arrives at a fraternity party in response to a noise complaint. May the officer chase the student down and conduct a *Terry* stop? Why or why not?

Now imagine that same college student is walking in a high-

poverty, primarily minority neighborhood in the middle of an afternoon. He sees two police officers walking toward him, and he runs in the other direction. Does this conduct justify *Terry* stop? Why or why not?

In the next case, the Court found that the information provided by a tipster did not justify a *Terry* stop.

FLORIDA V. J.L. (2000)

Supreme Court of the United States

Florida v. J.L. 529 U.S. 266 (2000)

Justice GINSBURG delivered the opinion of the [unanimous] 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.

I

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 birth[day]," 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. We granted certiorari and now affirm the judgment of the Florida Supreme Court.

II

Our "stop and frisk" decisions begin with Terry v. Ohio. 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, "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." 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.

The tip in the instant case lacked the moderate indicia of reliability present in [Alabama v.] 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. The United States as amicus curiae makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip...." 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.

***

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with Terry, to conduct a protective search of a person who has

already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

* * *

FOURTH AMENDMENT FLOWCHART EXERCISE

Fourth Amendment Flowchart Exercise

Flowcharts can help students visualize what they have learned. The goal is not to memorize the example chart presented here but instead to create a new chart that helps one to connect material from throughout the book. Your authors recommend that when students make their own charts, they add additional detail, such as case names or chapter numbers. For example, in the box asking whether there was a "search" or "seizure" at all, students might add information related to dog sniffs, aerial surveillance, the open fields doctrine, thermal imaging, garbage collection, and other items included in the early chapters of this book.

In the box asking if there was a valid warrant, students might add information related to the particularity requirement, as well as other sources of challenges to validity.

This chart focuses on the Fourth Amendment. Later in the book, a different sample chart focuses on the Miranda Rule.

These charts have two primary purposes. One is that when the charts are finished, they can serve as study aids. The other is that the creation of the charts—even if students never review them after finishing them—forces students to consider material more carefully than they otherwise might, which helps with learning and with retention of information. Also, fellow students can help spot misunderstandings that, were they not in a chart, would remain uncorrected. Study group members might wish to bring charts to share with classmates.

Note that the "Fourth Amendment violation" box asks students to consider what remedy might be available to the person whose rights were violated. A separate chart devoted to remedies (such as the exclusionary rule) would be worth creating after students cover that material.

PART XXI

INTERROGATIONS: DUE PROCESS AND THE VOLUNTARINESS REQUIREMENT

Due Process and the Voluntariness Requirement

In this chapter we begin our study of how the Court has used the Constitution to regulate interrogations. Over the next several chapters, we will review three main lines of cases: (1) those decided under the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment, which the Court has used to require that only "voluntary" confessions be admitted as evidence, (2) those decided under the Self-Incrimination Clause of the Fifth Amendment, which the Court has used as the basis for the *Miranda* Rule, and (3) those decided under the Assistance of Counsel Clause of

the Sixth Amendment, which the Court has used to prohibit certain questioning of defendants for whom the right to counsel has "attached."

We begin with cases enforcing the voluntariness requirement under the Due Process Clauses. Our first case, *Brown v. Mississippi*, appeared in the reading for our first chapter and students may wish to quickly reread the facts of the case if they do not remember them. In that chapter, *Brown* was presented to provide background on why the Supreme Court might feel the need to supervise the criminal justice systems of the states. Now, we consider it again to learn the substantive law governing interrogations.

BROWN V. MISSISSIPPI (1936)

Supreme Court of the United States.

Ed Brown v. Mississippi

Decided Feb. 17, 1936 – 297 U.S. 278

Mr. Chief Justice HUGHES delivered the opinion of the [unanimous] Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture.

[D]efendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitution right.

The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made

voluntarily but were coerced." There is no dispute as to the facts upon this point. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

[The Court then quoted portions of the state court dissent:]

"[T]he solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise."

"The defendants were brought to the courthouse ... and the so-called trial was opened, and was concluded on the next day, ... and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was

the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would have been inescapable."

[T]he trial [] is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established

and specially set up and claimed, and the judgment must be reversed.

* * *

The Court has stated that "when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial ... the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." Lego v. Twomey, 404 U.S. 477, 489 (1972); see also Bram v. United States, 168 U.S. 532, 555 (1897) (recalling with approval English precedent to the effect "that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received").

Unfortunately, while the facts in Brown v. Mississippi are horrific, it was not the only case in which the Court found it necessary to reverse a conviction based upon an involuntary confession. Indeed, in reciting the facts of the next case, the Court referred to "the usual pattern" of testimony concerning the treatment of a suspect.

Coercive interrogations were by no means limited to the American South. Further, to find that a confession was not voluntary, the Court does not require evidence of physical mistreatment of a suspect. Continuous interrogation that does not permit the suspect to eat or sleep, or implied threats can also make a confession considered to be not voluntary.

Notes, Comments, and Questions

For a case in which coercive conduct was alleged but the Court nonetheless affirmed a conviction, students should see Lisbena v. California, 314 U.S. 219 (1941). In a dissent joined by Justice Douglas, Justice Black wrote, "The testimony of the officers to whom the confession was given is enough, standing alone, to convince me that it could not have been free and voluntary." In particular, the dissent noted that "an investigator, 'slapped' the defendant whose left ear was thereafter red and swollen" and that squads of questioners took turns interviewing the defendant, in a manner similar to other cases we have seen. The majority, however, deferred to state court findings "as concerns the petitioner's claims of physical violence, threats or implied promises of leniency." Despite referring to "the violations of law involved in the treatment of the petitioner," the Court declined to find a Due Process violation. Instead, it called the case "close to the line" and held that the defendant "exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

These days, a promise of lenient treatment does not automatically render the ensuing confession involuntary.

Instead, it is a factor to consider as part of the "totality-of-the-circumstances" test the Court applies to Due Process claims.

In part because the Court found it difficult to regulate interrogations effectively using only the Due Process Clauses, the Justices were inspired to create the Miranda Rule, which imposes additional requirements on police. We turn to Miranda in our next chapter.

PART XXII

INTERROGATIONS: THE MIRANDA RULE

The Miranda Rule

In Miranda v. Arizona, the Court created an entirely new method of regulating police interrogations of suspects. Rather than search the records of each case for evidence of voluntariness, the Court set forth a procedure under which law enforcement officers must—at least sometimes—inform suspects of certain constitutional rights and the potential consequences of waiving those rights. Under the new rule, the Court would presume confessions were obtained involuntarily if officers failed to follow the new procedure, and such a presumption would lead to exclusion of confessions from evidence at trial. Over the next several chapters, we will explore (1) the basics of the Miranda Rule, (2) how the Court has defined important terms like "custody" and "interrogation," (3) what constitutes an effective "waiver" of rights under Miranda, and (4) what exceptions apply to the rule that

evidence obtained in violation of Miranda is excluded from evidence.

Even more than Terry v. Ohio—which all lawyers and criminal justice students should be able to summarize—Miranda v. Arizona is a case that friends and acquaintances will expect lawyers and criminal justice students to understand. It is probably the most famous criminal procedure case ever decided, and students should form their own opinions about the doctrine it created.

MIRANDA V. ARIZONA (1966)

Supreme Court of the United States

Ernesto A. Miranda v. State of Arizona

Decided June 13, 1966 – 384 U.S. 436

Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in Escobedo v. State of Illinois, 378 U.S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible. This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago.

We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights

that are enshrined in our Constitution—that "No person ... shall be compelled in any criminal case to be a witness against himself," and that "the accused shall ... have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and ... designed to approach immortality as nearly as human institutions can approach it."

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these

rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in

self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions." The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will

advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain

only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged. The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt.

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or Mutt and Jeff [good cop-bad cop] act:

"... In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved

in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room."

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." Then the questioning resumes "as though there were now no doubt about the guilt of the subject."

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator." After this psychological conditioning, however,

the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice.

It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree"[extreme physical conditions such as sleep deprivation] or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

In these cases [before us], we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial

surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other

official investigations, where there are often impartial observers to guard against intimidation or trickery.

III

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

***

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent

pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through

an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

***

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to

consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those

who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon v. Wainwright, 372 U.S. 335 (1963), and Douglas v. California, 372 U.S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

***

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will

not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.

The principles announced today deal with the protection

which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

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In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws.

This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.

V

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

I believe the decision of the Court represents poor

constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other

unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

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How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

Mr. Justice WHITE, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.

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The obvious underpinning of the Court's decision is a

deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent. Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

The rule announced today will measurably weaken the

ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials. Criminal trials, no matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity***

Notes, Comments, and Questions

Most students are familiar with the Miranda warnings, even before reading the case. Prior to a custodial interrogation, officers must inform suspects of the following:

1. You have the right to remain silent
2. Anything you say can be used against you
3. You have the right to an attorney
4. An attorney will be provided by the government if you cannot pay

Review section I of the opinion to see where these specific warnings originated.

The Court finds the Constitutional basis in the 5th Amendment; an element of informal compulsion exists in any form of custodial interrogation, and specified warnings are needed to dispel the inherent pressure of custodial interrogation. Does the Court have the power to promulgate constitutional prophylactic rules?

The Miranda warnings are really a way to avoid the difficulties of case-by-case determination of compulsion. How well do you think Miranda warnings work in practice to (1) reduce the compulsion suspects feel during custodial interrogations; and (2) reduce courts necessity to make case-by-case determinations of compulsion.

As you can imagine, suspects continue to confess, despite receiving appropriate Miranda warnings. Why do you think this is?

HOW WELL MUST OFFICERS ADMINISTER THE MIRANDA WARNINGS?

How Well Must Officers Administer the Miranda Warnings?

One issue not settled by Miranda was how closely police interrogators would be required to deliver the precise warnings set forth by the Miranda majority. Would word-for-word accuracy—or at least warnings materially identical to those provided by the Court—be necessary? Because police officers are human, perfect accuracy would not be a fair standard. The real question was how far officers could stray from the Court's language while still having their warnings count for purposes of getting confessions into evidence under Miranda.

The next case presented the Court with another deviation from the warning language set forth in Miranda.

DUCKWORTH V. EAGAN (1989)

Supreme Court of the United States

Jack R. Duckworth v. Gary James Eagan

Decided June 26, 1989 – 492 U.S. 195

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed "if and when you go to court." The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of Miranda v. Arizona. We disagree and reverse.

Late on May 16, 1982, respondent contacted a Chicago police officer he knew to report that he had seen the naked

body of a dead woman lying on a Lake Michigan beach. Respondent denied any involvement in criminal activity. He then took several Chicago police officers to the beach, where the woman was crying for help. When she saw respondent, the woman exclaimed: "Why did you stab me? Why did you stab me?" Respondent told the officers that he had been with the woman earlier that night, but that they had been attacked by several men who abducted the woman in a van.

The next morning, after realizing that the crime had been committed in Indiana, the Chicago police turned the investigation over to the Hammond, Indiana, Police Department. Respondent repeated to the Hammond police officers his story that he had been attacked on the lakefront, and that the woman had been abducted by several men. After he filled out a battery complaint at a local police station, respondent agreed to go to the Hammond police headquarters for further questioning.

At about 11 a.m., the Hammond police questioned respondent. Before doing so, the police read to respondent a waiver form, entitled "Voluntary Appearance; Advice of Rights," and they asked him to sign it. The form provided:

"Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to

hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer."

Respondent signed the form and repeated his exculpatory explanation for his activities of the previous evening.

Respondent was then placed in the "lock up" at the Hammond police headquarters. Some 29 hours later, at about 4 p.m. on May 18, the police again interviewed respondent. Before this questioning, one of the officers read the following waiver form to respondent:

[The waiver form presented the Miranda warnings in a standard way.]

Respondent read the form back to the officers and signed it. He proceeded to confess to stabbing the woman. The next morning, respondent led the officers to the Lake Michigan beach where they recovered the knife he had used in the stabbing and several items of clothing.

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In Miranda itself, the Court said that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."

We think the initial warnings given to respondent touched

all of the bases required by Miranda. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had "this right to the advice and presence of a lawyer even if [he could] not afford to hire one," and that he had the "right to stop answering at any time until [he] talked to a lawyer." As noted, the police also added that they could not provide respondent with a lawyer, but that one would be appointed "if and when you go to court." The Court of Appeals thought this "if and when you go to court" language suggested that "only those accused who can afford an attorney have the right to have one present before answering any questions," and "implie[d] that if the accused does not 'go to court,' i.e.[,] the government does not file charges, the accused is not entitled to [counsel] at all."

In our view, the Court of Appeals misapprehended the effect of the inclusion of "if and when you go to court" language in Miranda warnings. First, this instruction accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant's initial appearance in court, and formal charges must be filed at or before that hearing. We think it must be relatively commonplace for a suspect, after receiving Miranda warnings, to ask when he will obtain counsel. The "if and when you go to court" advice simply anticipates that question. Second, Miranda does not require that attorneys be

producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one. The Court in Miranda emphasized that it was not suggesting that "each police station must have a 'station house lawyer' present at all times to advise prisoners." If the police cannot provide appointed counsel, Miranda requires only that the police not question a suspect unless he waives his right to counsel. Here, respondent did just that.

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

The majority holds today that a police warning advising a suspect that he is entitled to an appointed lawyer only "if and when he goes to court" satisfies the requirements of Miranda v. Arizona. The majority reaches this result by seriously mischaracterizing that decision. Under Miranda, a police warning must "clearly infor[m]" a suspect taken into custody "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." A warning qualified by an "if and when you go to court" caveat does nothing of the kind; instead, it leads the suspect to believe that a lawyer will not be provided until some indeterminate time in the future after questioning. I refuse to acquiesce in the continuing debasement of this historic precedent and therefore dissent.

Notes, Comments, and Questions

THE ENDURANCE OF MIRANDA IN THE FACE OF CRITICISM

The Endurance of Miranda in the Face of Criticism

In 2000, the Court considered whether to abolish the Miranda Rule. Miranda had inspired intense criticism, including from William H. Rehnquist, who had been an assistant attorney general in the Nixon administration soon after Miranda was decided. He wrote in 1969 that "the court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given, which is very likely to have the effect of preventing a defendant from making any statement at all." See Victor Li, "50-Year Story of the Miranda Warning Has the Twists of a Cop Show," ABA Journal (Aug. 2016). Three decades later, Rehnquist was Chief Justice of the United States, with the ability to shape constitutional law instead of merely commenting on it.

DICKERSON V. UNITED STATES (2000)

Supreme Court of the United States

Charles Thomas Dickerson v. United States

Decided June 26, 2000 – 530 U.S. 428

Chief Justice REHNQUIST delivered the opinion of the Court.

[Examining validity of a congressional statute indicating that federal law enforcement officers are not obligated to give Miranda warnings]

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Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now. While "'stare decisis is not an inexorable command,'" particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine

carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"

We do not think there is such justification for overruling Miranda. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the Miranda decision. If anything, our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

The disadvantage of the Miranda rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result.....

In sum, we conclude that Miranda announced a constitutional rule that Congress may not supersede legislatively. Following the rule of stare decisis, we decline to overrule Miranda ourselves. The judgment of the Court of Appeals is therefore [r]eversed.

Justice SCALIA, with whom Justice THOMAS joins, dissenting. [omitted]

Notes, Comments, and

Questions

When given the opportunity, the Court did not overrule Miranda. Do you agree that Miranda warnings should still be required? Why or why not?

Our next chapters explore two important questions left open by Miranda—how the Court would define "custody" and how it would define "interrogation." Because the Miranda Rule applies only during "custodial interrogation," each of these definitions is essential to applying the rule.

PART XXIII

INTERROGATIONS: WHAT IS CUSTODY?

The Miranda Rule: What Is Custody?

The Miranda Rule applies only during "custodial interrogation." Therefore, unless a suspect is both (1) "in custody" and (2) being "interrogated," police need not provide the warnings described in Miranda. In this chapter, we consider how the Court has defined "custody" in cases applying the Miranda Rule. We also review some of the literature evaluating the practical effects of the doctrine on suspects and police.

In Miranda, the Court wrote: "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Subsequent cases, however, have strayed from the expansive

definition of "custody" implied by the words "deprived of his freedom of action in any significant way."

Students should note that the definition of "custody" under Miranda differs from the definition of a "seizure" for Fourth Amendment purposes. In other words, a person can be "seized" (or "detained") but not be in a situation in which Miranda warnings are required before police may begin interrogation. Yet Fourth Amendment law remains a useful touchstone because if a person is not "seized"—that is, if a reasonable person in her situation would have felt free to leave—then it will be difficult to argue that she was "in custody" for Miranda purposes.

Notes, Comments, and Questions

We have seen the Court's preference for objective tests—those based upon what a "reasonable" person would have done or believed in certain circumstances—over subjective tests based on what a specific person was actually thinking. When deciding whether Sylvia Mendenhall was detained (Chapter 19), for example, the question was not whether she felt free to leave but instead was whether a hypothetical reasonable person in her situation at the airport would have felt free to leave. Similar analysis pervades decisions about whether consent for searches was validly obtained.

Further, the Court has often seemed to adopt a one-size-fits-

all concept of the reasonable person. To return to Mendenhall: The Court considered briefly that she was "22 years old and had not been graduated from high school ... [and was] a female and a Negro" interacting with white police officers. Nonetheless, the Court's "reasonable person" analysis paid little attention to these factors, finding them "not irrelevant" but not especially important. Critics have suggested (as they have in other legal contexts applying "reasonable person" standards, such as tort law) that the beliefs and behaviors of a reasonable person will depend significantly on factors such as race, sex, education, age, and social class, to which the Court gives little attention.

In the next case, the Court considered the potential relevance of someone's age to the question of whether he was "in custody" for purposes of Miranda. The result differed from the common one-size-fits-all concept of "reasonable" that the Court had previously applied in Miranda cases.

J.D.B. V. NORTH CAROLINA (2011)

Supreme Court of the United States

J.D.B. v. North Carolina

Decided June 16, 2011 – 564 U.S. 261

Justice SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of Miranda v. Arizona. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the Miranda custody analysis.

I

A

Petitioner J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and seen in J.D.B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and

parent contact information from school records, neither the police officers nor the school administrators contacted J.D.B.'s grandmother.

The uniformed officer interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither Miranda warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J.D.B.'s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to "do the right thing," warning J.D.B. that "the truth always comes out in the end."

Eventually, J.D.B. asked whether he would "still be in

trouble" if he returned the "stuff." In response, DiCostanzo explained that return of the stolen items would be helpful, but "this thing is going to court" regardless. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court."

After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the schoolday, J.D.B. was allowed to leave to catch the bus home.

***

II

A

Any police interview of an individual suspected of a crime has "coercive aspects to it." Only those interrogations that occur while a suspect is in police custody, however, "heighte[n] the

risk" that statements obtained are not the product of the suspect's free choice.

By its very nature, custodial police interrogation entails "inherently compelling pressures." Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely." Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," this Court in Miranda adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Because these measures protect the individual against the coercive nature of custodial interrogation, they are required "'only where there has been such a restriction on a person's freedom as to render him "in custody."'" As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

The benefit of the objective custody analysis is that it is "designed to give clear guidance to the police."

B

The State and its amici contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child's age is far "more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults," that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," that they "are more vulnerable or susceptible to ... outside pressures" than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can

overawe and overwhelm a lad in his early teens." Describing no one child in particular, these observations restate what "any parent knows"—indeed, what any person knows—about children generally.

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

***

Reviewing the question de novo today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s

age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the Miranda rule: the perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the Miranda Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of Miranda's principal strengths—"the ease and clarity of its application" by law enforcement officials and courts. A key contributor to this clarity, at least up until now, has been Miranda's objective reasonable-person test for determining custody.

***

Today's decision shifts the Miranda custody determination from a one-size-fits-all reasonable-person test into an inquiry

that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the Miranda custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the Miranda Court found to be unsatisfactory.

For at least three reasons, there is no need to go down this road. First, many minors subjected to police interrogation are near the age of majority, and for these suspects the one-size-fits-all Miranda custody rule may not be a bad fit. Second, many of the difficulties in applying the Miranda custody rule to minors arise because of the unique circumstances present when the police conduct interrogations at school. The Miranda custody rule has always taken into account the setting in which questioning occurs, and accounting for the school setting in such cases will address many of these problems. Third, in cases like the one now before us, where the suspect is especially

young, courts applying the constitutional voluntariness standard can take special care to ensure that incriminating statements were not obtained through coercion. Safeguarding the constitutional rights of minors does not require the extreme makeover of Miranda that today's decision may portend.

Notes, Comments, and Questions

The dissent in J.D.B raised concerns that the majority's decision will lead to a slippery slope. Should the court consider factors like race, sex, and socioeconomic status in the Miranda analysis? What are potential pros and cons of such an approach?

The next case provides a stark example of the difference between "custody" under Miranda and the definition of a Fourth Amendment "seizure." The Court has long held that when police stop a car, the driver is "seized" and can later object if the stop was unlawful. See Delaware v. Prouse, 440 U.S. 648, 653 (1979). In 2007, the Court announced the additional holding that everyone in the car—including passengers—is "seized" during a vehicle stop. See Brendlin v. California, 551 U.S. 249 (2007). The Court explained: "We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart

without police permission. A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally (and did not here) distinguish between passenger and driver."

Nonetheless, the Court held in Berkemer v. McCarty (1984)—in an opinion by Justice Marshall, normally among the Justices most supportive of expanding the scope of the Miranda Rule—that police need not recite Miranda warnings before questioning a driver during a vehicle stop. (The opinion was nearly unanimous. Justice Stevens wrote separately that the Court should not have reached the issue. No Justice disagreed on the merits.)

