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THE FOURTH AMENDMENT TODAY: A BICENTENNIAL APPRAISAL*

WAYNE R. LAFAVE**

I. REMINISCENCES AND INTRODUCTION

In the autumn of the year 1960, a callow youth fresh from the consummation of his pupillage at the University of Wisconsin law school, suitably well-scrubbed and sporting a closely-trimmed crewcut and an enthusiastic demeanor, arrived at Villanova to join that exiguous coterie which then constituted the law faculty. As improbable as it may seem to you, given the ravages of an intervening quarter of a century, I am (or, more precisely, was) that youth.

Upon my arrival, I proceeded to take stock of my new colleagues. There was the Dean, Harold Reuschlein—a true eccentric—who I soon came to believe was afflicted with acute pyromania, for at every law school function, whatever the size of the crowd or the outside temperature, he stoked a fireplace deflagration so intense that any of the guests who failed to retreat to the far wall were certain to be singed. There was the Vice Dean, Thomas O'Toole—a true eccentric—who as our resident Irishmen seemed, at least to this displaced midwesterner, to be in constant pursuit of the indefectible Barry Fitzgerald imitation. There was law librarian Arthur Pulling—a true eccentric—whose bibliomania was as pronounced as Reuschlein's pyromania; Pulling actually had one huge room at the law school filled to overflowing with non-law books, "Rebecca of Sunnybrook Farm" and the like, which he hoped to swap with secondhand dealers for copies of Blackstone or whatever else was needed to enrich the law school's then meager collection. There was Prof. J. Edward Collins—a true eccentric—who prominently displayed on his office wall an outsized print of Goya's erotic painting, "The Naked Maja"; this bit of conspicuity, as best I could tell, was intended to and did in fact cause the Dean palpitations about how the Board of Visitors

* This article, including of course the personal reminiscences, was the basis of the Donald A. Giannella Memorial Lecture of the Villanova University School of Law, April 3, 1987. The reminiscences, I have assured the Law Review, are covered by the doctrine of New York Times v. Sullivan, 376 U.S. 254 (1964).

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would react to such vulgarity upon their forthcoming inspection. There was Prof. John Stevenson III—a true eccentric—who was about what you would expect of someone with a roman numeral at the end of his name; John taught Property (naturally!) and had the bearing and demeanor characteristic of a member of the landed gentry. There was Prof. Ernest Roberts—a true eccentric—whose penchant for realism in the Trial Practice course prompted him to stage a mock bank robbery in a neighboring Main Line community, an event so convincing as to provoke a police response well beyond his wildest expectations. And then there was Prof. William Painter—a true eccentric—whose waggery I shall not particularize here for fear that Painter, now my colleague at the University of Illinois, would be moved to frenzied acts of vengeance against me.

That was the crew which greeted me upon my arrival at Villanova. But those were also the people who had hired me, who had invited me to become a member of their small and closely-knit collegium—to become, if you will, one of them. Reflection upon that fact, you might surmise, should have produced some stirrings of self-doubt within my breast. But that never happened, and certainly one reason why it never happened was because I was but one of two faculty additions that fall, the other being a truly remarkable young man by the name of Donald Giannella. It soon became apparent to me that Don was a most extraordinary individual, an exceptionally brilliant and articulate lawyer who was certain to excel as a law teacher and scholar. For the Villanova faculty to have selected and attracted an individual of Don's caliber, it seemed to me, attested to the good judgment and quality of Reuschlein's little band. And so I concluded that I was most fortunate to be a member of that confraternity, the (eccentric, to be sure) faculty of the Villanova School of Law.1 That conclusion was reaffirmed time and again during my first year of law teaching. Despite the rigors of trying to stay a few pages ahead of the students in four new courses, I found the Villanova environment exciting and intellectually stimulating; there was never a dull moment.

The more cynical among you may be inclined to doubt the sincerity of that assertion when I next report, as surely I must,

1. It was only later, after I had attained greater experience in academe, that I came to realize that eccentricity is a prerequisite to tenure on any law faculty. It may be, of course, that the tenure screening as to this requirement is occasionally slipshod, as doubtless it was in my case.
that at the end of that academic year I abruptly departed Villanova for my present environs, the University of Illinois. The attractions of Illinois were many, ranging all the way from their ample research resources to the opportunity for me again to spectate Big Ten football, but I can truthfully say that the decision to move on was made with many regrets about what I was leaving behind. As the years passed, I followed with interest the further growth and development of this law school, noting especially the many accomplishments achieved by Donald Giannella prior to his untimely demise. I am thus particularly honored to be chosen to participate in the lecture series which bears Don’s name. And believe me, it is truly good to be back at Villanova once again. My purpose here today, however, is not a celebration of the Silver Anniversary of my exodus from Villanova. Rather, I have come in the hope that I might make a small contribution to the ongoing commemoration of a much more important milestone in the law. I refer, of course, to the Bicentennial of the United States Constitution.

Surely few would question Gladstone’s appraisal that “the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man.” It is truly an extraordinary document, not, as was once supposed, because “the Constitution in its words is plain and intelligible and . . . is meant for the homebred, unsophisticated understandings of our fellow citizens,” but rather because the broad sweep of its language has facilitated an ongoing process of interpretation of that charter by the Supreme Court. And particularly because it is a living Constitution, it is most certainly appropriate that we take stock of the Constitution on the occasion of its Bicentennial. But an assessment of the entire Constitution lies well beyond my capabilities (to say nothing of your endurance), and thus I shall pursue a more modest goal here today: that of critically examining some of the major developments in the jurisprudence of the Fourth Amendment.