Notes, Comments, and Questions

THE PRACTICAL CONSEQUENCES OF THE MIRANDA RULE

The Practical Consequences of the Miranda Rule

Before exploring more of the Miranda doctrine—defining "interrogation," learning what counts as a "waiver" of Miranda rights, and so on—we pause here to consider the practical effects of the doctrine. The Miranda Rule is now more than 50 years old, and debate rages on straightforward questions such as: (1) does the rule reduce the ability of police to obtain voluntary confessions,56 (2) does it provide any real benefits to suspects, or to society as a whole, such as by promoting meaningful free choice and protecting the dignity of suspects under interrogation, (3) has it affected the crime rate?

For example, Professor Paul Cassell has argued that Miranda has increased the crime rate while providing no compelling benefits to compensate.57 Challenging a perceived academic consensus that Miranda's practical effects on crime-fighting

have been "negligible," Professor Cassell offers an empirical analysis of the number of confessions police never obtain because of Miranda. He includes a corresponding analysis of lost convictions—as well as lenient plea bargains necessitated by missing evidence. He begins with the "common sense" premise that "[s]urely fewer persons will confess if police must warn them of their right to silence, obtain affirmative waivers from them, and end the interrogation if they ask for a lawyer or for questioning to stop." He also quotes the Miranda dissent of Justice White: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."

While acknowledging that any empirical analysis must be a "sound estimate" rather than an exact calculation, Cassell argues that the costs are severe—well in excess of the insignificant harms commonly imagined by scholars and judges.58 He concludes that each year, Miranda results in tens of thousands of "lost cases" for violent crimes, along with tens of thousands more for property crimes. His numbers are based on an estimated loss of 3.8 percent of convictions in serious cases.

Replying to Cassell, Professor Stephen Schulhofer reached the opposite conclusion.59 After adjusting for what he describes as Cassell's faulty data analysis and biased selection of samples, Schulhofer concludes, "For all practical purposes, Miranda's empirically detectable harm to law enforcement

shrinks virtually to zero." Schulhofer then offers a robust defense of Miranda's benefits, noting that "[t]o carry the day, an alternative to Miranda not only must promise more convictions, but also must preserve justice and respect for constitutional values in the 99% (or perhaps only 96.2%) of convictions that will be obtained successfully under either regime—and in all the arrests that will not produce convictions under either regime."60

Noting that—according to his own analysis—police have managed to obtain confessions under Miranda at rates similar to those of the old days, Schulhofer confronts the question of why then we should care about Miranda. That is, if it doesn't reduce confessions, why bother? He replies that the Court's goal in Miranda was not "to reduce or eliminate confessions," recalling that the Court explicitly established a procedure "to ensure that confessions could continue to be elicited and used."61 "Miranda's stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process."62 In other words, under Miranda, police still get confessions, but they get them by tricking suspects (and exploiting their overconfidence) instead of by "pressure and fear." That difference, to Schulhofer, honors the Self-Incrimination Clause of the Fifth Amendment while imposing "detectable social costs [that] are vanishingly small."63

A decade later, Professors George C. Thomas III and Richard A. Leo reviewed "two generations of scholarship" and

concluded that Miranda has "exerted a negligible effect" on the ability of police to obtain confessions.64 They argued, as well, that Miranda's "practical benefits—as a procedural safeguard against compulsion, coercion, false confessions, or any of the pernicious interrogation techniques that the Warren Court excoriated in the Miranda decision"—are similarly negligible.65 They offered several potentially overlapping explanations for their findings of negligible effects. First, suspects know of their rights from television and elsewhere, yet overwhelming majorities "waive their rights and thus appear to consent to interrogation."66 (They analogized Miranda warnings to those on cigarette packages.) Second, police have learned to recite the Miranda warnings in a way that encourages cooperation. Third, Supreme Court decisions have limited the effects of the Miranda Rule (for example, by making it easy for prosecutors to demonstrate "waiver"). Indeed, police and prosecutors now largely support Miranda and report that it does not interfere with their work.

The broad consensus is that Miranda is not a serious impediment to policework, meaning that suspects regularly confess to serious crimes despite being explicitly informed (1) that they need not do so and (2) that doing so could cause them harm in court. Students interested in how police obtain confessions should see an article titled Ordinary Police Interrogation in the United States: The Destruction of Meaning and Persons: A Psychoanalytic-Ethical Investigation.67 The authors describe a suspect who falsely

confessed to murdering his sister. The interrogation was videotaped, allowing analysis of how an innocent person (conclusive evidence of his innocence was later discovered) was pressured to confess by lawful police tactics. The authors argue, "The goal of interrogation is not to gather information. It is to obtain confessions."68 That is, once police decide during an investigation who they believe committed the crime, the purpose of interrogation is to get the admissions needed to convict the suspect.

One author attended a training seminar for police interrogators, learning techniques such as how to "evade informing suspects of their rights during interrogation by giving suspects the impression that they have been arrested without in fact placing them under arrest." He reports, "Reid seminar attendees are told to walk into interviews with thick folders, videocassettes, or similar props spilling out to make subjects believe interrogators have evidence against them." After describing several other techniques effective against the innocent and guilty alike, the authors state, "The interrogator, armed and trained with these powerful rhetorical tools developed and refined over seventy years of systematic study and placed in the position of power and authority over the suspect, not surprisingly often extracts admissions of criminal conduct. But such admissions do not end the interrogation."69 Because police prefer confessions that match other evidence, interrogators follow the initial admissions with

leading questions designed to conform the suspect's story to what is already known about a crime.

A discussion of best practices for interrogations is beyond the scope of this chapter. It will suffice to state that if questioners seek to learn the truth during questioning—as opposed to confirming existing beliefs and obtaining evidence for trial—the process described in Ordinary Police Interrogation would be avoided.70

Regardless of one's views on the ultimate practical effects of Miranda, one cannot deny that Supreme Court doctrine affects the number of confessions admitted as evidence against defendants. In our next chapter, we review how the Court has defined "interrogation" under Miranda.

PART XXIV

INTERROGATIONS: THE MIRANDA RULE—WAIVER

BERGHUIS V. THOMKINS (2010)

Supreme Court of the United States

Mary Berghuis v. Van Chester Thomkins

Decided June 1, 2010 – 560 U.S. 370

Justice KENNEDY delivered the opinion of the Court.
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I

A

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified.

Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the Miranda rule. It stated:

"NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

"1. You have the right to remain silent.

"2. Anything you say can and will be used against you in a court of law.

"3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.

"4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

"5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to

ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four Miranda warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault

with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

B

***

III

All concede that the warning given in this case was in full compliance with the [Miranda] requirements. The dispute centers on the response—or nonresponse—from the suspect.

A

Thompkins makes various arguments that his answers to questions from the detectives were inadmissible. He first contends that he "invoke[d] his privilege" to remain silent by not saying anything for a sufficient period of time, so the

interrogation should have "cease[d]" before he made his inculpatory statements.

This argument is unpersuasive. In the context of invoking the Miranda right to counsel, the Court [has] held that a suspect must do so "unambiguously." If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her Miranda rights.

The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent and the Miranda right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked.

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong."

Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of Miranda rights "might add marginally to Miranda's goal of dispelling the compulsion inherent in custodial interrogation." But "as Miranda holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'" Here he did neither, so he did not invoke his right to remain silent.

B

We next consider whether Thompkins waived his right to remain silent. ...

The prosecution [] does not need to show that a waiver of Miranda rights was express. An "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into evidence. If the State establishes that a Miranda warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate "a valid waiver" of Miranda rights. The prosecution must make the

additional showing that the accused understood these rights. Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent.

***

The record in this case shows that Thompkins waived his right to remain silent. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. There was more than enough evidence in the record to conclude that Thompkins understood his Miranda rights. Thompkins received a written copy of the Miranda warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that "you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.

Second, Thompkins' answer to Detective Helgert's question about whether Thompkins prayed to God for

forgiveness for shooting the victim is a "course of conduct indicating waiver" of the right to remain silent. If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a Miranda warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time. Thompkins' answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation.

Third, there is no evidence that Thompkins' statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful.

***

D

In sum, a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right

to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins' right to remain silent before interrogating him. The state court's decision rejecting Thompkins' Miranda claim was thus correct.

IV

[The Court held that Thomkins could not show prejudice from ineffective assistance of counsel.]

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

Justice SOTOMAYOR, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court concludes today that a criminal suspect waives his right to remain silent if, after sitting tacit and uncommunicative through nearly three hours of police interrogation, he utters a few one-word responses. The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of "waiver" must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that Miranda v. Arizona has long provided during custodial interrogation.

This Court's decisions subsequent to Miranda have emphasized the prosecution's "heavy burden" in proving waiver. We have also reaffirmed that a court may not presume waiver from a suspect's silence or from the mere fact that a confession was eventually obtained.

Even in concluding that Miranda does not invariably require an express waiver of the right to silence or the right to counsel, this Court in Butler made clear that the prosecution bears a substantial burden in establishing an implied waiver.

It is undisputed here that Thompkins never expressly waived his right to remain silent. His refusal to sign even an acknowledgment that he understood his Miranda rights evinces, if anything, an intent not to waive those rights. That Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as "strong evidence" against waiver. Miranda and Butler expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.

***

Today's decision turns Miranda upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in Miranda or our subsequent cases and are

inconsistent with the fair-trial principles on which those precedents are grounded. Today's broad new rules are all the more unfortunate because they are unnecessary to the disposition of the case before us. I respectfully dissent.

* * *

PART XXV

INTERROGATIONS: THE MIRANDA RULE: EXCEPTIONS

The Miranda Rule: Exceptions

In Miranda v. Arizona, the Court summarized its holding as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court then explained that "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it," police would be required to provide certain information—the Miranda warnings—to suspects.

We have learned that this holding spawned controversy about the meaning of "custody" and "interrogation," as well as over when a suspect's waiver of rights has been "made voluntarily, knowingly and intelligently."

In this chapter, we will review three exceptions that the

Court has created to the Miranda Rule. Under each of these exceptions, a prosecutor may use statements against a defendant even though (1) those statements were obtained through custodial interrogation and (2) police either did not provide the Miranda warnings or did so but did not obtain a valid waiver. The three exceptions are known as the "impeachment exception," the "emergency exception" (also known as the "public safety exception"), and the "routine booking exception." We begin with impeachment.

In the next case, the Court articulated what is known as the "emergency" or "public safety" exception to the Miranda Rule. Students reading this case should consider two questions. First, is such an exception justified? Second, if so, do the facts presented constitute an "emergency" to which the exception should apply?

NEW YORK V. QUARLES (1984)

Supreme Court of the United States

New York v. Benjamin Quarles

Decided June 12, 1984 – 467 U.S. 649

Justice REHNQUIST delivered the opinion of the Court.

Respondent Benjamin Quarles was charged in the New York trial court with criminal possession of a weapon. The trial court suppressed the gun in question, and a statement made by respondent, because the statement was obtained by police before they read respondent his "Miranda rights." That ruling was affirmed on appeal through the New York Court of Appeals. We granted certiorari and we now reverse. We conclude that under the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide Miranda warnings before he asked questions devoted to locating the abandoned weapon.

On September 11, 1980, at approximately 12:30 a.m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, N.Y., when a young woman approached their car. She told them that she had just been raped by a black male, approximately six feet tall, who was wearing a black jacket with the name "Big Ben" printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.

The officers drove the woman to the supermarket, and Officer Kraft entered the store while Officer Scarring radioed for assistance. Officer Kraft quickly spotted respondent, who matched the description given by the woman, approaching a checkout counter. Apparently upon seeing the officer, respondent turned and ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun. When respondent turned the corner at the end of an aisle, Officer Kraft lost sight of him for several seconds, and upon regaining sight of respondent, ordered him to stop and put his hands over his head.

Although more than three other officers had arrived on the scene by that time, Officer Kraft was the first to reach respondent. He frisked him and discovered that he was wearing a shoulder holster which was then empty. After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, "the gun is over there." Officer Kraft thereafter

retrieved a loaded .38-caliber revolver from one of the cartons, formally placed respondent under arrest, and read him his Miranda rights from a printed card. Respondent indicated that he would be willing to answer questions without an attorney present. Officer Kraft then asked respondent if he owned the gun and where he had purchased it. Respondent answered that he did own it and that he had purchased it in Miami, Fla.

In the subsequent prosecution of respondent for criminal possession of a weapon, the judge excluded the statement, "the gun is over there," and the gun because the officer had not given respondent the warnings required by our decision in Miranda v. Arizona before asking him where the gun was located. The judge excluded the other statements about respondent's ownership of the gun and the place of purchase, as evidence tainted by the prior Miranda violation. The Appellate Division of the Supreme Court of New York affirmed without opinion.

***

In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist. Thus the only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since Miranda.

The New York Court of Appeals was undoubtedly correct

in deciding that the facts of this case come within the ambit of the Miranda decision as we have subsequently interpreted it. We agree that respondent was in police custody because we have noted that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Here Quarles was surrounded by at least four police officers and was handcuffed when the questioning at issue took place. As the New York Court of Appeals observed, there was nothing to suggest that any of the officers were any longer concerned for their own physical safety. The New York Court of Appeals' majority declined to express an opinion as to whether there might be an exception to the Miranda rule if the police had been acting to protect the public, because the lower courts in New York had made no factual determination that the police had acted with that motive.

We hold that on these facts there is a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.

Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

***

We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions

without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

In recognizing a narrow exception to the Miranda rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule.***

The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety.

We hold that the Court of Appeals in this case erred in excluding the statement, "the gun is over there," and the gun because of the officer's failure to read respondent his Miranda rights before attempting to locate the weapon. Accordingly we hold that it also erred in excluding the subsequent statements as illegal fruits of a Miranda violation. We therefore reverse and remand for further proceedings not inconsistent with this opinion.

Justice O'CONNOR, concurring in the judgment in part and dissenting in part.

Today, the Court concludes that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of

[Miranda] warnings. Were the Court writing from a clean slate, I could agree with its holding. But Miranda is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures. Accordingly, I would require suppression of the initial statement taken from respondent in this case. On the other hand, nothing in Miranda or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree with the Court that admission of the gun in evidence is proper.

***

In my view, a "public safety" exception unnecessarily blurs the edges of the clear line heretofore established and makes Miranda's requirements more difficult to understand. In some cases, police will benefit because a reviewing court will find that an exigency excused their failure to administer the required warnings. But in other cases, police will suffer because, though they thought an exigency excused their noncompliance, a reviewing court will view the "objective" circumstances differently and require exclusion of admissions thereby obtained.

***

The Court concedes, as it must, both that respondent was in "custody" and subject to "interrogation" and that his statement "the gun is over there" was compelled within the meaning of our precedent. In my view, since there is nothing about an exigency that makes custodial interrogation any less

compelling, a principled application of Miranda requires that respondent's statement be suppressed.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

The police in this case arrested a man suspected of possessing a firearm in violation of New York law. Once the suspect was in custody and found to be unarmed, the arresting officer initiated an interrogation. Without being advised of his right not to respond, the suspect incriminated himself by locating the gun. The majority concludes that the State may rely on this incriminating statement to convict the suspect of possessing a weapon. I disagree. The arresting officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. By finding on these facts justification for unconsented interrogation, the majority abandons the clear guidelines enunciated in Miranda v. Arizona and condemns the American judiciary to a new era of post hoc inquiry into the propriety of custodial interrogations. More significantly and in direct conflict with this Court's longstanding interpretation of the Fifth Amendment, the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions. I dissent.

The majority's entire analysis rests on the factual assumption that the public was at risk during Quarles' interrogation. This assumption is completely in conflict with the facts as found by New York's highest court. Before the

interrogation began, Quarles had been "reduced to a condition of physical powerlessness." Contrary to the majority's speculations, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns. As Officer Kraft acknowledged at the suppression hearing, "the situation was under control." Based on Officer Kraft's own testimony, the New York Court of Appeals found: "Nothing suggests that any of the officers was by that time concerned for his own physical safety." The Court of Appeals also determined that there was no evidence that the interrogation was prompted by the arresting officers' concern for the public's safety.

***

In this case, there was convincing, indeed almost overwhelming, evidence to support the New York court's conclusion that Quarles' hidden weapon did not pose a risk either to the arresting officers or to the public. The majority ignores this evidence and sets aside the factual findings of the New York Court of Appeals. More cynical observers might well conclude that a state court's findings of fact "deserv[e] a 'high measure of deference,'" only when deference works against the interests of a criminal defendant.

***

***This case is illustrative of the chaos the "public-safety" exception will unleash. The circumstances of Quarles' arrest have never been in dispute. After the benefit of briefing and

oral argument, the New York Court of Appeals, as previously noted, concluded that there was "no evidence in the record before us that there were exigent circumstances posing a risk to the public safety." Upon reviewing the same facts and hearing the same arguments, a majority of this Court has come to precisely the opposite conclusion: "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety...." If after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world.

Though unfortunate, the difficulty of administering the "public-safety" exception is not the most profound flaw in the majority's decision. The majority has lost sight of the fact that Miranda v. Arizona and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.

***

Whether society would be better off if the police warned

suspects of their rights before beginning an interrogation or whether the advantages of giving such warnings would outweigh their costs did not inform the Miranda decision. On the contrary, the Miranda Court was concerned with the proscriptions of the Fifth Amendment, and, in particular, whether the Self-Incrimination Clause permits the government to prosecute individuals based on statements made in the course of custodial interrogations.

***The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in Miranda v. Arizona proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

The majority should not be permitted to elude the Amendment's absolute prohibition simply by calculating

special costs that arise when the public's safety is at issue. Indeed, were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties.

Notes, Comments, and Questions

In her opinion concurring in part, Justice O'Connor wrote that she would not have excluded Quarles's gun from evidence, even if his initial statement about the gun had been excluded as she thought Miranda required. Because the majority in this case found that a Miranda Rule exception applied, the Court did not decide whether a Miranda violation could lead to the exclusion of physical evidence found as a result of statements obtained after interrogation. We will review how the Court decided this issue later this semester when we turn out attention to the exclusionary rule.

In Justice Marshall's dissent, he writes that the majority has permitted the use of "coerced statements" against a criminal defendant. But if the statements were truly the result of coercion, then the Due Process Clause of the Fourteenth Amendment should bar the statements as involuntary. Indeed, the majority opinion states, "In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist." The disconnect between the dissent and majority opinions

illustrates a fundamental disagreement about the Miranda doctrine. In the eyes of the dissent, statements obtained in violation of Miranda are "coerced," and their admission violates the Fifth Amendment. The majority, by contrast, reasons that Miranda merely created a "presumption" that such statements are involuntary, a presumption created by the Court for its convenience, as well as to promote adherence to constitutional commands. A statement that is presumed compelled can be admitted against a defendant in appropriate circumstances—assuming of course that no actual compulsion is found—without offending the Self-Incrimination Clause.

* * *

PART XXVI

INTERROGATIONS: SIXTH AMENDMENT: THE MASSIAH RULE

The Sixth Amendment: The Massiah Doctrine

The text of the Sixth Amendment says nothing about interrogations. But it does have at least one useful hint about its applicability—the phrase "in all criminal prosecutions." If there is no "prosecution," there is no Sixth Amendment. The Court has clarified that "prosecution" is not limited to trials, and it has also stated that mere arrest isn't enough. There must be some sort of formal proceeding.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The Court has held that once a defendant's right to counsel has "attached"—a concept we will examine later—additional rules restrict

interrogations. These rules differ from the Miranda Rule in important ways. For example, the Assistance of Counsel Clause applies regardless of whether a suspect is in custody. Further, the restrictions imposed under the Clause apply to undercover agents as well as to interrogators whom suspects know to be police officers.

The cases beginning with Massiah v. United States compose the third and final interrogation doctrine included in this book. Students should recall that the Due Process Clauses, the Miranda Rule, and the Massiah doctrine impose overlapping commands that police must obey during their investigations of crime.

MASSIAH V. UNITED STATES (1964)

Supreme Court of the United States

Winston Massiah v. United States

Decided May 18, 1964 – 377 U.S. 201

Mr. Justice STEWART delivered the opinion of the Court.

***In July a superseding indictment was returned, charging the petitioner and a man named Colson with the same substantive offense, and in separate counts charging the petitioner, Colson, and others with having conspired to possess narcotics aboard a United States vessel, and to import, conceal, and facilitate the sale of narcotics. The petitioner, who had retained a lawyer, pleaded not guilty and was released on bail, along with Colson.

A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics

activities in which the petitioner, Colson, and others had allegedly been engaged. Colson permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

***We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the

circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Mr. Justice WHITE, with whom Mr. Justice CLARK and Mr. Justice HARLAN join, dissenting. [omitted]

Notes, Comments, and Questions

Because under Massiah police cannot use undercover agents to question a suspect whose right to counsel has "attached," two suspects in the same jail can have different rules apply to them. If one has been arrested but not yet indicted or brought before a judge, chances are that Miranda applies to her and Massiah does not. In that case, because undercover questioning is not "interrogation" under Miranda, a secret informant could freely question the suspect, with only the Due Process Clauses regulating the tactics. A cellmate who had been indicted—or for whom adversary proceedings had otherwise commenced—would be protected by Massiah doctrine, which applies regardless of whether a suspect is in custody.

In Brewer v. Williams, the Court was forced to decide whether to apply the Massiah doctrine in the case of a murder of a ten-year-old child. Perhaps because the straightforward application of the rule would lead to such an unappealing outcome—the state's inability to punish a killer whose guilt was seemingly in little doubt—the case caused sharp disagreements among the Justices.