There may be some who would question the appropriateness of a Bicentennial assessment directed at the Fourth Amendment. After all, this is not its Bicentennial, for it did not take effect until as recently as 1791. This overlooks, of course, the fact that ratification of the Constitution doubtless would not have occurred ab-

3. Id. at 48 (quoting George M. Dallas, President Polk’s Vice-President).
sent the understanding that a Bill of Rights would be promptly appended thereto. But there is another sense in which the Fourth Amendment can be viewed as a relative newcomer. As with other provisions of the Constitution, it has "both the virtue of brevity and the vice of ambiguity," so that it must of necessity find its content in the Supreme Court's interpretations of it. The Fourth Amendment, however, "remained for almost a century a largely unexplored territory," as it was not until the 1886 case of Boyd v. United States that the Court had occasion to elaborate upon the Amendment's protections. And the Amendment only took full flower with the 1961 ruling in Mapp v. Ohio that it had to be treated as more than "a form of words" in the state courts, so perhaps we are dealing with a silver anniversary after all!

Be that as it may, there is no denying the importance of the Fourth Amendment in our constitutional scheme of things. As Dean Erwin Griswold aptly put it, the protections of the Amendment largely determine "the kind of society in which we live." It is thus true, in a hierarchical though not in a numerical sense, that the Fourth Amendment occupies "a place second to none in the Bill of Rights." Its exact significance, however, can be fully appreciated only by examining four overarching Fourth Amendment questions: (i) what factual basis is required for a lawful search or seizure? (ii) when is a warrant required for a lawful search or seizure? (iii) what conduct qualifies as a search or seizure, so as to be subject to the preceding limitations? and (iv) how is the Fourth Amendment to be enforced?

II. BASIS FOR SEARCH OR SEIZURE

As for the first of these issues, it is well to begin with the language of the Fourth Amendment itself: "no Warrants shall is-

4. J. Landynski, Search and Seizure and the Supreme Court; A Study in Constitutional Interpretation 42 (1966).
5. Id. at 49.
10. It is rare for all of these fundamental issues to be addressed in a single Supreme Court decision. Unique in this regard is the very last search and seizure case of the Burger Court, which by a curious set of circumstances never saw the light of day in the official reports. See LaFave, A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court, 1986 U. Ill. L. Rev. 1669.
sue, but upon probable cause.” Of course, probable cause is also
needed for warrantless searches and seizures, for (as the Supreme
Court has quite correctly concluded) the Amendment’s require-
ments “surely cannot be less stringent” merely because the po-
lice are acting without a warrant. This probable cause
requirement, the Court explained in Brinegar v. United States, is
intended both “to safeguard citizens from rash and unreasonable
interferences with privacy and from unfounded charges of crime”
and “to give fair leeway for enforcing the law in the community’s
protection”; it is “the best compromise that has been found for
accommodating these often opposing interests.” Striking just the
right balance is a difficult enough task, but doing so in a fashion
which contributes meaningfully to the understanding of lower
courts and police is a most formidable undertaking. This is be-
because probable cause is inherently “an exceedingly difficult con-
cept to objectify.” “Because of the kaleidoscopic myriad that
goes into the probable cause mix ‘seldom does a decision in one
case handily dispose of the next.’”

Consequently, any assessment of the Supreme Court’s con-
tribution to a “fleshing out” of this Fourth Amendment probable
cause standard must take account of these difficulties. Quite
clearly, the Court cannot be criticized for its failure to produce
some litmus-paper test which readily decides all subsequent
cases; the most that can be expected is that the Court would pro-
vide an approach, a structure, which could thereafter be benefi-
cially utilized by police, warrant-issuing magistrates, and
suppression hearing judges. In a series of cases, the Supreme
Court took very substantial steps in that direction. Focusing
upon the most often litigated question of when information to-
tally or partially acquired from a police informant amounts to
probable cause, the Court in Aguilar v. Texas helpedfully developed
what it later came to call “Aguilar’s two-pronged test.” Aguilar
and its progeny established that there was a “basis of knowl-

given case rarely furnishes a formula for making similar findings in other cases
because probable cause depends upon the facts and circumstances of the partic-
ular case being reviewed.”).
17. These cases and the reaction to them by the lower courts is more fully
edge" prong, which could be satisfied by a statement from the informant as to precisely how he came by his information or sometimes by inference flowing from the great number of details provided by the informant, and a "veracity" prong which could be met on the basis of the informant's past good performance or by virtue of his admissions against penal interest. The discussed in LaFave, Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication, U. ILL. L.F. 1 (1977).


19. As Justice White explained in his very helpful concurring opinion in Spinelli v. United States:

   If the affidavit rests on hearsay—an informant’s report—what is necessary under Aguilar is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be first-hand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient.


20. Justice White, in his concurring opinion in Spinelli v. United States, in providing the fifth vote for this self-verifying detail method of satisfying the first prong of Aguilar, helpfully commented:

   I am inclined to agree with the majority that there are limited special circumstances in which an "honest" informant's report, if sufficiently detailed, will in effect verify itself—that is, the magistrate when confronted with such detail could reasonably infer that the informant had gained his information in a reliable way. . . . Detailed information may sometimes imply that the informant himself has observed the facts. Suppose an informant with whom an officer has had satisfactory experience states that there is gambling equipment in the living room of a specified apartment and describes in detail not only the equipment itself but also the appointments and furnishings in the apartment. Detail like this, if true at all, must rest on personal observation either of the informant or of someone else. If the latter, we know nothing of the third person's honesty or sources; he may be making a wholly false report. But it is arguable that on these facts it was the informant himself who has perceived the facts, for the information reported is not usually the subject of casual, day-to-day conversation. Because the informant is honest and it is probable that he has viewed the facts, there is probable cause for the issuance of a warrant.

   Id. at 425-26 (White, J., concurring).


22. Illustrative is McCray v. Illinois, 386 U.S. 300 (1967) where defendant was arrested and searched, resulting in the discovery of narcotics on his person, after an informant told the arresting officer that defendant was selling narcotics and had narcotics on his person at a particular location and then pointed out the defendant at that place. On the motion to suppress, the officer testified that he
Court also made it apparent that partial corroboration of the informant's tale was of significance, though the two-pronged approach was not sufficiently developed that it could be said exactly how this corroboration was to be taken into account or, more particularly, whether corroboration was an alternative means of satisfying both or only one of the two prongs.  

So matters stood when the Supreme Court unfortunately decided in *Illinois v. Gates* to dismantle this structure rather than build upon it; that case marks the abandonment of the two-pronged test and the recrudescence of "totality of the circumstances analysis." In support, the *Gates* majority offered a series of propositions which neither individually nor collectively justify such a step. The claim that the "totality of the circumstances approach" had been acquainted with the informant for about a year and that during this period the informant had supplied him with information some 15 or 16 times and that the information had proved to be accurate and had resulted in numerous arrests and convictions. On cross-examination he was even more specific as to the informant's previous reliability, giving the names of people who had been convicted of narcotics violations as the result of information supplied by this same informant. In addition, another officer testified as to his use of this informant some 20 to 25 times and that he had also obtained many convictions as a result. Understandably, the Supreme Court concluded there was "no doubt," but that the credibility of the informant had been sufficiently established. *Id.* at 304.

23. Illustrative is United States v. Harris, 403 U.S. 573 (1971), involving the assessment of a search warrant affidavit reciting that the informant had purchased illicit whiskey from a named person for two years, most recently in the past two weeks, in the course of which he saw that person obtain the whiskey from a certain specified outbuilding. What appears to be a majority of the Court stressed: "The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself." *Id.* at 580.

24. The Supreme Court either used corroboration or assumed that it might be used in a variety of ways. Sometimes it appears the Court was seeking evidence of corroboration because of no showing of the informant's basis of knowledge. *See, e.g., Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959).* Sometimes, it appears the Court was seeking corroboration because the informant's veracity was not otherwise established sufficiently. *See, e.g., United States v. Harris, 403 U.S. 573 (1971); Jones v. United States, 362 U.S. 257 (1960).* And sometimes the Court was seeking corroboration for both reasons. *See, e.g., Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).* Moreover, the type of information considered as tending to corroborate has ranged from innocent conduct in *Draper* to that which itself created a "strong suspicion" in *Ker*, 374 U.S. at 35.

26. *Id.* at 230.
is far more consistent with our prior treatment of probable cause” as a “‘practical, nontechnical conception,’” “a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules”\(^{28}\) is nothing but a red herring. No one had ever contended that the *Aguilar* formula would eventually reduce probable cause to “a neat set of legal rules.” Rather, it provided a structure for probable cause inquiries and, if not rigidly applied,\(^{29}\) allowed sufficient room for assessment of the unique facts of the particular case. As for the second proposition, that the new approach was justified by the fact that affidavits “are normally drafted by nonlawyers” and warrants are issued “by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of ‘probable cause,’”\(^{30}\) those facts if anything cut in exactly the opposite direction. As Justice White pointed out in his separate opinion, that laymen police and magistrates must often make the critical probable cause determination in the first instance is all the more reason for the Court “to provide more precise guidance” rather than “totally abdicating [its] responsibility in this area.”\(^{31}\) The Court’s third proposition, “that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review,”\(^{32}\) is a truism\(^{33}\) which lends no support to *Gates*, a decision which discourages not only de novo review but any meaningful review whatsoever. Proposition four, the *in terrorem* that closer scrutiny of affidavits than *Gates* requires might prompt police to


29. In a footnote, the *Gates* majority made reference to the fact that three “lower court decisions, brought to our attention by the State, reflect a rigid application of such rules.” *Id.* at 234 n.9. But Justice White quite correctly pointed out in his separate opinion: “The holdings in these cases could easily be disapproved without reliance on a ‘totality of the circumstances’ analysis.” *Id.* at 273 n.26.

30. *Id.* at 235.

31. *Id.* at 274.

32. *Id.* at 236.

33. In both *Aguilar* and *Spinelli* the Court had been careful to reaffirm the principle that a magistrate’s determination of probable cause is entitled to considerable deference. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) (acknowledging that reviewing courts “will pay substantial deference to judicial determinations of probable cause”); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (noting that magistrates’ determinations of probable cause “should be paid great deference by reviewing courts”).
"resort to warrantless searches," is equally unpersuasive, for the longstanding rule that a somewhat more generous probable cause test obtains in with-warrant cases means there is nothing to be gained by police acting without rather than with a warrant whenever either alternative is permissible only upon probable cause and the officer entertains some doubts about the sufficiency of the information at hand. The fifth proposition, that if *Aguilar* survived anonymous tips "would be of greatly diminished value in police work," ignores the fact that under the pre-*Gates* regime such tips could and often did prompt police surveillance and investigation uncovering uncontrovertible probable cause.