BREWER V. WILLIAMS (1977)

Supreme Court of the United States

Lou V. Brewer v. Robert Anthony Williams

Decided March 23, 1977 – 430 U.S. 387

Mr. Justice STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding a Federal District Court ruled that under the United States Constitution Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in

Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by Miranda v. Arizona. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his Miranda rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to

Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the Miranda warnings, and told Williams:

"[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and ... I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that "[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story." Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-

ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," the detective said: "I want to give you something to think about while we're traveling down the road. ... Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl's body, and Leaming responded that he knew the body was in the area of Mitchellville a town they would be passing on the way to Des Moines. Leaming then stated: "I do not want you to

answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim's shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After an evidentiary hearing the trial judge denied the motion. He found that "an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines," and that the evidence in question had been elicited from Williams during "a critical stage in the proceedings requiring the presence of counsel on his request." The judge ruled, however, that Williams had "waived his right to have an attorney present during the giving of such information."

***There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams' trial:

"Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren't you?

"A. I was sure hoping to find out where that little girl was, yes, sir.

"Q. Well, I'll put it this way: You was [sic] hoping to get all the information you could before Williams got back to McKnight, weren't you?

"A. Yes, sir."

The state courts clearly proceeded upon the hypothesis that

Detective Leaming's "Christian burial speech" had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. Yet no such constitutional protection would have come into play if there had been no interrogation.

The circumstances of this case are thus constitutionally indistinguishable from those presented in Massiah v. United States. That the incriminating statements were elicited surreptitiously in the Massiah case, and otherwise here, is constitutionally irrelevant. Rather, the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the Massiah doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

***

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it

pursues." Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all. The judgment of the Court of Appeals is affirmed.

Mr. Justice MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Mr. Justice STEVENS, concurring.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice

given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage as in countless others in which the law profoundly affects the life of the individual the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Mr. Chief Justice BURGER, dissenting.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court by the narrowest margin on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody,

and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.

[Chief Justice Burger's dissent then raised two main points. First, he argued that Williams's statements were voluntary. Second, he urged that the exclusionary rule should not be applied to "non-egregious police conduct."]

Mr. Justice WHITE, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

The respondent in this case killed a 10-year-old child. The majority sets aside his conviction, holding that certain statements of unquestioned reliability were unconstitutionally obtained from him, and under the circumstances probably makes it impossible to retry him. Because there is nothing in the Constitution or in our previous cases which requires the Court's action, I dissent.

***

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE and Mr. Justice REHNQUIST join, dissenting. [omitted]

Notes, Comments, and Questions

Compare the outcome in Williams to Rhode Island v. Innis. Why are the outcomes different in these cases?

The Court in Williams took the defendant's guilt for granted, which one can understand because Williams was seen leaving the YMCA with a body and eventually led police to the hidden body of the victim. Subsequent research, however, suggests another possibility—that a different YMCA resident killed Pamela Powers and put her body in Williams's room, after which Williams panicked and tried to hide the evidence. For a discussion of the facts, see Tom N. McInnis, Nix v. Williams and the Inevitable Discovery Exception: Creation of a Legal Safety Net, 28 St. Louis U. Pub. L. Rev. 397, 417-27 (2009). While Williams may well be guilty, his guilt is not as obvious as the Justices seemed to believe. The title of Professor McInnis's article refers to this case as "Nix v. Williams," the name under which we will see the case again later in the semester.

INTERROGATIONS FLOWCHART EXERCISE

Interrogation Flowchart Exercise

Flowcharts can help students visualize what they have learned. The goal is not to memorize the example chart presented here but instead to create a new chart that helps one to connect material from throughout the book. Your authors recommend that when students make their own charts, they add additional detail, such as case names or chapter numbers. For example, in the box asking whether a statement was "voluntary," such as Brown v. Mississippi, which is a particularly helpful case because its facts are so close to the line separating a voluntary confession from an inadmissible, involuntary confession.

This chart focuses on the Miranda Rule. A separate chart might depict Sixth Amendment law set forth in Massiah and related cases.

——- [Insert chart] ———

These charts have two primary purposes. One is that when the charts are finished, they can serve as study aids. The other is that the creation of the charts—even if students never review

them after finishing them—forces students to consider material more carefully than they otherwise might, which helps with learning and with retention of information. Also, fellow students can help spot misunderstandings that, were they not in a chart, would remain uncorrected. Study group members might wish to bring charts to share with classmates.

INTERROGATIONS REVIEW

Interrogation Review

The Fifth and Sixth Amendments: Constitutional Regulation of Interrogation

Before moving to the next chapter, students may wish to review what we have learned about how police interrogation practices are regulated by constitutional law.

Instructions: For each problem, indicate which if any doctrines likely prohibit the conduct described. The answer choices are: (1) Miranda Rule, (2) Massiah doctrine, (3) voluntariness requirement, (4) multiple doctrines (indicate which ones), and (5) none (i.e., the suspect has no good arguments based on interrogation law presented so far in this book). Jot down your reasoning briefly. If you are not sure, note why.

Each problem is independent of all other ones.

1) Police suspect someone of dealing drugs but lack good

evidence. Officers hide a microphone in the pocket of an undercover agent disguised as a drug buyer. The suspect welcomes the undercover agent into the suspect's home. However, when the undercover agent asks about drugs, the suspect says, "You must be confused. I don't have anything to do with drugs." Frustrated, the agent brandishes a pistol and shouts, "Tell me the truth or I'll shoot." The suspect says, "Fine, fine. I sell weed. How much do you need?"

2) A suspect has been indicted for tax evasion. Unable to make bail, the suspect returns to jail. Police plant an undercover agent in the suspect's cell, disguised as a fellow inmate. The agent asks the suspect about tax evasion and learns important details about the suspect's crimes.

3) A suspect has been indicted for embezzlement. Released on bail, the suspect goes home. Police send an undercover agent to the suspect's home. (The agent is a co-conspirator who, without the suspect's knowledge, has decided to cooperate with prosecutors.) The agent records the suspect describing the embezzlement scheme.

4) A suspect has been indicted for cocaine distribution. Released on bail, the suspect goes to a favorite public park and begins calling friends, sharing the good news about the bail hearing. Police have hidden a microphone on the underside of the suspect's favorite park bench. Using that device, police overhear the suspect tell friends about continuing illegal activity.

5) A suspect is arrested for robbery. While driving the

suspect to the police station, officers converse with one another. One officer says, "Can you believe this guy? I can't believe I'm stuck in a car with someone who robbed a gas station mini mart, a boy scout troop, and a church. What a piece of human garbage!" Impulsively, the suspect responds, "Listen, I'm not perfect, but I definitely didn't rob any boy scouts."

PART XXVII

INTRODUCTION TO THE EXCLUSIONARY RULE

Introduction to the Exclusionary Rule

In the reading assignment for the first chapter, students were encouraged to consider two questions when reading cases: "First, were someone's rights (usually constitutional rights) violated? Second, if so, so what?" We have thus far focused mostly on the first question, examining how the Court has construed the rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments. Yet the second question has arisen from time to time as the Justices debated whether certain behavior by state agents justified the exclusion of evidence. For example, the public safety exception to the Miranda Rule (Chapter 28) rests upon a judgment by the Court that police efforts to manage an ongoing

"emergency"—or, to be less dramatic, a plausible urgent threat to public safety—are not the sort of activity that should hinder prosecution. Similarly, the opinions in Brewer v. Williams (Chapter 29) clashed over the propriety of excluding evidence against an accused murderer that police obtained through questionable interrogation techniques. Further, lurking behind the facts and legal analysis of nearly every case included in this book so far has been a defendant's desire to prevent evidence from being offered by prosecutors. Recall, for example, Terry v. Ohio (Chapter 20), in which the Court held that police may conduct certain searches and seizures without probable cause. John Terry did not bring his case to the Supreme Court because of his interest in Fourth Amendment jurisprudence; instead, he hoped that the Court might somehow prevent the state of Ohio from sending him to prison for carrying the concealed weapon that Officer McFadden found when frisking Terry in Zucker's store that Cleveland afternoon.

Terry's desired outcome—the exclusion of evidence—is the same as most of the parties we have seen complaining about state action of one kind or another. Yes, there are exceptions, such as Muehler v. Mena (2005), a lawsuit brought by a woman not found to have committed any crime who objected to how police treated her while executing a search warrant. She wanted money, not a ruling about evidence. We will turn later to the doctrine governing when money damages are available as a remedy for constitutional harms.

For now, and for the bulk of this unit, we turn to the "exclusionary rule," a term that covers various doctrines through which the Court has prohibited certain uses of unlawfully-obtained evidence.

Underlying all debate on the exclusionary rule, one finds two facts. Although not always explicitly acknowledged, these facts pervade the Justices' reasoning in exclusionary rule cases. First, when courts prevent prosecutors from using relevant, reliable evidence against criminal defendants, courts impede the fight against crime. One can debate the extent of the impediment—critics of the exclusionary rule tend to imagine higher hurdles than those described by supporters of the doctrine. Yet no honest defender of the exclusionary rule can deny that, in at least some cases, guilty defendants—sometimes guilty of terrible crimes—go free because of the Court's criminal procedure jurisprudence. In the words of Justice Cardozo during his time on the Court of Appeals of New York, "The criminal is to go free because the constable has blundered."

Second, remedies other than the exclusionary rule have not been effective in preventing police from violating the rights announced in Supreme Court opinions—that is, the rights described in books like this one. Other remedies exist, including money damages, internal police department discipline, and oversight by elected officials. Again, one can debate the extent of the problem. Opponents of the exclusionary rule tend to see less police misconduct than do

the rule's supporters, and exclusionary rule opponents tend to have greater faith in the professionalism and goodwill of police department leaders and the politicians to whom they report. Yet police departments—from top leaders to officers on the street—worry about losing evidence to the exclusionary rule and govern their behavior, at least in part, to avoid that judicial remedy.

In short, the exclusionary rule promotes police conformity with Supreme Court criminal procedure decisions, and it does so at the cost of evidence otherwise available to convict accused criminals. As Judge Friendly put it, "The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable factfinding. The evidence is likely to be the most reliable that could possibly be obtained; exclusion rather than admission creates the danger of a verdict erroneous on the true facts. The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution."71

Some might quibble with Judge Friendly's statement that the "sole reason" for the exclusionary rule is to deter police misconduct. For example, perhaps apart from deterrence, exclusion is justified because courts will lose respect from the people if they allow agents of the state to prosecute the accused using evidence obtained illegally. That said, deterrence is the primary justification offered by the Court, especially in recent

decades. Students should consider which justifications, if any, they find persuasive.

WEEKS V. UNITED STATES (1914)

Supreme Court of the United States

Fremont Weeks v. United States

Decided February 24, 1914 – 232 U.S. 383

Mr. Justice Day delivered the opinion of the [unanimous] court:

***

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant's room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the

marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelops found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant.

[The defendant filed a petition requesting return of his "private papers, books, and other property" and stating that the use of his personal items at trial would violate his Fourth and Fifth Amendment rights.]

***Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court.

***

[The Court recounted the origin and history of the Fourth Amendment.]

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon

all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

***If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.** [emphasis added by editor] The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to

bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. ...To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

***

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused.

***

Notes, Comments, and Questions

A few years after deciding Weeks, the Court confronted an attempt by federal officials to avoid the new exclusionary rule. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), federal agents raided an office unlawfully and seized books and records. After being ordered to return the illegally-

gotten items, the government retained photographs and copies of some of the documents. Government lawyers then sought to subpoena the original documents (once again in the hands of their owners) on the basis of information learned while the documents were in the possession of federal agents. The Court reacted as follows:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

The rule stated in Silverthorne Lumber has sometimes been called the "fruit of the poisonous tree" doctrine. The analogy is that if the evidence or knowledge obtained through the

original constitutional violation is a poisonous tree, then evidence obtained as a result of that wrong is a poisonous fruit which must also be excluded from evidence. The case of Kyllo v. United States (Chapter 3) provides an example. If, as the Court found, the thermal imaging of Kyllo's house was an unlawful search, then a search warrant obtained by officers who recited information learned during the illegal imaging could not justify the subsequent police entry into the house. The marijuana seized from Kyllo's house was poisonous fruit of the thermal imaging.

In the next case, the Court considered whether to apply the rule of Weeks to state courts. The Court had already decided that the Fourth Amendment's protections against unreasonable searches and seizures were "incorporated" against the states through the Fourteenth Amendment. The issue was whether the exclusionary rule would also be imposed on the states.

WOLF V. COLORADO (1949)

Supreme Court of the United States

Wolf v. Colorado, 338 U.S. 25 (1949)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The precise question for consideration is this: does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. United States, 232 U. S. 383? The Supreme Court of Colorado has sustained convictions in which such evidence was

admitted, 117 Col. 279, 187 P.2d 926; 117 Col. 321, 187 P.2d 928, and we brought the cases here. 333 U.S. 879.

Unlike the specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII) upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution, and thereby incorporates them, has been rejected by this Court again and again, after impressive consideration. See, e.g., Hurtado v. California, 110 U. S. 516; Twining v. New Jersey, 211 U. S. 78; Brown v. Mississippi, 297 U. S. 278; Palko v. Connecticut, 302 U. S. 319. Only the other day, the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. Adamson v. California, 332 U. S. 46. The issue is closed.

For purposes of ascertaining the restrictions which the Due Process Clause imposed upon the States in the enforcement of their criminal law, we adhere to the views expressed in Palko v. Connecticut, supra, 302 U. S. 319. That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty, of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead. In rejecting the suggestion that the Due Process Clause incorporated the

original Bill of Rights, Mr. Justice Cardozo reaffirmed on behalf of that Court a different but deeper and more pervasive conception of the Due Process Clause. This Clause exacts from the States for the lowliest and the most outcast all that is "implicit in the concept of ordered liberty." 302 U.S. at 302 U. S. 325.

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. ***

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

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

Accordingly, we have no hesitation in saying that, were a State affirmatively to sanction such police incursion into privacy, it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against

it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

In Weeks v. United States, supra, this Court held that, in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication. Since then, it has been frequently applied, and we stoutly adhere to it. But the immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded. As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers. When we find that, in fact, most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration

which they have given the problem in the light of the Weeks decision.

"I. Before the Weeks decision, 27 States had passed on the admissibility of evidence obtained by unlawful search and seizure."

" (a) Of these, 26 States opposed the Weeks doctrine....

" (b) Of these, 1 State anticipated the Weeks doctrine....

"II. Since the Weeks decision, 47 States all told have passed on the Weeks doctrine....

" (a) Of these, 20 passed on it for the first time."...

"~ (1) Of the foregoing States, 6 followed the Weeks doctrine....

"~ (2) Of the foregoing States, 14 rejected the Weeks doctrine. ...

" (b) Of these, 26 States reviewed prior decisions contrary to the Weeks doctrine."...

"~ (1) Of these, 10 States have followed Weeks, overruling or distinguishing their prior decisions. ...

"~ (2) Of these, 16 States adhered to their prior decisions against Weeks....

" (c) Of these, 1 State repudiated its prior formulation of the Weeks doctrine....

"III. As of today, 31 States reject the Weeks doctrine, 16 States are in agreement with it....

"IV. Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on

the question, none has held evidence obtained by illegal search and seizure inadmissible....

The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that, in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice (then Judge) Cardozo in *People v. Defore*, 242 N.Y. 13, 150 N.E. 585. We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures, but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a

community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

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

ROCHIN V. CALIFORNIA (1952)

Supreme Court of the United States

Rochin v. California, 342 U.S. 165 (1952)

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Having "some information that [the petitioner here] was selling narcotics," three deputy sheriffs of the County of Los Angeles, on the morning of July 1, 1949, made for the two-story dwelling house in which Rochin lived with his mother, common law wife, brothers and sisters. Finding the outside door open, they entered and then forced open the door to Rochin's room on the second floor. Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying. On a "night stand" beside the bed, the deputies spied two capsules. When asked "Whose stuff is this?", Rochin seized the capsules and put them in his mouth.

A struggle ensued in the course of which the three officers "jumped upon him" and attempted to extract the capsules. The force they applied proved unavailing against Rochin's resistance. He was handcuffed and taken to a hospital. At the direction of one of the officers, a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This "stomach pumping" produced vomiting. In the vomited matter were found two capsules which proved to contain morphine.

Rochin was brought to trial before a California Superior Court, sitting without a jury, on the charge of possessing "a preparation of morphine" in violation of the California Health and Safety Code 1947, § 11500. Rochin was convicted and sentenced to sixty days' imprisonment. The chief evidence against him was the two capsules. They were admitted over petitioner's objection, although the means of obtaining them was frankly set forth in the testimony by one of the deputies, substantially as here narrated.

On appeal, the District Court of Appeal affirmed the conviction, despite the finding that the officers "were guilty of unlawfully breaking into and entering defendant's room, and were guilty of unlawfully assaulting and battering defendant while in the room," and "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital." 101 Cal. App. 2d 140, 143, 225 P.2d 1, 3. One of the three judges, while finding that "the record in this case reveals a shocking series of violations of constitutional

rights", concurred only because he felt bound by decisions of his Supreme Court. These, he asserted, "have been looked upon by law enforcement officers as an encouragement, if not an invitation, to the commission of such lawless acts." ***

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of or judicial process. See Cardozo, The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science. These are considerations deeply rooted in reason and in the compelling traditions of the legal profession. The Due Process Clause places upon this Court the duty of exercising a judgment, within the narrow confines of judicial power in reviewing State convictions, upon interests of society pushing in opposite directions.

***

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his

stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

***On the facts of this case, the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be reversed.

Reversed.

MR. JUSTICE BLACK, concurring.

Adamson v. California, 332 U. S. 46, 332 U. S. 68-123, sets out reasons for my belief that state, as well as federal, courts and law enforcement officers must obey the Fifth Amendment's command that "No person . . . shall be compelled in any criminal case to be a witness against himself." I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when as here, incriminating evidence is forcibly taken from him by a contrivance of modern science.... California convicted this petitioner by using against him evidence obtained in this manner, and I agree with MR. JUSTICE DOUGLAS that the case should be reversed on this ground.

In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But

I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.

***

MAPP V. OHIO (1961)

Supreme Court of the United States

Dollree Mapp v. Ohio

Decided June 19, 1961 – 367 U.S. 643

Mr. Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home ...."

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of [gambling] paraphernalia being

hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was

then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] were such as to 'offend "a sense of justice,"'" but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing Wolf v. People of State of Colorado, 338 U.S. 25 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amendment

does not forbid the admission of evidence obtained by an unreasonable search and seizure." On this appeal, it is urged once again that we review that holding.

I

[T]he Court in [Weeks v. United States] clearly stated that use of [] seized evidence involved "a denial of the constitutional rights of the accused." Thus, in the year 1914, in the Weeks case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts ...," and that such evidence "shall not be used at all."

There are in the cases of this Court some passing references to the Weeks rule as being one of evidence. But the plain and unequivocal language of Weeks—and its later paraphrase in Wolf—to the effect that the Weeks rule is of constitutional origin, remains entirely undisturbed.

II

In 1949, 35 years after Weeks was announced, this Court, in Wolf v. People of State of Colorado, again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

"[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

Nevertheless, after declaring that the "security of one's privacy against arbitrary intrusion by the police" is "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" and announcing that it "stoutly adhere[d]" to the Weeks decision, the Court decided that the Weeks exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." The Court's reasons ... were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which Wolf was based.

The Court in Wolf first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule

of Weeks was "particularly impressive"; and, in this connection that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy ... by overriding the [States'] relevant rules of evidence." While in 1949, prior to the Wolf case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule. Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions ...." In connection with this California case, we note that the second basis elaborated in Wolf in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the right to privacy." The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment of the protection of other remedies has, moreover, been recognized by this Court since Wolf.

***

It, therefore, plainly appears that the factual considerations supporting the failure of the Wolf Court to include the Weeks exclusionary rule when it recognized the enforceability of the

right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III

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

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

IV

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due

Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." ....To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of

a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain that that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.?

***

V

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. ***

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." In some cases this will undoubtedly be the result.

But [] "there is another consideration—the imperative of judicial integrity." The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 277 U.S.438, 485 (1928): "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." ***

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

judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Mr. Justice BLACK, concurring. [omitted]

Mr. Justice DOUGLAS, concurring.

We held in Wolf v. People of State of Colorado that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the Weeks case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle. As stated in the Weeks case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures, is of no value, and ... might as well be stricken from the Constitution."

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home, we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet, "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself

or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, Wolf v. People of State of Colorado in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter."

Memorandum of Mr. Justice STEWART.

Agreeing fully with Part I of Mr. Justice HARLAN'S dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice HARLAN, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

Mr. Justice HARLAN, whom Mr. Justice

FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

In overruling the Wolf case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for stare decisis, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the Wolf rule represents sounder Constitutional doctrine than the new rule which now replaces it.

***

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule Wolf. With all respect for the views of the majority, and recognizing that stare decisis carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining Wolf.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling Wolf the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) and

irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, surely presents a Constitutional question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

***In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done.***

Notes, Comments, and Questions

Dollree Mapp, who objected so vigorously to the search of her home in 1957, lived until 2014.72 Her obituary reported that after being convicted of drug possession in New York in 1971, "she pursued a series of appeals, claiming that the search warrant used in her arrest had been wrongly issued and that the police had targeted her because of her role in Mapp v. Ohio."

The Justices debated two main questions in Mapp v. Ohio:

First, would imposing the exclusionary rule on the states be good policy? Second, does the Court have authority under the Constitution to impose it?

Scholars writing under the banner of "originalism" have argued that the Court lacked authority to hold as it did in Mapp. See, e.g., John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 Nw. U. L. Rev. 803, 806, 850-53 (2009) ("under our theory, the Supreme Court could appropriately discard a substantial portion of current constitutional criminal procedure, such as the exclusionary rule"); Stephen G. Calabresi, "Introduction," in Originalism: A Quarter-Century of Debate (Stephen G. Calabresi, ed. 2007), at 1, 39-40 (listing, among "good consequences that would flow from adopting originalism," that "[w]e would be better off if criminals never got out of jail because of the idiocy of the exclusionary rule"); but see Akhil Reed Amar, "Panel on Originalism and Precedent," in id., at 210-11 ("And yet none of the supposedly originalist justices on the Supreme Court reject the exclusionary rule. Even Justices Scalia and Thomas exclude evidence pretty regularly, and do not ever quite tell us why they do so when it means abandoning the original meaning of the Fourth Amendment.").

In a provocative essay, Judge Guido Calabresi argues that the exclusionary rule has perverse effects, including encouraging false testimony by police. In particular, he suggests that because finding a constitutional violation—such

as an illegal search—often requires a judge to free a dangerous criminal, judges err on the side of finding no violation. "Judges—politicians' claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty in on technicalities. ... [Judges do] not like the idea of dangerous criminals being released into society. This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes precedent for the next case."73 After acknowledging that alternative methods of "controlling the police in this area simply do not work," Judge Calabresi proposes an odd scheme by which convicted defendants could win reduced sentences by proving after trial that the prosecution used illegally-obtained evidence to convict them.74

Professor Yale Kamisar presented a more straightforward defense of the exclusionary rule, arguing that the rule's survival should not depend on an "empirical evaluation of its efficacy in deterring police misconduct."75 Instead, the "imperative of judicial integrity,"76 requires the exclusion of evidence obtained in violation of the constitution.

Professor Kamisar next recounted an anecdote that helped him to appreciate the importance of Mapp, which he recalled as having "caused much grumbling in police ranks" in Minnesota.77 In response to the grumbling, the state's attorney general reminded police officers that "the language of

the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution" and that in terms of substantive law—that is, what police are and are not allowed to do—"Mapp did not alter one word of either the state or national constitutions," nor had it reduced lawful "police powers one iota."78 Professor Kamisar reported also that after the attorney general's speech, "proponents of the exclusionary rule quoted [his] remarks and made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner would now be excluded by the courts, the police must have been violating the guarantee against unreasonable search and seizure all along."

Professor Kamisar then recounted how a police officer reacted to the insinuation of longstanding officer misbehavior:

"No officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open ... often we picked locks. ... The Supreme Court of Minnesota sustained this time after time. ... [The] judiciary okayed it; they knew what the facts were."79

In other words, Professor Kamisar wrote, the "police departments ... reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written."80

Noting that police in other jurisdictions reacted in the same way he had observed in Minnesota, Professor Kamisar quoted the chief of the Los Angeles Police Department, who "warned

that his department's 'ability to prevent the commission of crime has been greatly diminished' because henceforth his officers would be unable to take 'affirmative action' unless and until they possessed 'sufficient information to constitute probable cause.'"81 Similarly, the commissioner of police in New York City reported that in the wake of Mapp, "[r]etraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function." These sessions covered information not taught to the officers when they first joined the force; the NYPD "was immediately caught up in the entire problem of reevaluating our procedures ... and modifying, amending and creating new policies and new instructions for the implementation of Mapp."82

If one takes the contemporary statements of police department leaders at face value, Mapp inspired far greater attention to search and seizure law than had previously existed in police departments across the United States.

In our next chapter, we review more recent case law. The Court has limited the application of the exclusionary rule to cases involving particularly egregious official misconduct. This causes less evidence—and fewer cases—to be lost because of judicial intervention. It also, however, decreases the deterrent effect of the rule.

PART XXVIII

WHEN DOES THE EXCLUSIONARY RULE APPLY?

When Does the Exclusionary Rule Apply?

The exclusionary rule has lasted more than a century in federal court and more than half a century in the courts of the states. Time has not dulled the controversy created by the rule. Although recent Supreme Court opinions devote relatively little time to debating the constitutional underpinnings of the rule, the Justices continue to argue over the rule's utility. In particular, twenty-first century exclusionary rule cases have contested the costs (measured in the loss of relevant, reliable evidence) and benefits (measured in deterrence of official misconduct, particularly the kind that violates constitutional rights). Recent cases have narrowed the scope of the rule—applying it to less misconduct than was covered in the decades after Mapp v. Ohio—but have not abolished it. Defendants retain powerful incentives to seek the exclusion of

evidence, especially in cases of brazen police misconduct and when there are clear violations of well-established rights.

In our next case, the Court considered whether violations of the knock-and-announce rule—covered in Chapter 7—justify the exclusion of evidence found during a police search.

HUDSON V. MICHIGAN (2006)

Supreme Court of the United States

Booker T. Hudson, Jr. v. Michigan

Decided June 15, 2006 – 547 U.S. 586

Justice SCALIA delivered the opinion of the Court.

We decide whether violation of the "knock-and-announce" rule requires the suppression of all evidence found in the search.

I

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which

he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps "three to five seconds"—before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

***

II

[It was undisputed that the entry was a knock-and-announce violation.]

III

A

In Weeks v. United States, we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in Mapp v. Ohio.

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio[us] against expanding" it and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." We have rejected "[i]ndiscriminate application" of the rule and have held it to be applicable only "where its remedial objectives are thought most efficaciously served"—that is, "where its deterrence benefits outweigh its 'substantial social costs.'"

***

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who "'did not know of the process, of which, if he had notice, it is to be presumed that he would obey it ....'" The knock-and-announce rule gives individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. "The brief interlude

between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.***

Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: "[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.") To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even "reasonable suspicion" of their existence, suspend the knock-

and-announce requirement anyway. Massive deterrence is hardly required.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when Mapp was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

Justice KENNEDY, concurring in part and concurring in the judgment. [omitted]

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In Wilson v. Arkansas (Chapter 7), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the

near century since it first set forth the exclusionary principle in Weeks v. United States.

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

It is not surprising [] that after looking at virtually every pertinent Supreme Court case decided since Weeks, I can find no precedent that might offer the majority support for its contrary conclusion. ***

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court's prior case law, through its claim of "'substantial social costs'"—at least if it means that those "'social costs'" are somehow special here. The only costs it mentions are those that typically accompany any use of the Fourth Amendment's exclusionary principle. In fact, the "no-knock" warrants that are provided by many States, by diminishing uncertainty, may make application of the knock-and-announce principle less "'cost[ly]'" on the whole than application of comparable Fourth Amendment principles, such as determining whether a particular warrantless search was justified by exigency. The majority's "substantial social costs" argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected.

* * *

The Court in Hudson v. Michigan reasoned that the police would have found the evidence anyway (even without the Fourth Amendment violation), and Justice Kennedy concurred that there was no evidence of widespread knock-and-announce violations across the land. Although the decision answered only a fairly narrow question—the availability of the exclusionary rule in knock-and-announce cases—its reasoning foreshadowed a further reduction of the scope of the exclusionary rule.

The next cases answer the question of whether ordinary negligence by police—if it results in a violation of constitutional rights—is sufficient to trigger the exclusionary rule, or if instead more culpable misconduct is required.

ARIZONA V. EVANS (1995)

Supreme Court of the United States

Arizona v. Evans, 514 U.S. 1 (1995)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether evidence seized in violation of the Fourth Amendment by an officer who acted in reliance on a police record indicating the existence of an outstanding arrest warrant-a record that is later determined to be erroneous-must be suppressed by virtue of the exclusionary rule regardless of the source of the error. The Supreme Court of Arizona held that the exclusionary rule required suppression of evidence even if the erroneous information resulted from an error committed by an employee of the office of the Clerk of Court. We disagree.

In January 1991, Phoenix police officer Bryan Sargent

observed respondent Isaac Evans driving the wrong way on a one-way street in front of the police station. The officer stopped respondent and asked to see his driver's license. After respondent told him that his license had been suspended, the officer entered respondent's name into a computer data terminal located in his patrol car. The computer inquiry confirmed that respondent's license had been suspended and also indicated that there was an outstanding misdemeanor warrant for his arrest. Based upon the outstanding warrant, Officer Sargent placed respondent under arrest. While being handcuffed, respondent dropped a hand-rolled cigarette that the officers determined smelled of marijuana. Officers proceeded to search his car and discovered a bag of marijuana under the passenger's seat.

The State charged respondent with possession of marijuana. When the police notified the Justice Court that they had arrested him, the Justice Court discovered that the arrest warrant previously had been quashed and so advised the police. Respondent argued that because his arrest was based on a warrant that had been quashed 17 days prior to his arrest, the marijuana seized incident to the arrest should be suppressed as the fruit of an unlawful arrest. Respondent also argued that "[t]he 'good faith' exception to the exclusionary rule [was] inapplicable ... because it was police error, not judicial error, which caused the invalid arrest." App. 5.

At the suppression hearing, the Chief Clerk of the Justice Court testified that a Justice of the Peace had issued the arrest

warrant on December 13, 1990, because respondent had failed to appear to answer for several traffic violations. On December 19, 1990, respondent appeared before a pro tem Justice of the Peace who entered a notation in respondent's file to "quash warrant." Id., at 13.

The Chief Clerk also testified regarding the standard court procedure for quashing a warrant. Under that procedure a justice court clerk calls and informs the warrant section of the Sheriff's Office when a warrant has been quashed. The Sheriff's Office then removes the warrant from its computer records. After calling the Sheriff's Office, the clerk makes a note in the individual's file indicating the clerk who made the phone call and the person at the Sheriff's Office to whom the clerk spoke. The Chief Clerk testified that there was no indication in respondent's file that a clerk had called and notified the Sheriff's Office that his arrest warrant had been quashed. A records clerk from the Sheriff's Office also testified that the Sheriff's Office had no record of a telephone call informing it that respondent's arrest warrant had been quashed. Id., at 42-43.

At the close of testimony, respondent argued that the evidence obtained as a result of the arrest should be suppressed because "the purposes of the exclusionary rule would be served here by making the clerks for the court, or the clerk for the Sheriff's office, whoever is responsible for this mistake, to be more careful about making sure that warrants are removed from the records." Id., at 47. The trial court granted the

motion to suppress because it concluded that the State had been at fault for failing to quash the warrant. Presumably because it could find no "distinction between State action, whether it happens to be the police department or not," id., at 52, the trial court made no factual finding as to whether the Justice Court or Sheriff's Office was responsible for the continued presence of the quashed warrant in the police records.***

Applying the reasoning of Leon to the facts of this case, we conclude that the decision of the Arizona Supreme Court must be reversed. The Arizona Supreme Court determined that it could not "support the distinction drawn ... between clerical errors committed by law enforcement personnel and similar mistakes by court employees," 177 Ariz., at 203, 866 P. 2d, at 871, and that "even assuming ... that responsibility for the error rested with the justice court, it does not follow that the exclusionary rule should be inapplicable to these facts," ibid.

This holding is contrary to the reasoning of Leon, supra; Massachusetts v. Sheppard, supra; and, Krull, supra. If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in Leon, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. See Leon, supra, at 916; see also Krull, supra, at 350. Second, respondent offers no evidence

that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See Leon, supra, at 916, and n. 14; see also Krull, supra, at 350-351. To the contrary, the Chief Clerk of the Justice Court testified at the suppression hearing that this type of error occurred once every three or four years. App. 37.

Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, see Johnson v. United States, 333 U. S. 10, 14 (1948), they have no stake in the outcome of particular criminal prosecutions. Cf. Leon, supra, at 917; Krull, supra, at 352. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed. Cf. Leon, supra, at 917; Krull, supra, at 352.

If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer. ***

The judgment of the Supreme Court of Arizona is therefore reversed, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

The evidence in this case strongly suggests that it was a court employee's departure from established recordkeeping procedures that caused the record of respondent's arrest warrant to remain in the computer system after the warrant had been quashed. Prudently, then, the Court limits itself to the question whether a court employee's departure from such established procedures is the kind of error to which the exclusionary rule should apply. The Court holds that it is not such an error, and I agree with that conclusion and join the Court's opinion. The Court's holding reaffirms that the exclusionary rule imposes significant costs on society's law enforcement interests and thus should apply only where its deterrence purposes are "most efficaciously served,"***

JUSTICE STEVENS, dissenting.

***The Court seems to assume that the Fourth Amendment and particularly the exclusionary rule, which effectuates the Amendment's commands-has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception. The Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects," against all official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its

agents. See Olmstead v. United States, 277 U. S. 438, 472-479 (1928) (Brandeis, J., dissenting). The remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations. See Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and Seizure Cases, 83 Colum. L. Rev. 1365, 1400 (1983).

The exclusionary rule is not fairly characterized as an "extreme sanction," ante, at 11 (internal quotation marks omitted). As Justice Stewart cogently explained, the implementation of this constitutionally mandated sanction merely places the government in the same position as if it had not conducted the illegal search and seizure in the first place. Given the undisputed fact in this case that the Constitution prohibited the warrantless arrest of respondent, there is nothing "extreme" about the Arizona Supreme Court's conclusion that the State should not be permitted to profit from its negligent misconduct.

***

***[O]ne consequence of the Court's holding seems immediately obvious. Its most serious impact will be on the otherwise innocent citizen who is stopped for a minor traffic infraction and is wrongfully arrested based on erroneous information in a computer data base. I assume the police officer who reasonably relies on the computer information would be immune from liability in a § 1983 action. Of course, the Court has held that respondeat superior is unavailable as

a basis for imposing liability on his or her municipality. See Monell v. New York City Dept. of Social Servs., 436 U. S. 658, 663-664, n. 7 (1978). Thus, if courts are to on that same day that it happened. Fortunately, they weren't all arrested." App. 37.

***The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as equally outrageous. In this case, of course, such an error led to the fortuitous detection of respondent's unlawful possession of marijuana, and the suppression of the fruit of the error would prevent the prosecution of his crime. That cost, however, must be weighed against the interest in protecting other, wholly innocent citizens from unwarranted indignity. In my judgment, the cost is amply offset by an appropriately "jealous regard for maintaining the integrity of individual rights." Mapp v. Ohio, 367 U. S. 643, 647 (1961). For this reason, as well as those set forth by JUSTICE GINSBURG, I respectfully dissent.

[Justice Ginsburg dissent omitted]

HERRING V. UNITED STATES (2009)

Supreme Court of the United States

Bennie Dean Herring v. United States

Decided Jan. 14, 2009 – 555 U.S. 135

Chief Justice ROBERTS delivered the opinion of the Court.

The Fourth Amendment forbids "unreasonable searches and seizures," and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

I

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff's Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county's warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring's arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County's computer database, Morgan replied that there was an active arrest warrant for Herring's failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and drugs. He moved to suppress the evidence on the ground that his initial arrest had been illegal because the warrant had been rescinded.

***

In analyzing the applicability of the [exclusionary] rule, we must consider the actions of all the police officers involved. The Coffee County officers did nothing improper. Indeed, the

error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

***

The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion "has always been our last resort, not our first impulse," and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'" We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.

In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." ***

We [have] held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and "most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances" would have any significant effect in deterring the errors.

***

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. Petitioner's fears that our decision will cause police departments to deliberately keep their officers ignorant are thus unfounded.

Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered." The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Petitioner Bennie Dean Herring was arrested, and subjected

to a search incident to his arrest, although no warrant was outstanding against him, and the police lacked probable cause to believe he was engaged in criminal activity. The arrest and ensuing search therefore violated Herring's Fourth Amendment right "to be secure ... against unreasonable searches and seizures." The Court of Appeals so determined, and the Government does not contend otherwise. The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless recordkeeping by the police—not flagrant or deliberate misconduct—accounts for Herring's arrest.

I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: "[I]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule." The unlawful search in this case was contested in court because the police found methamphetamine in Herring's pocket and a pistol in his truck. But the "most serious impact" of the Court's holding will be on innocent persons "wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base."

The sole question presented [] is whether evidence the police obtained through the unlawful search should have been

suppressed. In my view, the Court's opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement.

The Court states that the exclusionary rule is not a defendant's right; rather, it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system.

***

Other [judges] have described "a more majestic conception" of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental "right of the people to be secure in their persons, houses, papers, and effects," the Amendment "is a constraint on the power of the sovereign, not merely on some of its agents." I share that vision of the Amendment.

The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

***The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation. Civil liability will not lie for "the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice." Criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are an even farther cry.

***

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base" is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule "is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera." In keeping with the rule's "core concerns," suppression should have attended the unconstitutional search in this case.

For the reasons stated, I would reverse the judgment of the Eleventh Circuit.

Justice BREYER, with whom Justice SOUTER joins, dissenting.

I agree with Justice GINSBURG and join her dissent. I write separately to note one additional supporting factor that I believe important. In Arizona v. Evans, we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon

the court clerk's recordkeeping. The rationale for our decision was premised on a distinction between judicial errors and police errors.

Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than the Court's case-by-case, multifactored inquiry into the degree of police culpability. I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.

Notes, Comments, and Questions

Many criminal procedure issues are litigated concurrently in multiple forums. For example, when deciding Miranda v. Arizona, the Court also resolved additional cases presenting the same question about custodial interrogation. Because most cases never reach the Supreme Court, it is common for two cases to present the same issue, for the Court to take only one of them, and for the Court's decision of that case to resolve the other case. For example, imagine that on the same day that police scanned the home of Danny Lee Kyllo, other officers conducting an unrelated investigation scanned a different home, and the resident of that home sought exclusion of items found during an ensuing search. If the Court decided Kyllo v. United States (Chapter 3) while the second case was pending,

the defendant in the second case could rely upon the holding of Kyllo. In other words, the Court's decision that thermal imaging of a home is a "search" would apply to all pending cases in which the issue was presented, and the judge in the second case would know that the second defendant's home had been "searched" for Fourth Amendment purposes.

Notes, Comments, and Questions

In Byrd v. United States, 138 S. Ct. 1518 (2018), the Court addressed whether rental car drivers who are not on a rental agreement (for example, someone given the keys by the person who is authorized to drive) have standing to object to a search of the car. The Court distinguished Rakas by emphasizing the reasonable expectation of privacy test. In Byrd, the unauthorized driver was the only person in the car and had a reasonable expectation of privacy in the contents of the car sufficient to have standing.

In Minnesota v. Olson, 495 U.S. 91 (1990), the Court considered the "warrantless, nonconsensual entry into a house where respondent Robert Olson was an overnight guest." The question was whether the entry, along with Olson's subsequent arrest, violated Olson's Fourth Amendment rights. The Court decided yes and allowed Olson to exclude evidence found during the illegal search and seizure. Rejecting the state's argument that Olson had no reasonable expectation

of privacy because the searched location was not his "home," the Court concluded "that Olson'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 recognize as reasonable." The Court noted that one's expectation of privacy while staying as an overnight guest must equal, if not exceed, that enjoyed by a person using a telephone booth. See Katz v. United States (Chapter 2).

Notes, Comments, and Questions

Would a guest who was present for dinner or an afternoon barbecue have standing? Why or why not? That individual would have more connection to the home than in Carter but less than Minnesota v. Olson.

In Brendlin v. California, 551 U.S. 249 (2007), the Court applied the holdings of Olson and Carter to the case of a passenger riding in a car stopped by police. Prior precedent made clear that a driver whose car is subjected to a traffic stop is "seized within the meaning of the Fourth Amendment" and could challenge the admissibility of evidence found during an unlawful stop. The question was whether a passenger in the same car could also exclude evidence. Quoting language from United States v. Mendenhall (Chapter 19) stating that "a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have

believed that he was not free to leave,'" the Brendlin Court found that a vehicle "stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver," and it rejected "any notion that a [reasonable] passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission."

The Court held that passengers could invoke the exclusionary rule with respect to evidence found during unlawful vehicle stops, noting that the opposite result would encourage bad police behavior. "The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right."

Because Brendlin argued that his rights were violated by the unlawful stop of the car—as opposed to by the search of the car—his claim was not barred by the rule of Rakas v. Illinois.

EXCLUSIONARY RULE: EXCEPTIONS

Exceptions to the Exclusionary Rule

Even if a criminal defendant has standing to invoke the exclusionary rule, not all evidence found as a result of police violating the defendant's constitutional rights will be excluded. The following cases build upon the limitations to the exclusionary rule described in the previous chapter.

Notes, Comments, and Questions

In Nix v. Williams, 467 U.S. 431 (1984), the Court considered once again the conviction of Robert Williams for the murder of 10-year-old Pamela Powers, who disappeared from a YMCA building in Des Moines, Iowa on Christmas Eve in 1968. The case returned to the Court because after the decision in Brewer v. Williams (Chapter 29), Iowa prosecutors retried Williams. In the second trial, prosecutors did not offer evidence of the

statements Williams made during his car ride, the ones elicited by the "Christian Burial Speech." They did, however, offer physical evidence found as a result of Williams's statements, including the body of Powers.

Building on the independent source exception described in Murray, the Nix Court created what has become known as the "inevitable discovery" exception to the exclusionary rule. When considering whether to adopt the new exception—which had already been approved by several lower courts—the Supreme Court first reviewed the justification for the exclusionary rule:

"The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired."

The Court then revisited the grounds supporting the independent source doctrine and applied them to the slightly different situation presented in Nix.

"The independent source doctrine teaches us that the

interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule."

After Powers disappeared from the YMCA, police found some of her clothing near a rest stop in Grinell, Iowa. Next, police "initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a

small child could be hidden." Before the volunteers found the body, Williams led police to the hiding spot.

The Court applied the new inevitable discovery rule as follows:

"On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found."