As for the *Gates* Court's sixth and final proposition, that the two prongs of *Aguilar* should not have "such independent status," so that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other," it contains a fatal flaw. A "common-sense decision" on probable cause, to take the Court's language, necessitates attention to both veracity and basis of knowledge, and to treat a strong showing of one as curing a deficiency in the other makes a mockery of the Fourth Amendment's probable cause requirement. The preferred method of satisfying the basis of knowledge requirement, a direct statement from the informant as to how he came by the information, is virtually worthless when it is made by an individual from the criminal milieu about whom no veracity judgment is possible. And information tendered by a person of unquestioned credibility is worth very little when no judgment is possible as to the basis of his conclusions whether or not, to use

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34. 462 U.S. at 236.
35. United States v. Ventresca, 380 U.S. 102, 109 (1965) ("when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants").
36. 462 U.S. at 237.
37. *Gates* itself illustrates the point that an anonymous tip can prompt a police investigation by which the necessary facts could be developed. The letter received by police from an anonymous informant confronted the police with the prospect of uncovering $200,000 worth of drugs, and thus, certainly justified some expenditure of police resources in checking it out. By abandoning the *Aguilar* formula, the majority concluded the checking done was sufficient even though (as Justice Stevens noted in his dissent) what was found was "nothing except ordinary innocent activity." *Id.* at 294. Other facts would doubtless have come to light adding up to the pre-*Gates* quantum of probable cause, if the police had heeded the letter writer's promise that "if you watch them carefully you will make a big catch." *Id.* at 225.
38. *Id.* at 233.
39. *Id.* at 236.
the Court's oft-quoted phrase, he is merely reporting "an offhand remark heard at a neighborhood bar." No wonder that Justice Brennan was moved to declare in his dissent that "today's decision threatens to 'obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'"

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

One illustration of this development is the Court's accept-

41. 462 U.S. at 291.
42. As Professor Amsterdam once put it, the Court's decisions for the most part treated the Fourth Amendment "as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a 'search' or 'seizure' within the ambit of the amendment is to impose those restrictions upon it." Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 388 (1974).
44. If it is a variable concept then, in addition to the developments discussed in the text following, one would think that sometimes an especially high probable cause standard would apply, though this has received little recognition. But see Winston v. Lee, 470 U.S. 753, 767 (1985), asserting that "the Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable.'" The Court there held the usual quantum of probable cause would not suffice to justify surgery on the defendant to obtain evidence; a "compelling need" must be shown. 470 U.S. at 765; see also Gooding v. United States, 416 U.S. 450, 464 (1974) (three Justices argue that nighttime executions of search warrants "involve a greater intrusion than ordinary searches and therefore require a greater justification"); Berger v. New York, 388 U.S. 41, 69 (1967) (Stewart, J., concurring) (electronic eavesdropping "involves a broad invasion of a constitutionally protected area" and [o]nly the most precise and rigorous standard of probable cause should justify an intrusion of this sort"); Schmerber v. California, 384 U.S. 757, 770 (1966) (taking of blood sam-
In some instances of a lesser quantum of individualized suspicion, as in the seminal stop-and-frisk case of *Terry v. Ohio*. By balancing the need to search against the invasion which the search entails, the Court concluded that a brief on-the-street seizure does not require as much evidence of probable cause as one which involves taking the individual to the station, as the former is relatively short, less conspicuous, less humiliating to the person, and offers less chance for police coercion. It thus suffices for a stop, as the Court later put it, that the police had “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” The *Terry* case also “dissipated the notion that the search and seizure provisions of the Fourth Amendment are subject to verbal manipulation,” and thus the Court has wisely declined in later cases to permit the *Terry* formula to be used to justify more substantial detentions not called arrests but which are “in important respects indistinguishable from a traditional arrest.” However, the Court has correctly utilized the *Terry* formula for other, comparable lesser intrusions, such as a brief detention of luggage.

In another category of cases, the Court has allowed a search or seizure to be made without any individualized suspicion at all. This result has been reached in limited circumstances in which there exists a rather extraordinary and unique public interest to be satisfied and where, also, it appears that the limited intrusion involved is tolerable so long as those subjected to it are not arbitrarily selected. A leading case of this genre is *Camara v. Municipal Court*, holding that nonconsensual health and safety inspections of residential premises may be conducted without any facts whatsoever tending to show that code violations exist within particular premises, provided however that it is shown to a magistrate that the selection of the premises in question was pursuant to neutral

45. 392 U.S. 1 (1968).
46. Id. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-37 (1967)).
52. 387 U.S. 523 (1967).
criteria derived from a pre-existing legislative or administrative inspection scheme. This somewhat different type of balancing test makes sense in a situation like that in *Camara* and, especially, in those instances in which the minimal intrusion is directed only at those who are self-selected by virtue of their choice of location. The Supreme Court has thus approved the operation of a highway checkpoint at which all vehicles are stopped for brief questioning of the occupants about their possible illegal alienage, and the stopping of all traffic at a roadblock for the purpose of checking driver's licenses and vehicle registration.