In dissent, Justices Brennan and Marshall did not object to the new doctrine in principle. They argued that for the inevitable discovery exception to apply, the prosecution should be required to prove by "clear and convincing evidence" that the requirements had been met. The majority held that "preponderance of the evidence" was sufficient.

***

UTAH V. STREIFF (2016)

Supreme Court of the United States

Utah v. Edward Joseph Strieff

Decided June 20, 2016 – 136 S. Ct. 2056

Justice THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search

incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell

searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. [T]he prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an "'extraordinary intervening circumstance.'" Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed. The Utah Supreme Court reversed. We granted certiorari to resolve disagreement about how the

attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.

II

A

We have [] recognized several exceptions to the [exclusionary] rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."

B

***

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." Nothing prevented him from approaching Strieff simply to ask. But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion

about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

Justice SOTOMAYOR, with whom Justice GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police

to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as "'fruit of the poisonous tree.'" Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality."

This "exclusionary rule" removes an incentive for officers to search us without proper justification. It also keeps courts

from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement polices, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution."

***The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." Under our precedents, because the officer found Strieff's drugs by

exploiting his own constitutional violation, the drugs should be excluded.

***

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior."

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the "staggering" numbers of warrants, "'drawers and drawers'" full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a "backlog" of such warrants. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population

of 21,000, 16,000 people had outstanding warrants against them.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion."

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. Many are the product of institutionalized training procedures. The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct. Surely it should not take a federal

investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. That justification must provide specific reasons why the officer suspected you were breaking the law but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.

The indignity of the stop is not limited to an officer telling

you that you look like a criminal. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may "'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.'"

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck ... with [your] 3-year-old son and 5-year-old daughter ... without [your] seatbelt fastened." At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future.

This case involves a suspicionless stop, one in which the

officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

I dissent.

* * *

In our next chapter, we will review how the Court has applied the exclusionary rule to evidence obtained as a result of Miranda Rule violations.

PART XXIX

EXCLUSIONARY RULE: SUPPRESSION HEARINGS AND MONETARY DAMAGES

The Basics of Suppression Hearings and Money Damages

Having studied the Court's precedent on when the exclusionary rule applies, we will now turn to an overview of how suppression hearings work. In addition, this chapter reviews the availability of monetary damages to victims of constitutional violations related to criminal procedure law.

THE BASICS OF SUPPRESSION HEARINGS

The Basics of Suppression Hearings

When a defendant seeks to exclude evidence allegedly obtained in violation of the constitution, the judge normally decides the suppression motion by preponderance of the evidence.83 With most court motions, the burden of persuasion is on the moving party, meaning that a tie is resolved in favor of the non-moving party. Accordingly, a defendant arguing that a magistrate issued a search warrant without probable cause would have the burden of proof. There are, however, situations in which the prosecution bears the burden of proof. When a confession is challenged as involuntary, for example, "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."84

When defendants seek exclusion of evidence on constitutional grounds, the standard procedure is for the judge to hold a "suppression hearing" outside the presence of the

jury. Each side may present witnesses. Police officers commonly testify about what things they observed in advance of a Terry stop or arrest that justified a seizure under review. They also explain what evidence provided probable cause to justify warrantless searches under doctrines such as the automobile exception and exigent circumstances. Defendants may testify in support of their suppression motions, and absent unusual circumstances, their testimony at suppression hearings may not be used against them at trial.85 Under this rule, a defendant may testify that a suitcase belonged to him in order to establish standing to object to an unlawful search of the suitcase, without providing the prosecution a damaging admission usable to prove guilt. If the judge finds for the defendant, then the excluded evidence cannot be shown to the jury. In cases where the prosecution's primary evidence is challenged as unlawfully obtained—for example, a gun seized from a defendant who is then charged with unlawfully possessing it—a suppression ruling in the defendant's favor can result in the dismissal of the charges. A defendant who loses her pre-trial suppression motion may, if subsequently convicted, raise her suppression arguments again on appeal.

Our next case explains how courts resolve allegations that a search warrant was issued on the basis of false statements made by police officers to the issuing magistrate.

Notes, Comments, and Questions

The details of suppression motion practice differ markedly among jurisdictions and even among judges in the same courthouse. Students who eventually practice criminal law must study carefully the rules and preferences of the judges before whom they appear. The overwhelming bulk of criminal cases never go to trial, and suppression hearings are often the most important court proceeding in a case.

One risk of which defense counsel must be aware concerns the use of suppression hearing testimony against a defendant should a case eventually go to trial. While such testimony cannot be used during the prosecution's case in chief (that is, cannot be used substantively to prove the defendant's guilt), see Simmons v. United States, 390 U.S. 377, 390 (1968), it can be used to impeach the defendant should her trial testimony contradict what she said at the hearing. See, e.g., United States v. Beltran-Gutierrez, 19 F.3d 1287, 1290–91 (9th Cir. 1994); United States v. Geraldo, 271 F.3d 1112, 1116 (D.C. Cir. 2001).

INTRODUCTION TO MONETARY DAMAGES

An Introduction to the Availability of Monetary Damages

Much as members of the public commonly overestimate the role of the exclusionary rule in freeing guilty defendants on "technicalities," public opinion also overestimates the availability of money damages to the victims of police misconduct. For multiple reasons, persons who suffer unlawful searches and seizures—as well as those who experience violations of their rights related to interrogations—rarely recover money.

First, many people under police investigation—the people most likely to undergo searches, seizures, and interrogations, whether lawful or unlawful—are criminals. Imagine, for example, that police violate the "knock-and-announce" rule and break down a suspect's door unlawfully. Then, while executing a valid search warrant, police find cocaine. Under the rule of Hudson v. Michigan (Chapter 32), the knock-and-announce violation would not stop prosecutors from using

the seized drugs at trial to convict the suspect of illegal possession. In theory, the convicted defendant could then sue police for damages related to the breaking of his door. A lawsuit against state officials could be brought under "Section 1983," as 42 U.S.C. § 1983 is commonly known. A suit against federal officials could be brought under the remedy provided in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), which provides a civil remedy (known as a "Bivens action") for certain constitutional violations by federal agents. See also Hernandez v. Mesa, No. 17–1678 (U.S. Feb. 25, 2020) (holding that family of a Mexican victim of unreasonable cross-border shooting by U.S. Border Patrol agent cannot bring Bivens action).

In practice, however, the defendant would likely have trouble finding a lawyer willing to take the case. In order to make his case to jurors, the convicted criminal defendant—now a civil plaintiff—would need to describe the incident, which involves police finding cocaine at his home. Further, the plaintiff's testimony could be impeached with evidence of the drug conviction.86 Jurors have been known to disfavor claims brought by convicted felons.

While a prevailing plaintiff in a "constitutional tort" case against state officials is entitled to reasonable attorney's fees paid by the defendant,87 a plaintiff who loses must pay his own lawyer. Therefore, unless the victim of police misconduct has money for legal bills, he must convince a lawyer to take his case on a contingent fee basis, which a lawyer is likely to do

only if she expects to win. In addition, if the actual damages awarded to prevailing plaintiffs are low, lawyers may not profit unless they win a high percentage of their cases. A lawyer who represents an indigent civil rights plaintiff on a contingency basis often pays up front for expenses such as travel, depositions, and expert witnesses. If the client loses, the lawyer may never be repaid for expenses in the tens of thousands of dollars. If the client wins, then the lawyer must hope that the judge's definition of a "reasonable fee" is fair, which may not always be true.88 Unless a lawyer is taking the rare civil rights case on the side of a different kind of practice, the lawyer can make a living only if occasional clients win sizeable judgments. But juries have been known to award trivial sums, even in cases of serious misconduct.89 While some cases do yield large judgments,90 the overwhelming majority of practicing lawyers have no interest in representing civil rights plaintiffs who are unable to pay hourly bills. Many would-be plaintiffs with credible claims of unlawful searches and seizures, including police brutality and wrongful shootings, often cannot find lawyers to bring their cases.

Second, even if a plaintiff wins a court ruling that police violated his constitutional rights, he may be denied monetary compensation under the doctrine of "qualified immunity." Under qualified immunity, a defendant need not pay monetary damages unless her conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, even

if a court finds that the defendant violated the plaintiff's constitutional rights, the plaintiff cannot recover unless the defendant's behavior violated "clearly established" law.

KISELA V. HUGHES (2018)

Supreme Court of the United States

Andrew Kisela v. Amy Hughes

Decided April 2, 2018 – 138 S. Ct. 1148

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking

a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from

the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," but "she is only seeking attention."

Hughes sued Kisela, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." [EMPHASIS ADDED BY EDITOR]

Although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'"

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Use of excessive force

is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful.

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." But the general rules [] "do not by themselves create clearly established law outside an 'obvious case.'" Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large

kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

[T]he petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content" and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that

would work." But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence ... in the light most favorable to" Hughes, the nonmovant, "with respect to the central facts of this case." The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all

of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting "erratically." A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared "composed and content," and did not look angry. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and "was not the least bit threatened by the fact that [Hughes] had a knife in her hand" and that Hughes "never acted in a threatening manner." The officers did not observe

Hughes commit any crime, nor was Hughes suspected of committing one.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came "in quick succession." The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, "'Why'd you shoot me?'" Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

***Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had

committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

III

This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." Such a one-sided approach to qualified immunity transforms the doctrine into an absolute

shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Notes, Comments, and Questions

Our next case involves serious violations of the Court's rule set forth in Brady v. Maryland, 373 U.S. 83 (1963), which requires that prosecutors provide material exculpatory evidence in their possession to the defense. Although this book does not explore the Brady rule, students should recognize its importance to avoiding wrongful convictions. Our next case illustrates the impediments in the path of a defendant who seeks monetary damages after winning release from prison by proving a Brady violation.

A bit of background will help students understand the plaintiff's cause of action. Because prosecutors (much like judges) normally enjoy absolute immunity from Section 1983 liability for actions taken during and in preparation for trial, see Buckley v. Fitzsimmons, 509 U.S. 259 (1993), plaintiff

John Thompson alleged that district attorney Harry Connick failed to train his prosecutors adequately about their duty under Brady to produce evidence. Only especially egregious failures to train can justify civil liability.

CONNICK V. THOMPSON (2011)

Supreme Court of the United States

Connick v. Thompson,

Decided March 29, 2011 — 563 U.S. 51

Justice THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under Brady v. Maryland. Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single Brady violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was

sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery

investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction. The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. In 2003, the district attorney's office retried Thompson for Liuzza's murder. The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated Brady by failing to disclose the crime lab report in his armed robbery trial. Thompson alleged liability under two theories: (1) the Brady violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train

the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a Brady violation. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors.

Although no prosecutor remembered any specific training session regarding Brady prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general Brady requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under Brady absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the Brady violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection—which

he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different Brady training because there was no evidence that he was aware of a pattern of similar Brady violations. The District Court rejected this argument.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. We granted certiorari.

II

The Brady violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their Brady disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the Brady violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different Brady training. We agree.

A

Title 42 U.S.C. § 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. But, under § 1983, local governments are responsible only for "their own illegal acts." They are not vicariously liable under § 1983 for their employees' actions.

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are "action[s] for which the municipality is actually responsible."

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official

government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." A less stringent standard of fault for a failure-to-train claim "would result in de facto respondeat superior liability on municipalities

***

Failure to train prosecutors in their Brady obligations does not fall within the narrow range of [] single-incident liability. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional

limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what Brady entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal." A licensed attorney making legal judgments, in his capacity as a prosecutor, about Brady material simply does not present the same "highly predictable" constitutional danger as [an] untrained officer.

We do not assume that prosecutors will always make correct Brady decisions or that guidance regarding specific Brady

questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront Brady issues while at the district attorney's office; (2) inexperienced prosecutors were expected to understand Brady's requirements; (3) Brady has gray areas that make for difficult choices; and (4) erroneous decisions regarding Brady evidence would result in constitutional violations. This is insufficient.

It does not follow that, because Brady has gray areas and some Brady decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those

gray areas and make incorrect Brady decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants' Brady rights. He did not do so.

III

We conclude that this case does not fall within the narrow range of "single-incident" liability. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

Justice SCALIA, with whom Justice ALITO joins, concurring. [omitted]

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In Brady v. Maryland, this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed

robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office) cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant Brady violation, not a routine practice of giving short shrift to Brady's requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived Brady's compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to Brady was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of Brady's disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

***

Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had

been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Riehlmann prepared an affidavit describing Deegan's disclosure "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson."

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]." After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

"[A]ll day long there have been a number of young Assistant D.A.'s ... sitting in this courtroom watching this, and I hope they take home ... and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work."

The District Attorney's Office then initiated grand jury

proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be Brady material if prosecutors did not know Thompson's blood type. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." In protest, that prosecutor tendered his resignation.

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. The merits of several Brady claims arising out of the murder trial, the court observed, had therefore become "moot."

Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

On July 16, 2003, Thompson commenced a civil action under 42 U.S.C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Office itself, had violated his constitutional rights by wrongfully withholding Brady evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their Brady obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" I disagree, however, with the Court's conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, concluding that the District Attorney's Office had been deliberately indifferent to Thompson's Brady rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdic[t] rendered by the jury," I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence ... adduced at trial" supported the jury's verdict.

* * *

In our next chapter, we return to substantive criminal procedure law, examining the right to counsel provided by the Sixth Amendment.

PART XXX

SIXTH AMENDMENT: RIGHT TO COUNSEL

INTRO TO RIGHT TO COUNSEL & INEFFECTIVE ASSISTANCE OF COUNSEL

Introduction to the Right to Counsel and Ineffective Assistance

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." For more than a century after the ratification of the Amendment, this right allowed criminal defendants to hire their own lawyers but did not require the government to provide counsel to indigent defendants who could not afford to hire counsel. In 1932, the Court held that state court indigent defendants must be provided counsel in death penalty cases. See Powell v. Alabama, 287 U.S. 45 (1932) (the "Scottsboro Boys" case). Although the Court soon thereafter required federal courts to provide counsel even in

non-capital cases, see Johnson v. Zerbst, 304 U.S. 458 (1938), the Court held in 1942 that for ordinary felony cases, state courts could decide for themselves whether to appoint counsel to indigent defendants. See Betts v. Brady, 316 U.S. 455, 473 (1942) ("we cannot say that the [Fourteenth A]mendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel").

In 1963, the Court reversed Betts v. Brady in the landmark case of Gideon v. Wainwright. The story of Clarence Earl Gideon inspired one of the best known works of legal journalism—Gideon's Trumpet (1964), by Anthony Lewis—as well as a movie with the same title starring Henry Fonda. Gideon asked for counsel when charged with a Florida crime, and the state judge refused to appoint him a lawyer. After his conviction, he appealed unsuccessfully in Florida courts. He then sent a handwritten note to the Supreme Court, which agreed to take the case.

GIDEON V. WAINWRIGHT (1963)

Supreme Court of the United States

Clarence Earl Gideon v. Louie L. Wainwright

Decided March 18, 1963 – 372 U.S. 335

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to

deny your request to appoint Counsel to defend you in this case.

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. [T]he problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral

arguments the following: "Should this Court's holding in Betts v. Brady be reconsidered?"

I

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that Betts v. Brady should be overruled.

II

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process

of law, that it is made obligatory upon the states by the Fourteenth Amendment." [T]he Court [in Betts] concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the states by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. In many cases [], this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court has

made obligatory on the States the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Eighth's ban on cruel and unusual punishment.

We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that "the right to the aid of counsel is of this fundamental character."

The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right, essential to a fair trial"—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly

spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put

on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Notes, Comments, and Questions

After the Court decided Gideon v. Wainwright, the state of Florida retried Gideon. He was represented by counsel at his second trial and was acquitted.

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court extended the rule of Gideon to all cases in which a defendant faces possible imprisonment, rejecting an argument it should

be limited to cases in which a substantial prison sentence was possible. "The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." Id. at 33.91

Students should note that because the Assistance of Counsel Clause applies only to "criminal prosecutions," the holding of Gideon does not provide a right to appointed counsel in all serious cases, only criminal cases. For example, a person at risk of deportation in immigration court has no right to counsel under Gideon, nor does a housing court litigant at risk of eviction, nor does a civil defendant sued for millions of dollars.

Students should also note that the right to trial by jury exists only if the maximum potential sentence exceeds six months. If the maximum is exactly six months or less, then the prosecutor can have a bench trial even if defendant objects. See Duncan v. Louisiana, 391 U.S. 145 (1968); see also Baldwin v. New York, 399 U.S. 66 (1970). If the statutory maximum is, say, eight months, then prosecutor can say she won't seek a sentence in excess of six months to avoid dealing with a jury. If the defendant is charged with two counts, and each count has a maximum sentence of four months, that does not exceed six months for purposes of this rule. The test is whether any offense has a maximum possible sentence above six months.

(Also, in actual practice, someone convicted on two counts, each with a maximum sentence of four months, usually serves four months rather than eight months. Sentences for multiple counts usually run concurrently instead of consecutively, absent an unusual statute.)

Because the "assistance of counsel" would have little value if the defendant's lawyer literally arrived only for the trial and provided help at no other time, the Court has held that defendants have the right to counsel not only at trial but also at other "critical stages" of the prosecution. These "critical stages" include: post-indictment line-ups (see United States v. Wade, chapter 38), preliminary hearings (see Coleman v. Alabama, 399 U.S. 1 (1970)), post-indictment interrogations (see Massiah, chapter 29), and arraignments (see Hamilton v. Alabama, 368 U.S. 52 (1961)). Recall also Rothgery v. Gillespie County (discussed in Chapter 29), in which the Court held that the right to counsel attaches at a defendant's first presentation before judicial officer, even if no lawyer is there for the prosecution.

By contrast, a defendant has no right to government-funded counsel after the conclusion of initial (direct) appeals. Accordingly, for certiorari petitions, habeas corpus petitions, and similar efforts, the defendant must pay a lawyer, find pro bono counsel, or proceed pro se.

Since the Court decided Gideon, states have created systems for the provision of counsel to indigent criminal defendants. The quality of these systems varies tremendously from state to

state. Common issues confronted by states include the quality of appointed counsel—especially in complicated cases, and most especially in capital cases—as well as funding to pay lawyers, experts, and other costs. States also diverge in their definitions of who qualifies as sufficiently indigent for appointed counsel. For a review of the state of indigent defense in the states, see the articles collected in the Summer 2010 symposium issue of the Missouri Law Review, entitled "Broke and Broken: Can We Fix Our State Indigent Defense System?" Topics include ethical duties lawyers owe to indigent clients, state constitutional challenges to inadequate indigent defense systems, and ethical issues provided by excessive caseloads. One recent example of a state system in crisis occurred in 2016, when the lead public defender in Missouri attempted to assign a criminal case to the state's governor, claiming that grievous underfunding justified the unusual move.92

2.

INEFFECTIVE ASSISTANCE OF COUNSEL

Ineffective Assistance of Counsel

The Sixth Amendment right to counsel has never been interpreted to mean that all defendants have the right to perfect, or even to very good, counsel. However, if the quality of counsel falls below the minimum standards of the legal profession, a convicted defendant may sometimes have a conviction set aside on the basis of "ineffective assistance of counsel." In Strickland v. Washington, 466 U.S. 668 (1984), the Court set forth the standard for ineffective assistance claims. Below, Justice Thurgood Marshall described the standards in the course of disagreeing with the majority decision announcing these standards.

STRICKLAND V. WASHINGTON (1984)

Strickland v. Washington (1984)

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance of counsel." The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance. Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a

capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. I disagree with both of these rulings.

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney" is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult

to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled

to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

[Justice Marshall then argued that even under the standard set forth by the majority, Strickland's claim should have prevailed.]

Notes, Comments, and Questions

The Strickland standard requires two showings from the defendant. First, the defendant must show that there was a deficiency in the attorney's performance, and second, the defendant must how that that deficiency prejudiced the defense. In other words, the defendant must show that but for the attorney's unprofessional errors, the outcome might well have been different.

Justice Marshall, on the other hand, focuses on the fairness of the process. He finds the requirement that a defendant prove prejudice, even after his attorney has been shown to be ineffective, is "senseless" because of the difficulties in making such a showing. Justice Marshall proposes the Sixth Amendment is violated when a defendant is represented by a manifestly ineffective attorney regardless of what other evidence of guilt the prosecution might possess.

Students should consider whether they find the majority or Justice Marshall more persuasive. Why? What are the problems, if any, with the majority's standard (or its application of the standard to the facts before it)? What are the problems, if any, with Justice Marshall's proposed alternative?

While Strickland articulated a two-pronged test applicable when a defendant points to a specific error made by counsel, prejudice is presumed (that is, the defendant needs to prove it) when the defendant's ineffective assistance claim rests on counsel's failure "to subject the prosecution's case to meaningful adversarial testing." United States v. Cronic, 466 U.S. 648 (1984). The Court in Cronic, articulated that surrounding circumstances (rather than specific error) can give rise to a presumption of prejudice when counsel's overall deficiency is akin to having no counsel at all. Some circuit courts have expanded the Cronic standard to encompass counsel that sleep during the entirety of trial and counsel that ask no questions on cross examination.

In our next chapter, we continue our examination of ineffective assistance claims. We also review when a criminal defendant may represent himself and when a Court may deny that option to a defendant.

PART XXXI

SIXTH AMENDMENT: RIGHT TO COUNSEL

SELF-REPRESENTATION AND MORE INEFFECTIVE ASSISTANCE OF COUNSEL

Self-Representation and More on Ineffective Assistance

In this chapter we continue our study of what constitutes effective (and ineffective) assistance of counsel in criminal cases. We also explore when a criminal defendant has the right to represent herself, even if a judge believes that she would be better served by a lawyer.

We begin with the Court's application of Strickland v. Washington (Chapter 36) to cases in which no trial occurs because the defendant enters a plea of guilty.

MISSOURI V. FRYE (2012)

Supreme Court of the United States

Missouri v. Galin E. Frye

Decided March 21, 2012 – 566 U.S. 134

Justice KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years.

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying

plea agreement. The state trial court accepted Frye's guilty plea. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. The trial judge sentenced Frye to three years in prison.

Frye filed for postconviction relief in state court. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer.

A state court denied the postconviction motion, but the Missouri Court of Appeals reversed. To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari.

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Critical stages include arraignments, postindictment

interrogations, postindictment lineups, and the entry of a guilty plea.

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: Hill v. Lockhart, 474 U.S. 52 (1985) and Padilla v. Kentucky, 559 U.S. 356 (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in Strickland. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of Strickland, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In Hill, the decision turned on the second part of the Strickland test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged.

In Padilla, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. Padilla held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant

of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.

The State is correct to point out that Hill and Padilla concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. Hill and Padilla both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been

inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

***And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." In today's criminal justice system, therefore, the negotiation of

a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"

B

Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

***There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.

Notes, Comments, and Questions

In general, courts reviewing claims of ineffective assistance of counsel are deferential to decisions by lawyers that can plausibly be described as "strategy." Notwithstanding the result in McCoy, lawyers enjoy broad latitude to decide how to achieve a client's objectives, and judges rarely second guess choices simply because bad results followed. By contrast, ineffective assistance claims have greater success when a lawyer's action (or inaction) appears driven by laziness rather than by tactics.

For example, a lawyer who interviews a potential alibi witness and chooses not to call her as a trial witness can later explain the strategy behind the choice. Perhaps the witness seemed shifty and counsel feared the jury would think poorly of a defendant who called such a witness. But if a client tells a lawyer of a potential alibi witness, and the lawyer conducts no investigation, the lawyer may have trouble justifying that choice.

Relatedly, defense lawyers have a duty to obtain expert

testimony in cases where any reasonable lawyer would do so. An insanity defense, for example, will normally require expert testimony about the client's mental health.

A few examples help illustrate the sorts of failings that constitute ineffective assistance:

In Hinton v. Alabama, 571 U.S. 263 (2014), the lawyer in a capital case had failed to obtain a qualified expert on "firearms and toolmark" evidence, largely because the lawyer erroneously believed that state law authorized only $1,000 for the cost of an expert. The Court held, "The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." Subsequently, Hinton was exonerated and released after thirty years in prison. He tells his story in The Sun Does Shine: How I Found Life and Freedom on Death Row (2018).

In Wiggins v. Smith, 539 U.S. 510 (2003), the Court found ineffective assistance in the penalty phase of a capital case after trial counsel failed to conduct an adequate investigation into the defendant's background. "Counsel's decision not to expand their investigation beyond the [presentence investigation (PSI) report] and the [Baltimore City Department of Social Services (DSS)] records fell short of the professional standards that prevailed in Maryland in 1989."

In Rompilla v. Beard, 545 U.S. 374 (2005), the Court found ineffective assistance in a lawyer's failure to examine a capital

defendant's prior case files. "Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. ... [I]t is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation."

Rompilla offers insight on how changes to Court membership can affect constitutional law. Justice Sandra Day O'Connor voted with the majority, and the case was decided 5-4. (She joined the majority opinion and also filed a concurrence.) About two weeks afterward, O'Connor announced her retirement. O'Connor's seat on the Court was then filled by Justice Samuel Alito, who joined the Court in 2006. As it happens, the Third Circuit judgment reversed by the Supreme Court in Rompilla was explained in an opinion written by then-Circuit Judge Alito. See 355 F.3d 233. Would a case with similar facts be decided the same way today?

FARETTA V. CALIFORNIA (1975)

Self-Representation by Criminal Defendants

Faretta v. California (1975)

In Faretta v. California, 422 U.S. 806 (1975), the Court considered "whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." The Court said that another way to frame the question was "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."

In an opinion by Justice Stewart, the Court noted that a defendant's right to represent himself in criminal cases had long been recognized in America. "In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case. The constitutions of 36 States explicitly confer that right. Moreover, many state courts have

expressed the view that the right is also supported by the Constitution of the United States." Recognizing that longstanding practice has its own persuasive authority, the Court wrote, "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."

The Court noted, too, that the Sixth Amendment provides the defendant with various rights; the rights are not provided to the lawyer. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

The Court then decided that even though a defendant would normally be extraordinarily foolish to forgo the assistance of counsel in favor of self-representation, the Constitution provides the option:

"It is undeniable that in most criminal prosecutions

defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."

When a defendant wishes to forgo counsel, a trial judge must advise the defendant carefully of the consequences. The decision then belongs to the defendant.

The Court's decision inspired a spirited dissent.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

This case [] is another example of the judicial tendency to constitutionalize what is thought "good." That effort fails on its own terms here, because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges. Moreover, there is no constitutional basis

for the Court's holding, and it can only add to the problems of an already malfunctioning criminal justice system. I therefore dissent.

The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself. The Court's opinion in Powell v. Alabama puts the point eloquently:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

Obviously, these considerations do not vary depending upon whether the accused actively desires to be represented by counsel or wishes to proceed pro se. Nor is it accurate to suggest, as the Court seems to later in its opinion, that the

quality of his representation at trial is a matter with which only the accused is legitimately concerned. Although we have adopted an adversary system of criminal justice, the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner ...." The system of criminal justice should not be available as an instrument of self-destruction.

In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of

basic fairness as a trial judge's discretion to decline to accept a plea of guilty.

Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered. However, such considerations are conspicuously absent from the Court's opinion in this case.

Notes, Comments, and Questions

After the Court decided Faretta, a few sensational cases followed in which criminal defendants represented themselves in especially ineffective ways, perhaps causing embarrassment to the judicial system in addition to themselves. The case of Colin Ferguson, who shot fellow passengers on a Long Island Rail Road train in 1993, became especially famous. Ferguson killed six passengers and shot several others. He later represented himself at trial, questioning victims he had shot. He referred to himself in the third person, stating, for example, that "at the time that Mr. Ferguson was on the train," he fell asleep and then someone else took his gun.

He asked one witness, "Is it your testimony that the defendant Ferguson stood right in front of you and shot you?"

The witness answered, "You weren't right in front of me. You were about ten to twelve feet away, approximately the distance we're at about now."

His performance was parodied on Saturday Night Life. "I did not shoot them. They shot me," the SNL Ferguson said in his opening statement. He continued, "There is no such thing as a 'railroad' or a 'Long Island.' Colin Ferguson is the victim of a conspiracy."

Do cases like these show that Faretta is wrongly decided, or are they a necessary evil associated with vindicating the rights explained by the Court?

In Indiana v. Edwards, the Court considered how to apply Faretta to defendants who may lack the mental competence to conduct their own defense. Students should note that the mental state of a defendant can be evaluated at three different times (at least) for different purposes. For a defense based on insanity or mental disease or defect, the question is what mental state the defendant had at the moment she committed an offense. Regardless of the defendant's mental state at the crime scene, a court may deem someone incompetent to stand trial if she is unable to understand the character and consequences of the proceedings against her or is unable properly to assist in her defense (that is, to communicate with counsel about defense strategies). Finally, there is the question of whether a defendant who is competent to stand trial might nonetheless be incompetent to represent himself. The Edwards Court decided whether such a category of defendants exists and, if so, how trial courts should deal with them.

INDIANA V. EDWARDS (2008)

Supreme Court of the United States

Indiana v. Ahmad Edwards

Decided June 19, 2008 – 554 U.S. 164

Justice BREYER delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. We conclude that the Constitution does not forbid a State so to insist.

* * *

Our next case concerns eyewitness identifications evidence. We will examine first when the Court has held that a suspect has the right to have counsel attend an identification

procedure such as a lineup. Then we will consider substantive regulations on the quality of such procedures, along with best practices for identifications suggested by modern social science.

PART XXXII

IDENTIFICATION: RIGHT TO COUNSEL

Identifications and the Right to Counsel

In this chapter we begin our three-chapter unit on identification evidence, which generally consists of witness statements about who committed a crime. A victim or other witness can identify a perpetrator in court (saying, in front of the jury, something like, "That's the one who did it"), and police often ask witnesses to identify suspects out of court. Out-of-court identification procedures include lineups—at which several similar-looking persons are presented to a witness in the hope that the witness will identify the correct person—as well as less elaborate presentations which are essentially lineups with only one suspect, about whom the witness says "yes" or "no." Further, police can show photos to witnesses, a process much quicker than in-person identification.

This chapter concerns when a suspect has the right to have counsel present during an identification procedure.

UNITED STATES V. WADE (1967)

Supreme Court of the United States

United States v. Billy Joe Wade

Decided June 12, 1967 – 388 U.S. 218

Mr. Justice BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons

in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like 'put the money in the bag,' the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted.

The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded. We granted certiorari and set the case for oral argument with [other cases] which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature ...." "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of

the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. ***

II

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. [I]n this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The

plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

***

In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such

testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial."

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and

this in turn results in a gap in our knowledge as to what in fact goes on ...." For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present. In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only

opportunity meaningfully to attack the credibility of the witness' courtroom identification.

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that had entered the bank."

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. ***

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel]... as at the trial itself." Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." [W]e leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.

***

Notes, Comments, and Questions

In Wade, the FBI held a lineup, and the defendant's counsel was not notified or present. The Court did not find a Fifth Amendment violation. Why not? Were you persuaded by the potential damages as identified by the majority in Wade? Why or why not?

KIRBY V. ILLINOIS (1972)

Supreme Court of the United States

Thomas Kirby v. Illinois

Decided June 7, 1972 – 406 U.S. 682

Mr. Justice STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join.

In United States v. Wade and Gilbert v. California this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a per se exclusionary rule as to

such testimony can be an effective sanction," the Court said, "to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." In the present case we are asked to extend the Wade-Gilbert per se exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler's checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago. When asked for identification, the petitioner produced a wallet that contained three traveler's checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found in Bean's possession. When asked to explain his possession of Shard's property, the petitioner first said that the traveler's checks were "play money," and then told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to

the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard's identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February 22, and identified them again in the courtroom as the men who had robbed him on February 20. He was cross-examined at length regarding the circumstances of his identification of the two defendants. The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court ... that [held] the Wade-Gilbert per se exclusionary rule is not applicable to preindictment confrontations. We granted certiorari, limited to this question.

I

***

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after Wade and Gilbert were decided, the Court explained

the rule of those decisions as follows: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.'" We decline to depart from that rationale today by imposing a per se exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

II

What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. The judgment is affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that Wade did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment. Counsel is required at those confrontations because "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification" mean that protection must be afforded to the "most basic right [of] a criminal

defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined."

An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

The highly suggestive form of confrontation employed in this case underscores the point. This showup was particularly fraught with the peril of mistaken identification. In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers. "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." The State had no case without

Shard's identification testimony,93 and safeguards against that consequence were therefore of critical importance. Shard's testimony itself demonstrates the necessity for such safeguards. On direct examination, Shard identified petitioner and Bean not as the alleged robbers on trial in the courtroom, but as the pair he saw at the police station. His testimony thus lends strong support to the observation that "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial."

Wade and Gilbert, of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance. For my part, I do not agree that we "extend" Wade and Gilbert by holding that the principles of those cases apply to confrontations for identification conducted after arrest. Because Shard testified at trial about his identification of petitioner at the police station showup, the exclusionary rule of Gilbert requires reversal.

* * *

Notes, Comments, and Questions

In our next chapter we will conclude our review of

identification evidence, focusing on recent state-court decisions, and will examine best practices suggested by modern research.

Before moving on, students may wish to consider some real-life consequences of unintentional witness misidentification. In one case, Ronald Cotton was identified as the rapist who attacked Jennifer Thompson in 1984 in North Carolina. Police showed Thompson a photo array, and she chose Cotton's photo. She later identified Cotton at a line up. He was convicted of rape and sentenced to life in prison. Subsequently, DNA evidence proved that a different man—who looked somewhat like Cotton—had committed the rape. Cotton was released from prison in 1995. Cotton and Thompson have since become advocates for criminal justice reform. They give talks and have published a book: Picking Cotton: Our Memoir of Injustice and Redemption

On the book's website, one can view documents from the case file, as well as photos of Cotton and of Bobby Poole, who committed the rape for which Cotton served more than ten years in prison. A short video (three minutes) about the case is available here: https://www.youtube.com/watch?v=nLGXrviy5Iw

A longer video (30 minutes), featuring remarks from Thompson and Cotton, is available here: https://www.youtube.com/watch?v=qB7MrfJ7X_c

PART XXXIII

IDENTIFICATION: BEST PRACTICES AND STATE APPROACHES

Best Practices and Modern State Approaches

The Supreme Court's eyewitness identification jurisprudence has remained virtually unchanged for the past 40 years.94 In the next two cases, students will observe how two state courts have dealt with eyewitness identification evidence in light of a plethora of scientific research showing how it can be unreliable.

Notes, Comments, and Questions

The Supreme Court of Connecticut focused on how a defendant might educate a jury about the unreliability of

eyewitness identification, ameliorating the negative consequences of unreliable evidence. Students who have taken Evidence may recognize similarities between this kind of testimony and other forms of hotly-disputed expert testimony. For example, testimony about "battered woman syndrome" and "rape trauma syndrome" may be helpful to the jury in some cases. For example, a woman who kills her abusive boyfriend may wish to offer syndrome evidence in support of a self-defense theory. But such testimony is valuable only to the extent it is based on sound scientific research. Also, when such testimony is admissible, courts normally are careful to limit its scope. For example, in a rape case, the defense might argue that the alleged victim's behavior is not consistent with that of a "real" rape victim (if, for example, she voluntarily spent time with the defendant after the alleged rape). A prosecution expert might help the jury understand that somewhat counterintuitive behavior is actually within the range of normal behavior observed among victims. The expert normally may not, however, speculate about whether any particular complaining witness was or was not raped.

Notes, Comments, and Questions

Connecticut and New Jersey are two examples of states that have endeavored to incorporate evidence-based recommendations into eyewitness identification practices. In

2009, The New York State Justice Task Force was created to "eradicate the systemic and individual harms caused by wrongful convictions, and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future." In 2011, the task force made the following recommendations:

NEW YORK STATE JUSTICE TASK FORCE RECOMMENDATIONS

New York State Justice Task Force

Recommendations for Improving Eyewitness Identifications (Excerpt)

1. Instructions to the WitnessPreliminary instructions given to a witness by the administrator of an identification procedure before the procedure begins, should include the following:
    a. Instructing the witness orally or in writing about the details of the identification procedure (including that they will be asked about their confidence in the identification if any identification is made).
    b. Advising the witness that the person who committed the crime may or may not be in the photo array or lineup.

c. Advising the witness that individuals may not appear exactly as they did on the day of the incident because features such as hair are subject to change.

d. Advising the witness as follows:

i. If an array or lineup is conducted double-blind, the administrator shall inform the witness that he does not know who the suspect is; and

ii. If the array or lineup is not conducted double-blind, the administrator shall inform the witness that he should not assume that the administrator knows who the perpetrator is.

e. Advising the witness that he or she should not feel compelled [or obligated] to make an identification.After the identification procedure is completed, the administrator of the identification procedure should:

f. Instruct the witness not to discuss what was said, seen or done during the identification procedure with other witnesses involved in the case.

2. Witness Confidence Statements

a. In every case in which an identification is made, the administrator should elicit a statement of the witness' confidence in the identification, by asking a question to the effect of, "in your own words, how sure are you?" Witnesses should not be asked

to rate their confidence in any identification on a numerical scale.

b. All witnesses should be instructed in advance that they will be asked about their confidence in any identification made.

c. Witness confidence statements should be documented before any feedback on the identification is given to the witness by the administrator or others.

3. Documentation of Identification Procedures
Documentation of identification procedures should include:

a. Documentation of all lineups with a color photograph of the lineup as the witness viewed it and preservation of all photo arrays viewed by a witness.

b. Documentation of the logistics of the identification procedure, including date, time, location and people present in the viewing room with the witness and/or the lineup room with the suspect, including anyone who escorted the witness to and/or from the procedure.

c. Documentation of any speech, movement or clothing change the lineup members are asked to perform.

d. Verbatim documentation of all statements and physical reactions made by a witness during an

identification procedure.

e. Ensuring that the witness sign and date the written results of the identification procedure, including a photograph of the live lineup if one is available.

4. Photo Arrays
   a. Photo arrays should be conducted double-blind whenever practicable.
   b. If a photo array is conducted with a non-blind administrator, the procedure should be conducted blinded (as defined herein), whenever practicable.
   c. Photo array administrators must ensure that the photos in the photo array do not contain any writing, stray markings or information about the suspect such as information concerning previous arrests.
   d. At least five fillers should be used in each photo array, in addition to the suspect. There should be only one suspect per array.
   e. Fillers should be similar in appearance to the suspect in the array. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.
   f. If there is more than one suspect, photo array administrators should avoid reusing fillers when showing an array with a new suspect to the same

witness.

g. The position of the suspect should be moved or a new photo array (with new fillers) should be created each time an array is shown to a different witness.

5. Live Lineups
   a. Lineups may be conducted double-blind and if not, should be conducted in accordance with the procedures outlined by the NYS Identification Procedure Guidelines mentioned above, which include instructions on how to remain neutral and stand out of the witness' line of sight while the witness is viewing the lineup, and which when coupled with appropriate preliminary instructions are intended to create a neutral environment free of inadvertent cues.
   b. There should be five fillers in addition to the suspect, where practicable, but in no case fewer than four fillers. There should be only one suspect per lineup.
   c. Fillers should be similar in appearance to the suspect in the lineup. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.
   d. If there is more than one suspect, the lineup

administrator should avoid reusing fillers when showing a lineup with a new suspect to the same witness.

e. The position of the suspect should be moved each time the lineup is shown to a different witness, assuming the suspect and/or defense counsel agree.
f. If an action is taken or words are spoken by one member of the lineup, all other members of the lineup must take the same action or speak the same words.
g. All members of the lineup should be seated, if necessary, to eliminate any extreme variations in height.
h. Fillers from a photo array previously viewed by the witness should not be used as fillers in the lineup.
i. In those jurisdictions that regularly use live lineup procedures, consideration should be given to running lineups after the first witness makes an identification from the photo array. Where practicable, additional witnesses can view only the lineup and not the photo array.

* * *

For further information on the problems associated with eyewitness identification evidence (along with other testimony dependent on accurate memory), students should read work by Professor Elizabeth Loftus, a member of the psychology

faculty and the law faculty at the University of California-Irvine (along with various collaborators). See, e.g., Steven J. Frenda et al., "False Memories of Fabricated Political Events," 49 J. Experimental Soc. Psych. 280 (2013) (showing ease with which false memories can be implanted in unwitting subjects); Deborah Davis & Elizabeth F. Loftus, "Remembering Disputed Sexual Encounters: A New Frontier for Witness Memory Research," 105 J. Crim. L. & Criminology 811 (2015); Charles A. Morgan et al., "Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events," 36 Int'l J. L. & Psych. 11 (2013) (examining false memories among participants in military POW interrogation training program). A 2015 lecture delivered by Professor Loftus at Harvard University, titled "The Memory Factory," is available online.

Consider the practices described in this chapter. Which seem easy to implement? Which seem difficult to implement?

PART XXXIV
PLEA BARGAINING

PLEA BARGAINING

In a prior chapter, we saw a case about the obligation of a defense attorney to inform the client about plea bargaining offers made by the prosecution (Missouri v. Frye, 2012). It is well recognized that the vast majority of criminal convictions are obtained through plea bargaining and relatively few criminal cases actually go through a criminal trial. Depending on the jurisdiction, it is very typical to see fewer than 10 percent of cases go to trial. Thus, plea bargaining is an especially important component of the process that determines people's fates in the criminal justice system.

When a plea bargain concludes a criminal case, it typically means that the defendant agree to enter a guilty plea in exchange for having certain charges dropped or having a sentence that is less severe than the maximum possible sentence or having the prosecutor make a recommendation for a lesser sentence.

In Santobellow v. New York (1971), Chief Justice Warren Burger clearly pronounced the Supreme Court's approval of plea bargaining as a desirable part of the criminal justice process:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See Brady v. United States, 397 U. S. 742, 397 U. S. 751-752 (1970).

There are, however, many criticisms of plea bargaining and questions about the ways that the process can create unfair treatment and unjust results. As described by a 2020 report by the Vera Institute of Justice, there are a variety of concerns and problems that can arise in concluding cases through the use of negotiated guilty pleas:

(https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf)

- Coercive factors: Defendants, including innocent defendants, may feel pressured to enter guilty pleas in order to avoid severe sentence or due to pressures from their defense attorneys who may desire to reach a quick conclusion to the case.
- Systemic inequities: Conscious and unconscious bias may affect the nature of plea agreements offered to and sentences received by defendants, depending on their age, race, social status, and other factors.
- Trial penalty: Because defendants who turn down plea agreement offers and are subsequently convicted after trial typically receive more severe sentences, there are concerns that the plea bargaining process unduly pressures defendants to surrender their constitutional rights, such as the right to trial by jury. Critics argue that defendants should not be penalized for using their constitutional rights.
- Innocence: Cases have emerged in which innocent people felt pressured to plead guilty. Their fear of potentially severe sentences and their lack of confidence in the ability of the justice system to produce accurate results through the trial process can lead them to plead guilty despite their innocence.

One of the key issues in plea bargaining is the extent to which prosecutors can pressure defendants to plead guilty by

threatening to pursue additional charges if the defendant insists on going to trial.