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

But it is fair to say that the Supreme Court has been too ready to utilize this "piggy-back" theory in situations where it is not needed, as is illustrated by *New York v. Belton,* holding a search without warrant and without traditional probable cause may be conducted of the entire passenger compartment of a vehicle simply because an occupant of that vehicle has just been arrested. For one thing, there is no need for such a rule, as


57. For a more complete analysis of *Robinson,* see LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127.


59. For a more extended criticism of *Belton,* see LaFave, *The Fourth Amend-
ascertaining when a vehicle interior is actually under the continuing control of an arrestee per the prior Chimel v. California test is not difficult. For another, the Belton decision invites subterfuge; as Justice Stevens correctly noted, now an officer may opt to make a custodial arrest "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation." 61

III. THE WARRANT REQUIREMENT

As for my second overarching question—when is a warrant required—it is useful to begin with the observation that while the Fourth Amendment proscribes "unreasonable searches and seizures" and then states that "no Warrants shall issue" except upon a certain showing and with certain specificity, it says absolutely nothing about whether lack of a warrant either sometimes or always makes a search or seizure "unreasonable." The Supreme Court, however, has long expressed a strong preference for searches and seizures pursuant to warrant. 62 This is understandable, as the warrant process permits the critical probable cause determination to be made in relatively calm circumstances by a judicial officer, who is presumably more knowledgeable on these matters than the cop on the beat. And even if this judicial scrutiny is not all it is cracked up to be, the pre-search or pre-seizure memorialization of the facts being relied upon ensures against post hoc manipulation of them in an effort to conceal inadequacies in a factual basis. 64 But, while the Supreme Court as-

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63. But see Illinois v. Gates, 462 U.S. 213, 235 (1983) (asserting that warrants are "issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause").
64. By the very fact that the police must commit themselves in advance to a statement of facts, usually in writing (the prevailing practice, though apparently not required by the Fourth Amendment, United States v. Goyett, 699 F.2d 838
asserted on one occasion "that the police must, whenever practicable, obtain advance judicial approval of searches and seizures," this is far from being an accurate portrayal of current law or practice.

The Court has long recognized that the police may forego a warrant when confronted with "exigent circumstances" necessitating warrantless action. Illustrative is Schmerber v. California, holding no warrant was needed to take a blood sample from an apparently intoxicated driver because the percentage of alcohol in the blood would be significantly diminished if testing was delayed until a warrant could be obtained. But the Court's exigency assessments have been erratic at best, as is shown by Vale v. Louisiana. Police were outside Vale's house intending to arrest him because his bail had been raised on a prior charge when they saw Vale come out and apparently make a drug sale to a person who pulled up in a car. They arrested him on his porch and briefly looked around inside; his brother and mother entered the premises, following which the police searched for and found Vale's drug stash therein. The Supreme Court rejected the state's claim of exigent circumstances. For one thing, said the Court, (6th Cir. 1983)), the warrant process serves "to facilitate review of probable cause and avoid justification for a search or an arrest by facts or evidence turned up in the course of their execution." Jones v. United States, 5 Crim. L. Rptr. 2124, 2126 (D.C. Cir. 1969), rev'd sub nom. on reh'g, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

68. Here again, a part of the problem may be the utilization of a too-generous "bright line" to spare the police the need to make case-by-case judgments. For example, in United States v. Watson, 423 U.S. 411, 423-24 (1976), holding no warrant was ever needed to make an arrest in a public place, the Court expressed a desire not "to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." But empirical evidence indicates that nearly 50% of all arrests are made within two hours of the crime, that very few additional arrests are made immediately thereafter, and that 45% of the remaining arrests are made more than a day after the crime (nearly 35% after the passage of over a week). PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 96 (1967). In these latter instances, the risk is negligible that the defendant would suddenly flee between the time the police solve the case and the time which would be required to obtain and serve an arrest warrant, which suggests the Court could have drawn its "bright line" to exclude the latter cases.
"no one else was in the house when they first entered," 70 but the significance of that comment remains undetermined absent any hint by the Court that the police, having preceded the mother and brother into the house, could have barred them from entry until a warrant was obtained. Even more bizarre is the Court's assertion the police could have obtained "a search warrant as well" 71 when they got arrest warrants regarding Vale's bail increase, as the probable cause to search for drugs arose moments before the search. Even the Vale Court's statement of what would amount to exigent circumstances (i.e., the observation that in the instant case the "goods ultimately seized were not in the process of destruction") 72 seems flawed; lower courts have found it so unrealistically narrow that they have in the main not accepted it as controlling. 73

The Vale decision is as sophistic in one direction as Chambers v. Maroney, 74 decided the very same day, is in the other. Chambers held there were exigent circumstances justifying a warrantless search of a car although, in point of fact, at the time of the search the car was securely held in police custody and the former occupants were all under arrest and in no position to gain access to it. The commentators had a field day with the blatantly false assertion of exigencies in Chambers, 75 and some years later the Court acknowledged in United States v. Chadwick 76 that its no-warrant rule for vehicles was instead based upon another consideration, namely, "the diminished expectation of privacy which surrounds the automobile." This notion that the protections of the warrant process are not necessary when only lesser Fourth Amendment interests are threatened is also to be found in some of the other