3.

BORDENKIRCHER V. HAYES (1978)

Bordenkircher v. Hayes, 434 U.S. 357 (1978)

MR. JUSTICE STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

I

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then

punishable by a term of 2 to 10 years in prison. Ky.Rev.Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences, the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that, if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, then Ky.Rev.Stat. § 431.190 (1973) (repealed 1975), which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. [Footnote 2] Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. ***

Plea bargaining flows from "the mutuality of advantage"

to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Brady v. United States, supra at 397 U. S. 752. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. 397 U.S. at 397 U. S. 758. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial. See ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.1 (App.Draft 1968);...

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" — and permissible — "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." Chaffin v. Stynchcombe, supra, at 412 U. S. 31. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable

under the recidivist statute, since he had, in fact, been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. [Footnote 8] Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not, in itself, a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler v. Boles, 368 U. S. 448, 368 U. S. 456. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. See Blackledge v. Allison, 431 U.S. at 431 U. S. 76.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.] And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold

only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment....

MR JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting. [separate dissenting opinion of Justice Powell is omitted]

***

Then later, in Perry, the Court applied the same principle to prosecutorial conduct where there was a "realistic likelihood of vindictiveness.'" 417 U.S. at 417 U. S. 27. It held that the requirement of Fourteenth Amendment due process prevented a prosecutor's reindictment of a convicted misdemeanant on a felony charge after the defendant had exercised his right to appeal the misdemeanor conviction and thus to obtain a trial de novo. It noted the prosecution's "considerable stake" in discouraging the appeal. Ibid.

The Court now says, however, that this concern with vindictiveness is of no import in the present case, despite the difference between five years in prison and a life sentence, because we are here concerned with plea bargaining where there is give-and-take negotiation, and where, it is said, at 434 U. S. 363, "there is no such element of punishment or retaliation so long as the accused is free to accept or reject the

prosecution's offer." Yet, in this case, vindictiveness is present to the same extent as it was thought to be in Pearce and in Perry; the prosecutor here admitted, see ante at 434 U. S. 358 n. 1, that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial. Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates "a strong inference" of vindictiveness. As then Judge McCree aptly observed, in writing for a unanimous panel of the Sixth Circuit, the prosecutor initially "makes a discretionary determination that the interests of the state are served by not seeking more serious charges." Hayes v. Cowan, 547 F.2d 42, 44 (1976). I therefore do not understand why, as in Pearce, due process does not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.

Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect. I perceive little difference between vindictiveness after what the Court describes, ante at 434 U. S. 362, as the exercise of a "legal right to attack his original conviction," and vindictiveness in the "give-and-take negotiation common in plea bargaining.'" Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an

accused against it, however it asserts itself. The Court of Appeals rightly so held, and I would affirm the judgment.

***

Notes:

The majority opinion grants to prosecutors significant discretion to threaten additional charges in the plea bargaining process as long as those charges are justified by the facts in the case. Prior decisions indicated that prosecutors could not be "vindictive"—which a dictionary defines as a strong or unreasoning desire for revenge. Here the majority justices and the dissenters disagree about whether the additional of the habitual offender statute, which carried a life sentence, was vindictive when the prosecutor apparently admitted that the sole reason for bringing the additional charge was to pressure the defendant to give up his constitutional right to a trial. For the dissenters, the prosecutor's original decision to charge without imposing the habitual offender count indicated that the prosecutor really thought this was the appropriate charge and associated punishment for the crime. Notice that the concept of a "vindictive" action is very much in the eye of the beholder and not at all clearly defined by the Supreme Court.

PART XXXV

SIXTH AMENDMENT: SPEEDY TRIAL

THE RIGHT TO A SPEEDY TRIAL

The 6th Amendment contains a right to a speedy trial. But what does it mean to have a "speedy" trial? The words of the Constitution do not provide a definition. Thus, the Supreme Court and other courts must rule on the meaning of this provision when defendants claim that this right was violated. The foundational Supreme Court decision address this right was Barker v. Wingo (1972).

BARKER V. WINGO (1972)

U.S. Supreme Court

Barker v. Wingo, 407 U.S. 514 (1972)

MR. JUSTICE POWELL delivered the opinion of the Court.

Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution, this Court has dealt with that right on infrequent occasions.... As MR. JUSTICE BRENNAN pointed out in his concurring opinion in Dickey, in none of [our prior] cases have we attempted to set out the criteria by which the speedy trial right is to be judged. 398 U.S. at 398 U. S. 401. This case compels us to make such an attempt.

I

On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. The grand jury

indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial. Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination, and would be able to assure his testimony against Barker.

The Commonwealth encountered more than a few difficulties in its prosecution of Manning. The first trial ended in a hung jury. A second trial resulted in a conviction, but the Kentucky Court of Appeals reversed because of the admission of evidence obtained by an illegal search. Manning v. Commonwealth, 328 S.W.2d 421 (1959). At his third trial, Manning was again convicted, and the Court of Appeals again reversed because the trial court had not granted a change of venue. Manning v. Commonwealth, 346 S.W.2d 755 (1961). A fourth trial resulted in a hung jury. Finally, after five trials, Manning was convicted, in March, 1962, of murdering one victim, and, after a sixth trial, in December, 1962, he was convicted of murdering the other.

The Christian County Circuit Court holds three terms each year — in February, June, and September. Barker's initial trial

was to take place in the September term of 1958. The first continuance postponed it until the February, 1959, term. The second continuance was granted for one month only. Every term thereafter for as long as the Manning prosecutions were in process, the Commonwealth routinely moved to continue Barker's case to the next term. When the case was continued from the June, 1959, term until the following September, Barker, having spent 10 months in jail, obtained his release by posting a $5,000 bond. He thereafter remained free in the community until his trial. Barker made no objection, through his counsel, to the first 11 continuances.

When, on February 12, 1962, the Commonwealth moved for the twelfth time to continue the case until the following term, Barker's counsel filed a motion to dismiss the indictment. The motion to dismiss was denied two weeks later, and the Commonwealth's motion for a continuance was granted. The Commonwealth was granted further continuances in June, 1962, and September, 1962, to which Barker did not object.

In February, 1963, the first term of court following Manning's final conviction, the Commonwealth moved to set Barker's trial for March 19. But on the day scheduled for trial, it again moved for a continuance until the June term. It gave as its reason the illness of the ex-sheriff who was the chief investigating officer in the case. To this continuance, Barker objected unsuccessfully.

The witness was still unable to testify in June, and the trial,

which had been set for June 19, was continued again until the September term over Barker's objection. This time the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term. The final trial date was set for October 9, 1963. On that date, Barker again moved to dismiss the indictment, and this time specified that his right to a speedy trial had been violated. The motion was denied; the trial commenced with Manning a the chief prosecution witness; Barker was convicted and given a life sentence.

Barker appealed his conviction to the Kentucky Court of Appeals, relying in part on his speedy trial claim. The court affirmed. Barker v. Commonwealth, 385 S.W.2d 671 (1964). In February, 1970, Barker petitioned for habeas corpus in the United States District Court for the Western District of Kentucky. Although the District Court rejected the petition without holding a hearing, the court granted petitioner leave to appeal in forma pauperis and a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court. 442 F.2d 1141 (1971). It ruled that Barker had waived his speedy trial claim for the entire period before February, 1963, the date on which the court believed he had first objected to the delay by filing a motion to dismiss. In this belief the court was mistaken, for the record reveals that the motion was filed in February, 1962. The Commonwealth so conceded at oral argument before this Court. The court held further that the remaining period after

the date on which Barker first raised his claim and before his trial — which it thought was only eight months but which was actually 20 months — was not unduly long. In addition, the court held that Barker had shown no resulting prejudice, and that the illness of the ex-sheriff was a valid justification for the delay. We granted Barker's petition for certiorari. 404 U.S. 1037 (1972).

II

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free

awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

If an accused cannot make bail, he is generally confined, as was Barker for 10 months, in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions. Lengthy exposure to these conditions "has a destructive effect on human character, and makes the rehabilitation of the individual offender much more difficult." At times the result may even be violent rioting. Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across the Nation. In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects. It is impossible to do more than generalize about when those circumstances exist. There is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel or his right to a jury trial. Thus, as we recognized in Beavers v. Haubert, supra, any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:

"The right of a speedy trial is necessarily relative. It is consistent with delays, and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence, because it means that a defendant who may be

guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.

Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it.***

The second suggested alternative would restrict consideration of the right to those case in which the accused has demanded a speedy trial.... We shall refer to the former approach as the demand-waiver doctrine. The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right. ***

The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial; [the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for the reasons earlier

expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.***

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application.***

We therefore reject both of the inflexible approaches — the fixed-time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.

IV

A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason

for the delay, the defendant's assertion of his right, and prejudice to the defendant.

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government, rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay,

and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record, because what has been forgotten can rarely be shown.

We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it

disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility....

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors, and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.888

[The Court looked at the four factors in this case and concluded that it was a "close case." It was a very lengthy delay and the delays were caused by the prosecution, two factors that favored the defendant. On the other hand, the defendant did not demand a trial and the defendant's case was not hurt by the delay, nor was he stuck in jail the other time. Thus, they

concluded there was no violation of the right to speedy trial here.]

PART XXXVI

SIXTH AMENDMENT: TRIAL BY JURY

THE RIGHT TO TRIAL BY JURY

Although relatively few criminal cases are decided through trials,—and even fewer through jury trials, since many trials are "bench trials" presided over by a judge without a jury—trials remain important in the criminal justice process. Prosecutors and defense attorneys look at trials to inform themselves about what kinds of offers and agreements to make in the plea bargaining process. During plea negotiations, both sides are thinking, "but if we go to trial, what might a jury think about the evidence?" If, by observing jury trials that have occurred in a particular court, a prosecutor believes, "a jury will definitely find the defendant guilty based on the evidence that we have," it enbles the prosecutor to take a tougher position in the plea negotiations. If, by observing jury trials that have occurred in a particular court, a defense attorney believes, "it is really

uncertain whether a jury will convict based on the available evidence," the defense attorney may use that information as an argument in plea negotiations to seek a more favorable outcome for the client. Thus, jury trials do not merely determine the fates of a small percentage of criminal defendants; they provide information that influences plea bargaining in the larger majority of cases that result in guilty pleas.

The words of the 6th Amendment say, "In all criminal prosecutions, the accused shall enjoy..." and then lists various rights, including the right to trial by jury. Yet, the Supreme Court has not followed the literal words of the Constitution. In certain kinds of criminal cases, defendants may be required to accept a bench trial rather than a jury trial (see Lewis v. United States, 1996, that follows).

Other issues concerning constitutional rights for criminal jury trials involve the selection and composition of the jury. Americans often think the Constitution gives them a right to a jury "of their peers." In fact, there is no right for defendants to have people like themselves demographically (i.e., race, age, gender, religion, etc.) on a jury. The phrase "jury of peers" goes back to the Magna Carta, a document about rights from 1215 in England. It actually means a jury of equal citizens rather than a jury of people who share the defendant's characteristics. Instead, under the 6th Amendment, the Supreme Court says that defendants have a right to a jury drawn from a "fair cross section" of the community.

Discrimination should not occur in jury selection. However, there is a long history of discrimination in jury selection in the United States, especially with respect to race as prosecutors in many places have sought to benefit from having all white juries judge African American defendants. In addition, women were long excluded from jury duty. Cases still arise alleging that people are unfairly excluded from participation in jury service for racial reasons (see Georgia v. McCollum, 1992, and Purkett v. Elem, 1995, that follow).

In Flowers v. Mississippi (2019), for example, the Supreme Court found that a prosecutor intentionally engaged in racial discrimination to remove African Americans from the jury pool by asking an African American potential many more questions in the jury selection process than those asked of potential white jurors.

LEWIS V. UNITED STATES (1996)

U.S. Supreme Court

Lewis v. United States, 518 U.S. 322 (1996)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether a defendant who is prosecuted in a single proceeding for multiple petty offenses has a constitutional right to a jury trial where the aggregate prison term authorized for the offenses exceeds six months. We are also asked to decide whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

We conclude that no jury trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth

Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged....

Petitioner Ray Lewis was a mail handler for the United States Postal Service. One day, postal inspectors saw him open several pieces of mail and pocket the contents. The next day, the inspectors routed "test" mail, containing marked currency, through petitioner's station. After seeing petitioner open the mail and remove the currency, the inspectors arrested him. Petitioner was charged with two counts of obstructing the mail, in violation of 18 U. S. C. § 170l. Each count carried a maximum authorized prison sentence of six months. Petitioner requested a jury, but the Magistrate Judge granted the Government's motion for a bench trial. She explained that because she would not, under any circumstances, sentence petitioner to more than six months' imprisonment, he was not entitled to a jury trial.

***

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed .... " It is well established that the Sixth Amendment, like the common law, reserves this jury trial right for prosecutions of serious offenses, and that "there is a category of petty crimes or offenses which

is not subject to the Sixth Amendment jury trial provision." Duncan v. Louisiana, 391 U. S. 145, 159 (1968).

***

An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious. Id., at 543; Codispoti v. Pennsylvania, 418 U. S. 506, 512 (1974).

Here, the maximum authorized penalty for obstruction of mail is six months' imprisonment-a penalty that presumptively places the offense in the "petty" category. We face the question whether petitioner is nevertheless entitled to a jury trial, because he was tried in a single proceeding for two counts of the petty offense so that the potential aggregated penalty is 12 months' imprisonment.

Petitioner argues that, where a defendant is charged with multiple petty offenses in a single prosecution, the Sixth Amendment requires that the aggregate potential penalty be the basis for determining whether a jury trial is required.

Although each offense charged here was petty, petitioner faced a potential penalty of more than six months' imprisonment; and, of course, if any offense charged had authorized more than six months' imprisonment, he would have been entitled to a jury trial. The Court must look to the aggregate potential prison term to determine the existence of the jury trial right, petitioner contends, not to the "petty" character of the offenses charged.

We disagree. The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. As set forth above, we determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.

***

JUSTICE KENNEDY, with whom JUSTICE BREYER joins, concurring in the judgment.

This petitioner had no constitutional right to a jury trial because from the outset it was settled that he could be sentenced to no more than six months' imprisonment for his combined petty offenses. The particular outcome, however, should not obscure the greater consequence of today's unfortunate decision. The Court holds that a criminal defendant may be convicted of innumerable offenses in one proceeding and sentenced to any number of years' imprisonment, all without benefit of a jury trial, so long as no one of the offenses considered alone is punishable by more than six months in prison. The holding both in its doctrinal formulation and in its practical effect is one of the most serious

incursions on the right to jury trial in the Court's history, and it cannot be squared with our precedents. The Sixth Amendment guarantees a jury trial to a defendant charged with a serious crime. Duncan v. Louisiana, 391 U. S. 145, 159 (1968). Serious crimes, for purposes of the Sixth Amendment, are defined to include any offense which carries a maximum penalty of more than six months in prison; the right to jury trial attaches to those crimes regardless of the sentence in fact imposed. Id., at 159-160. This doctrine is not questioned here, but it does not define the outer limits of the right to trial by jury. Our cases establish a further proposition: The right to jury trial extends as well to a defendant who is sentenced in one proceeding to more than six months' imprisonment. Codispoti v. Pennsylvania, 418 U. S. 506 (1974); Taylor v. Hayes, 418 U. S. 488 (1974). To be more specific, a defendant is entitled to a jury if tried in a single proceeding for more than one petty offense when the combined sentences will exceed six months' imprisonment; taken together, the crimes then are considered serious for constitutional purposes, even if each is petty by itself,...

***

The significance of the Court's decision quite transcends the peculations of Ray Lewis, the petitioner here, who twice filched from the mails. The decision affects more than repeat violators of traffic laws, persons accused of public drunkenness, persons who persist in breaches of the peace, and the wide range of eccentrics capable of disturbing the quiet

enjoyment of life by others. Just as alarming is the threat the Court's holding poses to millions of persons in agriculture, manufacturing, and trade who must comply with minute administrative regulations, many of them carrying a jail term of six months or less. Violations of these sorts of rules often involve repeated, discrete acts which can result in potential liability of years of imprisonment. See, e. g., 16 U. S. C. § 707 (violation of migratory bird treaties, laws, and regulations); 29 U. S. C. § 216 (penalties under Fair Labor Standards Act); 36 CFR § 1.3 (1995) (violation of National Park Service regulations); id., § 261.1b (violation of Forest Service prohibitions); id., § 327.25 (violation of Army Corps of Engineers water resource development project regulations); 43 CFR §8351.1-1(b) (1995) (violation of Bureau of Land management regulations under National Trails System Act of 1968). Still, under the Court's holding it makes no difference whether a defendant is sentenced to a year in prison or for that matter to 20 years: As long as no single violation charged is punishable by more than six months, the defendant has no right to a jury.

***

When a defendant's liberty is put at great risk in a trial, he is entitled to have the trial conducted to a jury. This principle lies at the heart of the Sixth Amendment. The Court does grave injury to the Amendment by allowing a defendant to suffer a prison term of any length after a single trial before a single

judge and without the protection of a jury. I join only the Court's judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

....The majority, relying exclusively on cases in which the defendant was tried for a single offense, extends a rule designed with those cases in mind to the wholly dissimilar circumstance in which the prosecution concerns multiple offenses. I agree with JUSTICE KENNEDY to the extent he would hold that a prosecution which exposes the accused to a sentence of imprisonment longer than six months, whether for a single offense or for a series of offenses, is sufficiently serious to confer on the defendant the right to demand a jury. See ante, at 335-337.

Unlike JUSTICE KENNEDY, however, I believe that the right to a jury trial attaches when the prosecution begins. I do not quarrel with the established view that only defendants whose alleged misconduct is deemed serious by the legislature are entitled to be judged by a jury. But in my opinion, the legislature's determination of the severity of the charges against a defendant is properly measured by the maximum sentence authorized for the prosecution as a whole. The text of the Sixth Amendment supports this interpretation by referring expressly to "criminal prosecutions."

***

All agree that a judge may not strip a defendant of the right to a jury trial for a serious crime by promising a sentence of six

months or less. ...Because the right attaches at the moment of prosecution, a judge may not deprive a defendant of a jury trial by making a pretrial determination that the crimes charged will not warrant a sentence exceeding six months.

GEORGIA V. MCCOLLUM (1992)

U.S. Supreme Court

Georgia v. McCollum, 505 U.S. 42 (1992)

JUSTICE BLACKMUN delivered the opinion of the Court.

For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause. See, e. g., Strauder v. West Virginia, 100 U. S. 303 (1880). Last Term this Court held that racial discrimination in a civil litigant's exercise of peremptory challenges also violates the Equal Protection Clause. See Edmonson v. Leesville Concrete Co., 500 U. S. 614 (1991). Today, we are asked to decide whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges.

I

On August 10, 1990, a grand jury sitting in Dougherty County, Ga., returned a six-count indictment charging respondents with aggravated assault and simple battery. See App. 2. The indictment alleged that respondents beat and assaulted Jerry and Myra Collins. Respondents are white; the alleged victims are African-Americans. Shortly after the events, a leaflet was widely distributed in the local African-American community reporting the assault and urging community residents not to patronize respondents' business.

Before jury selection began, the prosecution moved to prohibit respondents from exercising peremptory challenges in a racially discriminatory manner. The State explained that it expected to show that the victims' race was a factor in the alleged assault. According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African-American citizens from participating as jurors in the trial. Observing that 43 percent of the county's population is African-American, the State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors would be African-American.1 With 20 peremptory challenges, respondents therefore would be able to remove all the African-American potential jurors.2 Relying on Batson v. Kentucky, 476 U. S. 79 (1986), the Sixth

Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a prima facie case of racial discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

The trial judge denied the State's motion, holding that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." App.14. The issue was certified for immediate appeal. Id., at 15 and 18.

***

Over the last century, in an almost unbroken chain of decisions, this Court gradually has abolished race as a consideration for jury service. In Strauder v. West Virginia, 100 U. S. 303 (1880), the Court invalidated a state statute providing that only white men could serve as jurors. While stating that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race," id., at 305, the Court held that a defendant does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria. See also Neal v. Delaware, 103 U. S. 370,***

In Swain v. Alabama, 380 U. S. 202 (1965), the Court was confronted with the question whether an African-American defendant was denied equal protection by the State's exercise of peremptory challenges to exclude members of his race from the petit jury. Id., at 209-210. Although the Court rejected the defendant's attempt to establish an equal protection claim

premised solely on the pattern of jury strikes in his own case, it acknowledged that proof of systematic exclusion of African-Americans through the use of peremptories over a period of time might establish such a violation. Id., at 224-228.

In Batson v. Kentucky, 476 U. S. 79 (1986), the Court discarded Swain's evidentiary formulation. The Batson Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based solely on the prosecutor's exercise of peremptory challenges at the defendant's trial. Id., at 87. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Id., at 97.4

Last Term this Court applied the Batson framework in two other contexts. In Powers v. Ohio, 499 U. S. 400 (1991), it held that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding African-American jurors on the basis of race. In Edmonson v. Leesville Concrete Co., 500 U. S. 614 (1991), the Court decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner.5

In deciding whether the Constitution prohibits criminal defendants from exercising racially discriminatory peremptory challenges, we must answer four questions. First, whether a criminal defendant's exercise of peremptory challenges in a racially discriminatory manner inflicts the harms addressed by Batson. Second, whether the exercise of peremptory

challenges by a criminal defendant constitutes state action. Third, whether prosecutors have standing to raise this constitutional challenge. And fourth, whether the constitutional rights of a criminal defendant nonetheless preclude the extension of our precedents to this case.

***

[First Question answered] "[B]e it at the hands of the State or the defense," if a court allows jurors to be excluded because of group bias, "[it] is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice-our citizens' confidence in it." State v. Alvarado, 221 N. J. Super. 324, 328, 534 A. 2d 440, 442 (1987). Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquitta1.

***

[Second Question answered] ....Thus, the second question that must be answered is whether a criminal defendant's exercise of a peremptory challenge constitutes state action for purposes of the Equal Protection Clause.

Until Edmonson, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor, a quintessential state actor. In Edmonson, by

contrast, the contested peremptory challenges were exercised by a private defendant in a civil action.***

.... As to the first principle, the Edmonson Court found that the peremptory challenge system, as well as the jury system as a whole, "simply could not exist" without the "overt, significant participation of the government." Id., at 622. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources for creating a pool of qualified jurors representing a fair cross section of the community.***

....In regard to the second principle, the Court in Edmonson found that peremptory challenges perform a traditional function of the government: "Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact." Id., at 620. And, as the Edmonson Court recognized, the jury system in turn "performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people'" Id., at 624 (citation omitted). These same conclusions apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function.***

Finally, the Edmonson Court indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's

discriminatory act and contributes to its characterization as state action. These concerns are equally present in the context of a criminal trial. Regardless of who precipitated the jurors' removal, the perception and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that will be attributed to the State.***

***

We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges....

JUSTICE SCALIA, dissenting.

I agree with the Court that its judgment follows logically from Edmonson v. Leesville Concrete Co., 500 U. S. 614 (1991). For the reasons given in the Edmonson dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. JUSTICE O'CONNOR demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice), and the contrived nature of the Court's justifications. I see no need to add to her discussion, and differ from her views only in that I do not consider Edmonson distinguishable in

principle-except in the principle that a bad decision should not be followed logically to its illogical conclusion.

Today's decision gives the lie once again to the belief that an activist, "evolutionary" constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair. I dissent.

[omitted are concurring opinion by Justice Thomas and dissenting opinion by Justice O'Connor]

Notes:

Drawing jurors from a "fair cross section of the community" involves a two-step process. First, the local jurisdiction must use a fair process in identifying people to be summoned for potential jury duty. Typically, courts use voter registration lists and/or driver's license list to summon people at random. However, some demographic groups, especially the poor, young people, and, in some places, people of color, may be underrepresented among those who register to vote or who have driver's licenses. If the lists from which jurors are drawn do not accurately reflect the composition of the community,

this increases the likelihood that jury pools will be wealthier and whiter than the actual composition of the community.

Second, during the "voir dire" process in which attorneys question potential jurors, attorneys for each side typically can use two kinds of "challenges" to seek to remove individuals from participation in the jury. "Challenges for cause" involve asking the judge to excuse a potential juror because there is an indication of possible bias, such as the juror being personally acquainted with the defendant or prosecutor, the juror expressing views about the case in advance, or the juror making statements indicating potential bias. Attorneys can make as many requests for challenges for cause as they feel are needed in light of responses of individual jurors.

"Peremptory challenges" are discretionary challenges used by attorneys to remove potential jurors without giving any reasons. These are the challenges that have been used by prosecutors to create all-white or all-male juries by eliminating people of color or women from the jury pool. Each side has a set number of peremptory challenges that they may use. As described in Georgia v. McCollum, the Supreme Court in a series of cases forbade the use peremptory challenges in a racially discriminatory way by prosecutors, defense attorneys, and attorneys in civil litigation. According to the reasoning of the Court, such challenges do not impact the 6th Amendment jury trial right of the defendant, but rather constitute a 14th Amendment equal protection of the laws violation against the potential jurors by excluding them from participation in an

important government process due to their race. In J.E.B. v. Alabama ex rel. T.B. (1994), the Court ruled that peremptory challenges also cannot be used to engage in sex discrimination. That case concerned a civil action over paternity and child support in which the state, which was seeking to force a man to pay for the child he allegedly fathered, sought to create an all-woman jury to pass judgement on the man.

PURKETT V. ELEM (1995)

U.S. Supreme Court

Purkett v. Elem, 514 U.S. 765 (1995)

PER CURIAM.

Respondent was convicted of second-degree robbery in a Missouri court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on Batson v. Kentucky, 476 U. S. 79(1986). The prosecutor explained his strikes:

> "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury ... with the facial hair .... And I don't like the way they looked, with

> the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." App. to Pet. for Cert. A-41.

The prosecutor further explained that he feared that juror number 24, who had had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that "to have a robbery you have to have a gun, and there is no gun in this case." Ibid.

The state trial court, without explanation, overruled respondent's objection and empaneled the jury. On direct appeal, respondent renewed his Batson claim. The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch'" and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination." State v. Elem, 747 S. W. 2d 772, 775 (Mo. App. 1988).

***

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus. It said:

> "[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the

> prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut .... And the mustach[e] and the bear[d] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22." 25 F.3d 679, 683 (1994).

It concluded that the "prosecution's explanation for striking juror 22 ... was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination. Id., at 684.

Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. Hernandez v. New York, 500 U. S. 352, 358-359 (1991) (plurality opinion); id., at 375 (O'CONNOR, J., concurring in judgment); Batson, supra, at 96-98. ***

The Court of Appeals erred by combining Batson's second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, i. e., a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. ...At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may

choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious. ***

The prosecutor's proffered explanation in this case-that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard-is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." EEOC v. Greyhound Lines, Inc., 635 F.2d 188, 190, n. 3 (CA3 1980). And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent.

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JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case. The Court does this today when it overrules a portion of our opinion in Batson

In Batson, the Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to use peremptory challenges to exclude African-Americans from jury service because of their race. The Court articulated a three-step process for proving such violations. First, a pattern

of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima face case by tendering a race-neutral explanation for the strikes. Third, the court must decide whether that explanation is pretextual. Id., at 96-98. At the second step of this inquiry, neither a mere denial of improper motive nor an incredible explanation will suffice to rebut the prima facie showing of discriminatory purpose. At a minimum, as the Court held in Batson, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." Id., at 98.2

Today the Court holds that it did not mean what it said in Batson. Moreover, the Court resolves a novel procedural question without even recognizing its importance to the unusual facts of this case.

I

In the Missouri trial court, the judge rejected the defendant's Batson objection to the prosecutor's peremptory challenges of two jurors, juror number 22 and juror number 24, on the ground that the defendant had not made out a prima facie case of discrimination. Accordingly, because the defendant had failed at the first step of the Batson inquiry, the judge saw no need even to confirm the defendant's assertion that jurors 22 and 24 were black; nor did the judge require the prosecutor to explain his challenges. The prosecutor

nevertheless did volunteer an explanation, but the judge evaluated neither its credibility nor its sufficiency.

(1935)]. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." Batson v. Kentucky, 476 U. S., at 97-98 (footnotes omitted).

The Missouri Court of Appeals affirmed, relying partly on the ground that the use of one-third of the prosecutor's peremptories to strike black veniremen did not require an explanation, State v. Elem, 747 S. W. 2d 772, 774 (1988), and partly on the ground that if any rebuttal was necessary then the volunteered "explanation constituted a legitimate 'hunch,'" id., at 775. The court thus relied, alternatively, on steps one and two of the Batson analysis without reaching the question whether the prosecutor's explanation might have been pretextual under step three.***

***

Today, without argument, the Court replaces the Batson standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," ante, at 768, even if it is "silly or superstitious," ibid., is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially

motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter'S'" should satisfy step two, though a statement that "I had a hunch" should not. See ante, at 769; Batson, 476 U. S., at 98. It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, and trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. Cf. Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248, 253 (1981). That, in any event, is what we decided in Batson.

***

....Whatever procedure is contemplated, however, I think even this Court would acknowledge that some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence. Indeed, in Hernandez the Court explained that a trial judge could find pretext based on nothing more than a consistent policy of excluding all Spanishspeaking jurors if that characteristic was entirely unrelated to the case to be tried. 500 U. S., at 371-372 (pluralityopinion of KENNEDY, J.). Parallel reasoning would justify a finding of pretext based on a policy of excusing jurors with beards if beards have nothing to do with the pending case.

In some cases, conceivably the length and unkempt character of a juror's hair and goatee type beard might give rise to a concern that he is a nonconformist who might not be a good juror. In this case, however, the prosecutor did not

identify any such concern. He merely said he did not" 'like the way [the juror] looked,'" that the facial hair "'look[ed] suspicious.'" Ante, at 766. I think this explanation may well be pretextual as a matter of law; it has nothing to do with the case at hand, and it is just as evasive as "I had a hunch."...

...The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in Batson.

I respectfully dissent.

Notes:

Critics have argued that the decision in Purkett v. Elem may render the prohibition on discriminatory peremptory challenges largely symbolic if trial judges are permitted to accept any excuse for systematic exclusion of jurors by race or sex. Indeed, it has been argued that this decision provides a roadmap instructing attorneys how to engage in discrimination: eliminate jurors by race or sex but claim any fanciful reason other than race or sex for doing so. In effect, this decision places largely in the hands of trial judges the duty to stop this form of discrimination during jury selection. Trial judges who are willing to accept any old reason for exclusions

risk permitting intentional discrimination. Trial judges who are skeptical and ask the attorneys, "what does that reason have to do with the individual's ability to be a good juror in this case?" are much more likely to guard against discrimination in jury selection.

PART XXXVII

EIGHTH AMENDMENT ISSUES

8th AMENDMENT ISSUES

The 8th Amendment contains three specific provisions that protect constitutional rights:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

We summarize these three rights as being individual described in the three clauses of the 8th Amendment:

- The Excessive Bail Clause
- The Excessive Fines Clause
- The Cruel and Unusual Punishments Clause

All of the provisions require interpretation. What is "excessive bail"? What is an "excessive fine"? What punishments are "cruel and unusual"?

The U.S. Supreme Court has not given much attention to the Excessive Bail Clause. Indeed, it is one of the few rights

in the Bill of Rights that has not yet been incorporated and therefore does not apply to bail amounts and conditions imposed in state court proceedings.

Bear in mind that the Excessive Bail Clause does not guarantee that bail will be set in order for an arrested defendant to gain release pending trial. It should be understood as saying, "IF bail is set for a defendant in federal court, the amount and conditions of bail cannot be 'excessive.'" Under federal law (Bail Reform Act of 1984), if a U.S. magistrate judge or district judge finds that there is no amount of bail and no conditions of release that would prevent the defendant from fleeing or endangering the community, then the defendant can be ordered held in jail without bail until there is a plea agreement or trial to conclude the criminal case (United States v. Salerno and Cafaro, 1987).

The Excessive Fines Clause is the provision of the Bill of Rights most recently incorporated and applied in state court proceedings. The Supreme Court's decision in Timbs v. Indiana (2019) [below] incorporated this clause of the 8th Amendment and provided guidance on the definition of an "excessive fine."

The Cruel and Unusual Punishments Clause was incorporated and applied to the states in 1962 (Robinson v. California). As illustrated in cases that will follow, this clause has been interpreted by the Supreme Court to affect policies and practices concerning capital punishment, the length of

prison sentences, conditions of confinement in prisons, and other aspects of sentencing and punishment.

Excessive Fines

TIMBS V. INDIANA (2019)

U.S. Supreme Court

Timbs v. Indiana, 139 S.Ct. 682 (2019)

Justice Ginsburg delivered the opinion of the Court.

Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died.

The State engaged a private law firm to bring a civil suit for forfeiture of Timbs's Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture

demand. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals of Indiana affirmed that determination, but the Indiana Supreme Court reversed. 84 N.E. 3d 1179 (2017). The Indiana Supreme Court did not decide whether the forfeit-ure would be excessive. Instead, it held that the Exces- sive Fines Clause constrains only federal action and is inapplicable to state impositions. We granted certiorari. 585 U.S. __ (2018).

The question presented: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." McDonald v. Chicago, 561 U.S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The

Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

***

Today, acknowledgment of the right's fundamental nature remains widespread. As Indiana itself reports, all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality. Brief in Opposition 8–9. Indeed, Indiana explains that its own Supreme Court has held that the Indiana Constitution should be interpreted to impose the same restrictions as the Eighth Amendment. Id., at 9 (citing Norris v. State, 271 Ind. 568, 576, 394 N.E.2d 144, 150 (1979)).

For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. See Browning-Ferris, 492 U. S., at 267. Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." Harmelin v. Michigan, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit"). This concern is scarcely hypothetical. See Brief for American Civil Liberties Union et al. as Amici Curiae 7

("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue.").

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming. Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition." McDonald, 561 U.S., at 767 (internal quotation marks omitted; emphasis deleted).

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Note:

The Land Rover owned by Mr. Timbs was seized in 2013 when he entered a guilty to a drug offense. The U.S. Supreme Court's 2019 decision incorporated the Excessive Fines Clause of the 8th Amendment and informed Indiana—and other states—that this clause applies to state criminal cases. The U.S. Supreme Court sent the case back to Indiana for its state courts to decide whether the seizure of the vehicle violated the 8th Amendment as an Excessive Fine. The state trial court ruled that the seizure of the $35,000 vehicle was indeed an improper excessive fine for a crime for which the punishment was one-year of home confinement and $1,200 in court fees.

Indiana appealed that decision through state appellate courts. In June 2021, the Indiana Supreme Court ruled that the vehicle must be returned to Mr. Timbs. Mr. Timbs was represented by a public interest law firm that handles cases involving property rights, economic liberty for businesses, and parental choices about schools. Without the help of an organized public interest entity, the litigation process might very well have been much too expensive for him to see his case through to the end if he had to pay for his own attorney.

DISPROPORTIONATE SENTENCES

Disproportionate Sentences and the 8th Amendment

LOCKYER V. ANDRADE (2003)

Lockyer v. Andrade (2003)

Note:

Lockyer v. Andrade (2003) provides a controversial example of a case in which the Supreme Court examined whether a specific punishment should be considered "cruel and unusual" in violation of the 8th Amendment because it was allegedly disproportionate to the crime. Criminal sentences can be found to violate the Cruel and Unusual Punishments Clause either because of proportionality (they are disproportionate—too severe—for the crime being punished) or torturousness (they are akin to torture in their impact on the sentenced human being). A man with a drug addiction problem stole a total of $153 worth of children's videos in two separate thefts from different K-Mart stores. Because he had prior convictions for burglary and theft offenses, California's "three strikes law" was applied to him and he was given a life sentence with no possibility of parole for 50 years. The Supreme Court's justices have typically given states the

authority to define their own sentences for non-death penalty offenses. Thus, the majority of justices said that the sentence was did not constitute improper cruel and unusual punishment.

According to the dissenting opinion of Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer:

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.... Perhaps even more tellingly, no one could seriously argue that the second theft of videotapes provided any basis to think that Andrade would be so dangerous after 25 years, the date on which the consecutive sentence would begin to run, as to require at least 25 years more. I know of no jurisdiction that would add 25 years of imprisonment simply to reflect the fact that the two temporally related thefts took place on two separate occasions, and I am not surprised that California has found no such case, not even under its three-strikes law. Tr. of Oral Arg. 52 (State's counsel acknowledging "I have no reference to any 50-yearto-life sentences based on two convictions"). In sum, the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court's acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable...

This is the rare sentence of demonstrable gross

disproportionality, as the California Legislature may well have recognized when it specifically provided that a prosecutor may move to dismiss or strike a prior felony conviction "in the furtherance of justice." Cal. Penal Code Ann. § 667(f)(2) (West 1999). In this case, the statutory safeguard failed, and the state court was left to ensure that the Eighth Amendment prohibition on grossly disproportionate sentences was met. If Andrade's sentence is not grossly disproportionate, the principle has no meaning. The California court's holding was an unreasonable application of clearly established precedent.

CAPITAL PUNISHMENT

Capital Punishment

Note:

The constitutionality of capital punishment has been challenged in the Supreme Court in many cases for more than five decades. The Supreme Court temporarily halted the death penalty in 1972 (Furman v. Georgia) when it ruled that the punishment was administered too arbitrarily. States that sought to use the death penalty rewrote their laws to require more careful deliberation, especially through use of a separate proceeding after conviction focused solely on the sentence (to execute or to imprison?) and using an explicit consideration of aggravating and mitigating factors. Aggravating factors are those that make the crime or the murderer worse than those in other murder cases, such as a killing during the commission of a separate felony or a murderer with a long criminal record. Mitigating factors are those that make the individual or the crime less deserving of the death penalty, such as youthful age, victimization during childhood, or limited mental capacity.

The Supreme Court approved a reactivation of the death penalty under these new statutes in 1977 (Gregg v. Georgia).

The Supreme Court has prohibited the application of capital punishment to certain categories of crimes and individuals when such applications were ruled to violate the 8th Amendment prohibition on cruel and unusual punishments. For example:

- No death penalty permitted for the crime of rape of an adult woman (Coker v. Georgia, 1977)
- No death penalty for the rape of a child (Kennedy v. Louisiana, 2008)
- No death penalty for someone who commits a murder prior to attaining the age of 18 (Roper v. Simmons, 2005)
- No death penalty for developmentally disabled individuals who commit murders (Atkins v. Virginia, 2002).

Because the Supreme Court during its 2021-2022 term moved swiftly to reverse longstanding precedents concerning various major issues (e.g., the right to privacy, separation of church and state, and the authority of government agencies), commentators wonder whether the Court might revisit some of these capital punishment issues. The newly constituted majority on the Court, with the addition of three conservative appointees of President Donald Trump, has shown it will

decide many issues differently than did justices during prior Supreme Court eras.

The Supreme Court has heard several cases presenting arguments about lethal injection as a method of execution. Because of problems with lethal injections, including whether the method can inflict torturous pain, these cases seek to have the Court declare that this method violates the Cruel and Unusual Punishments Clause. The Court has consistently declared that no one has yet presented sufficient evidence and arguments to justify such a ruling (e.g., Baze v. Rees, 2008).

ROPER V. SIMMONS (2005)

The description of the murder in the following case is graphic and potentially upsetting.
U.S. Supreme Court

Roper v. Simmons, 543 U.S. 551 (2005)

Justice Kennedy delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime. In Stanford v. Kentucky, 492 U. S. 361 (1989), a divided Court rejected the proposition that the Constitution bars capital punishment for juvenile offenders in this age group. We reconsider the question.

I

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could "get away with it" because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The State later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response Simmons entered Mrs. Crook's bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her

hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim's body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman "because the bitch seen my face."

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his Miranda rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The State charged Simmons with burglary, kidnaping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri's juvenile court system. See Mo. Rev. Stat. §§211.021 (2000) and 211.031 (Supp. 2003). He was tried as an adult. At trial the State introduced Simmons' confession

and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The State sought the death penalty. As aggravating factors, the State submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. The State called Shirley Crook's husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons' attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons' mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons' mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge

had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough." Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

Simmons obtained new counsel, who moved in the trial court to set aside the conviction and sentence. One argument was that Simmons had received ineffective assistance at trial. To support this contention, the new counsel called as witnesses Simmons' trial attorney, Simmons' friends and neighbors, and clinical psychologists who had evaluated him.

Part of the submission was that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." The experts testified about Simmons' background including a difficult home environment and dramatic changes in behavior, accompanied by poor school performance in adolescence. Simmons was

absent from home for long periods, spending time using alcohol and drugs with other teenagers or young adults. The contention by Simmons' postconviction counsel was that these matters should have been established in the sentencing proceeding.

***

After these proceedings in Simmons' case had run their course, this Court held that the Eighth and Fourteenth Amendments prohibit the execution of a [developmentally disabled] person. Atkins v. Virginia, 536 U. S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of Atkins established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed. State ex rel. Simmons v. Roper, 112 S. W. 3d 397 (2003) (en banc). It held that since Stanford,

"a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since Stanford, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade." 112 S. W. 3d, at 399.

On this reasoning it set aside Simmons' death sentence and

resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." Id., at 413.

***

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. Trop v. Dulles, 356 U. S. 86, 100–101 (1958) (plurality opinion).

***

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

***

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more

understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." Johnson, supra, at 367; see also Eddings, supra, at 115–116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B–D, infra.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Eddings, supra, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that

adults have to extricate themselves from a criminogenic setting").

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Thompson, supra, at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See Stanford, 492 U. S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character....

***

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument. Tr. of Oral Arg. 48. In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes, see Harmelin v. Michigan, 501 U. S. 957, 998–999 (1991) (Kennedy, J., concurring in part and

concurring in judgment). Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. In particular, as the plurality observed in Thompson, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." 487 U. S., at 837. To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

***

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

Justice O'Connor, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral

proportionality analysis, nor the two in tandem suffice to justify this ruling.

Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of 17-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus. Indeed, the evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in Stanford v. Kentucky, 492 U. S. 361 (1989).

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

***

Justice Scalia, with whom The Chief Justice and Justice Thomas join, dissenting.

.... What a mockery today's opinion makes of [Alexander]

Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," ante, at 6 (internal quotation marks omitted), of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Ante, at 9 (internal quotation marks omitted). The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

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ONE FINAL SERIES OF QUESTIONS

One Final Series of Questions

Before putting this book away, please consider:

"If Americans better understood Supreme Court doctrine related to the Fourth, Fifth, Sixth, and Eighth Amendments, do you think they would have more or less faith in the criminal justice system? Why?"

"If you are unhappy with the state of policing, how might things be improved? If instead you think policing is going fairly well, to what do you attribute the discontent exhibited during the 2020 protests?"

Have your answers to these questions changed as you learned more about criminal procedure law?

A Thank You to Our Students

Thank you for joining us on this tour of American criminal procedure law. We especially appreciate our Fall 2018 students at the University of Missouri School of Law for serving as the initial test subjects for this book.

This is where you can add appendices or other back matter.