70. Id. at 34.
71. Id. at 35.
72. Id.
73. Rather, they have stated the exception in broader terms. See, e.g., United States v. Blake, 484 F.2d 50, 54 (8th Cir. 1973) (permitting search when evidence is "threatened with imminent removal or destruction"), cert. denied, 417 U.S. 949 (1974); United States v. Rubin, 474 F.2d 262, 268 (3d Cir. 1973) (stating that police must "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant"); State v. Patterson, 192 Neb. 308, 316, 220 N.W.2d 235, 240 (1974) (focusing on likelihood that evidence will be destroyed or removed before warrant can be obtained).
76. 433 U.S. 1, 12 (1977).
decisions of the Court. Thus, no warrant is needed to make an arrest in a public place, but judicial approval is required for an "extended restraint of liberty following arrest." Similarly, no warrant is needed when only the possessory interest in effects is in jeopardy, but a warrant is generally needed when possession will not be further interrupted or delayed but an intrusion into the privacy of those effects is contemplated.

Although one certainly might well criticize the manner in which the Supreme Court has sometimes drawn the lesser-interests line (e.g., in Chadwick, where the Court's rationalization was none too convincing and thus came back to haunt the Court when it later considered the situation of containers in vehicles), it is my view that the Court is on solid ground in not actually requiring resort to the warrant process whenever genuine exigent circumstances are lacking. A greatly expanded warrant system—that is, one which truly adhered to the principle that arrest and search warrants are required whenever practicable—might convert that process into somewhat of a mechanical routine, one in which the judiciary would "not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exists grounds for a search." My point is simply this: it may well be that, as a practical matter, the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to prevent those police practices which would be most destructive of Fourth Amendment values.

There is still another consideration which has influenced the

79. Coolidge v. New Hampshire, 403 U.S. 443 (1971) (if in course of lawful execution of search warrant police find item not named in that warrant (and not improperly omitted therefrom), they may seize it on probable cause without first obtaining magistrate's authorization). This is because, the Court explained, "the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause," not a problem on such facts because the search had already been authorized and conducted. Id. at 467. This left only the pending act of dispossession, that is, the seizure from the defendant's custody or control, which presented only a "minor peril to Fourth Amendment protections," and thus could proceed without a warrant. Id.
80. Walter v. United States, 447 U.S. 649, 654 (1980) (if private party to whom package was misdelivered turns it over to police, police still need warrant to scrutinize more closely content of package, as "an officer's authority to possess a package is distinct from his authority to examine its contents").
82. L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 120 (1967).
Supreme Court to permit warrantless Fourth Amendment activity absent true exigent circumstances. Sometimes no warrant is required simply because, given the theoretical basis of the contemplated activity and the consequent requisite factual basis needed to justify it, there would be no meaningful role for the magistrate to perform.\footnote{A variation on this proposition is to be found in a series of cases of a somewhat different kind than those discussed in the text following. It sometimes appears that the Court is saying that there is no need to involve the magistrate in certain situations where the probable cause showing is extraordinarily strong and by its nature not likely to be found mistaken by hindsight. See Texas v. Brown, 460 U.S. 730, 751 n.5 (1983) (three Justices stated that what makes warrant requirement inapplicable is "'virtual certainty' " as to container's contents); Robbins v. California, 453 U.S. 420, 428 (1981) (plurality held that for warrant requirement to be inapplicable "a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer"); Arkansas v. Sanders, 442 U.S. 753, 764-65 n.13 (1982) (asserting some containers "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance").} Illustrative is South Dakota v. Opperman,\footnote{428 U.S. 364 (1976).} in which the Court upheld warrantless vehicle inventories. As Justice Powell explained in his concurrence: "Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. There are thus no special facts for a neutral magistrate to evaluate."\footnote{Id. at 383.} Just when it is that going the warrant route would have no utility is not always apparent, and on occasion has sharply divided the Court. In Camara v. Municipal Court, the majority held that a housing inspection could be conducted without the traditional probable cause so long as a particular inspection conformed to "reasonable legislative or administrative standards for conducting an area inspection."\footnote{387 U.S. 523, 538 (1967).} The Court went on to hold that absent the household's consent a warrant was required, even though the magistrate's role in this setting is a very limited one—he is merely to ascertain whether the particular inspection fits within the general scheme "without any reassessment of the basic agency decision to canvass an area."\footnote{Id. at 532.} The dissenters saw this involvement of the magistrate as a meaningless act, and certainly a comparison of Camara with the later Opperman case lends some support to that judgment. If it is not necessary for a magistrate to determine in advance whether a particular inventory falls within a preexisting established plan, why is it necessary that there be such a before-
the-fact determination as to an inspection? But there are bases for distinguishing the two cases, one being that the warrant itself serves a function in *Camara* that is unnecessary in an *Opperman* type of case. As the *Camara* majority stressed, requiring that the inspector have a warrant reassures the householder that "the inspector himself is acting under proper authorization," but the dispossessed owner of a car needs no like assurance as to the inventory of his vehicle when it is already in police custody. This strikes me as a sensible distinction, one which also helps explain several of the Supreme Court's other recent no-warrant decisions.

**IV. REACH OF THE FOURTH AMENDMENT**

Turning now to my third issue, concerning the scope of the Fourth Amendment, the basic point is that for the previously discussed probable cause and warrant requirements to apply at all, the police conduct in question must constitute either a "search" or a "seizure" as those terms are used in the Fourth Amendment. If neither of those appellations is deemed appropriate, then the police activity is absolutely and totally free of any Fourth Amendment restraints.

As for the term "seizure," it is considerably broader than "arrest," and thus, the Supreme Court has wisely concluded that the mere fact that a particular detention is less intrusive than an arrest or is not called an arrest does not mean it falls outside the Fourth Amendment. As the Court put it in *Terry v. Ohio*, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." But judging

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88. Two others are (i) that the privacy interest in vehicles falls below that in houses; and (ii) that the inventory risk is not to all vehicles (as inspection is to all residences), but only to those already in police custody.

89. 387 U.S. at 532.

90. In Donovan v. Dewey, 452 U.S. 594 (1981), authorizing warrantless inspection of mines, the court reasoned, in effect, that the operator of a pervasively regulated business needed no comparable assurance because the regulatory scheme itself forewarned the businessman of the frequency and scope of the inspections. And in Michigan v. Clifford, 464 U.S. 287 (1984), where a majority of the Court rejected the Court's earlier view, in Michigan v. Tyler, 436 U.S. 499 (1978), that an inspection warrant was required for a with-notice postfire inspection into the cause of a fire, the conclusion as to the inutility of magisterial participation was grounded in the fact that such inspections are triggered only by an uncontroversible prior event: a fire of unknown origin. The householder therefore has no reason to doubt the inspector's authority or to fear he has been arbitrarily selected as the focus of official scrutiny.

91. 392 U.S. 1, 16 (1968).
this matter by whether the officer intended to restrain or whether the particular suspect believed he was restrained—as lower courts sometimes did—would be exceedingly difficult, and thus an objective test is called for in these circumstances. I thus believe that the Supreme Court took a very important step in the right direction in concluding in *Florida v. Royer* 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.” It does seem to me, however, that *Royer* is a bit off the mark. Few people feel free to walk away during any sort of police-citizen encounter, and thus a workable test would seem to require consideration of whether the officer added to the inherent pressures by engaging in menacing conduct significantly beyond that accepted in social intercourse.

Defining the term “search” has proved much more difficult. The earlier view that it covered only intrusion into a “constitutionally protected area” was abandoned in *Katz v. United States*. *Katz* involved electronic eavesdropping on one end of a phone conversation by a device attached to the outside of a telephone booth, and the Court held this was a search because the government “violated the privacy upon which [Katz] justifiably relied while using the telephone booth.” Justice Harlan, concurring in an opinion often relied upon thereafter by the Supreme Court and lower courts, enunciated “a twofold requirement, first that a person have exhibited an actual (subjective) expectation of pri-

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92. As explained in United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970), if intent of the officer was the test then the matter would “be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd,” while if the perception of the suspect governed this “would require a prescience neither the police nor anyone else possesses.”


94. This appears to be the approach actually taken by many lower courts. See, e.g., Login v. State, 394 So. 2d 183 (Fla. Dist. Ct. App. 1981). Under this approach, an officer has not made a seizure if, for example, he interrogated “in a conversational manner,” “did not order the defendant” to do something or “demand that he” do it, asked questions which “were not overbearing or harassing in nature,” did not “make any threats or draw a weapon,” State v. Tsukiyama, 56 Haw. 8, 12-13, 525 P.2d 1099, 1102 (1974), or made only such physical contact as is “a normal means of attracting a person’s attention,” United States v. Burrell, 286 A.2d 845, 846 (D.C. 1972).


96. *Id.* at 353.

vacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'”

As Justice Harlan later came to realize, the first of these two requirements deserves no place in a theory of what the Fourth Amendment protects. Analysis under Katz, he counseled in his dissenting opinion in United States v. White, must "transcend the search for subjective expectations," for "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.” Although a majority of the Court has on at least one occasion acknowledged that the "actual (subjective) expectation of privacy" formulation sometimes "would provide an inadequate index of Fourth Amendment protection," 100 I sense in the recent cases a willingness by the Court to be quite demanding with respect to subjective expectations. Illustrative is California v. Ciraolo, where the Supreme Court answered in the negative the question "whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home.” 101 The defendant was growing marijuana in a 15 by 20 foot plot in his backyard, surrounded by 10-foot solid fence. The majority in Ciraolo offered the gratuitous observation that because "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a truck or a 2-level bus," it "is not entirely clear" whether the defendant "therefore manifested a subjective expectation of privacy from all observations of his backyard, or whether instead he manifested merely a hope that no one would observe his unlawful gardening pursuits.” 102 The unfortunate implication is that a defendant cannot get by even the first Katz hurdle unless he has taken steps to ensure against all conceivable efforts at scrutiny, and that it is not enough that (as the dissenters put it) "he had taken steps to shield those activities from the view of passersby.” 103 To assert that such extraordinary precautions are necessary cannot be squared with Katz, for in that case "there was no suggestion that the defendant in the phone booth took

98. 389 U.S. at 361.
102. Id. at 1812 (emphasis in original).
103. Id. at 1817 (Powell, J., dissenting).
any precautions against the wiretapping at issue in that case.”¹⁰⁴

As for the second Katz requirement, sometimes referred to simply as the reasonable "‘expectation of privacy’” test,¹⁰⁵ it concerns not matters of statistical probability¹⁰⁶ but instead requires courts to make “a value judgment,” namely, “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”¹⁰⁷ Unfortunately, in recent years the Supreme Court itself seems not to have grasped that this is really what Katz is all about; the Court has “failed to pursue the implications of its insight”¹⁰⁸ in Katz. This can very easily be illustrated by a brief look at just a few of the cases.

In United States v. Miller,¹⁰⁹ the Court held a person has no justified expectation of privacy in the records of his banking transactions kept at those financial institutions with which he has done business, because the documents “contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.” That overlooks the fact that bank employees examine one’s checks briefly and one at a time and thus do not construct conclusions about the customer’s lifestyle, while when police study the totality of one’s banking records they acquire a virtual current biography. The Court’s error in Miller was compounded in Smith v. Maryland,¹¹⁰ holding that one has no legitimate expectation of privacy in the numbers he dials on his phone because those numbers are conveyed to the telephone company’s switching equipment and, in the case of long-distance calls, end up on the customer’s bill. Thus the defendant

¹⁰⁶. Thus, “[i]f two narcotics peddlers were to rely on the privacy of a desolate corner of Central Park in the middle of the night to carry out an illegal transaction, this would be a reasonable expectation of privacy; there would be virtually no risk of discovery. Yet if by extraordinary good luck a patrolman were to illuminate the desolate spot with his flashlight, the criminals would be unable to suppress the officer’s testimony as a violation of their rights under the fourth amendment.” Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U. L. REV. 968, 983 (1968).
¹⁰⁷. Amsterdam, supra note 42, at 403.
in that case could not object to police use of a pen register to
determine all numbers he dialed, though once again the more fo-
cused police examination of the information revealed much more
than the limited and episodic scrutiny which the phone company
gave the same numbers. In United States v. Knotts,\textsuperscript{111} the Court
similarly held it was no search for police to keep track of a per-
son's travels by using a "beeper" because "anyone who wanted to
look" could have without such assistance learned of defendant's
100-mile journey from Minneapolis into rural northern Wiscon-
sin. But to learn what the beeper revealed—that chemicals
purchased in Minneapolis were now in a particular secluded cabin
100 miles away—would have taken an army of bystanders in ready
and willing communication with one another. And then there is
the most recent Ciraolo case holding that it is no search for police
to look down from an airplane into one's solid-fenced back yard
to learn his gardening proclivities, as "[a]ny member of the public
flying over this airspace who glanced down could have seen every-
thing that these officers observed."\textsuperscript{112} This ignores the fact, as
the four dissenters put it, that "the actual risk to privacy from
commercial or pleasure aircraft is virtually nonexistent."\textsuperscript{113}

V. THE EXCLUSIONARY RULE

As for the fourth and final question, concerning enforcement
of the Amendment, I refer of course to the exclusionary rule.
Back in 1914 the Court in Weeks v. United States\textsuperscript{114} adopted a sup-
pression doctrine for federal courts regarding evidence obtained
in violation of the Fourth Amendment, and this exclusionary rule
was finally mandated for state courts as well in the 1961 decision
of Mapp v. Ohio.\textsuperscript{115} The theoretical foundation of the exclusion-
dary doctrine has long been a matter of dispute. One view is that
there is a Fourth Amendment right of exclusion (as it was put in
Mapp, "that no man is to be convicted on unconstitutional evi-
dence")\textsuperscript{116}; another is that the exclusionary rule is merely a deter-
rent device (Mapp also says "the purpose of the exclusionary rule
is to deter . . . .")\textsuperscript{117}. The Court has more often relied upon the
deterrence rationale in recent years, which has understandably

\textsuperscript{111} 460 U.S. 276, 281 (1983).
\textsuperscript{112} 106 S. Ct. at 1813.
\textsuperscript{113} Id. at 1818.
\textsuperscript{114} 232 U.S. 383 (1914).
\textsuperscript{115} 367 U.S. 643 (1961).
\textsuperscript{116} Id. at 657.
\textsuperscript{117} Id. at 656.
been seen by some as an unhealthy state of affairs. As Professor Francis Allen once put it: "The reason why the deterrence rationale renders the exclusionary rule vulnerable is that the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one." 118

But the heart of the difficulty, as I see it, is not so much that the Court utilizes the deterrence rationale but rather how that rationale is perceived and then applied. Surely the question of whether the exclusionary rule did or could deter in the particular case is irrelevant, for the "exclusionary rule is not aimed at special deterrence" 119 but instead is intended "to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." 120 That is, in the last analysis, deterrence "is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred." 121 But the Supreme Court’s decisions in this area are not infrequently inconsistent with that notion. One illustration is United States v. Janis, 122 where, utilizing "common sense" in "the absence of convincing empirical data," the Court held the exclusionary rule inapplicable in a civil suit by or against a sovereign other than that employing the searching officer, though in fact (as the dissenters recognized) such a result could only fortify the existing pattern "of mutual cooperation and coordination" 123 whereby evidence illegally seized by state officers was being "silver-plattered" to federal officials for use in enforcing their tax laws. Another is I.N.S. v. Lopez-Mendoza, 124 where the exclusionary rule was held inapplicable in a civil deportation hearing, in part because INS agents know "that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest," though (as Justice White noted in dissent) so concentrating on deterrence of individual agents "neglects the 'systemic' deterrent effect that may lead the agency to adopt policies and procedures that conform to Fourth Amendment standards." 125

123. *Id.* at 462.
125. *Id.* at 1054 (White, J., dissenting).
Any discussion of the Supreme Court's misapplication of the deterrence rationale must include *United States v. Leon*, holding that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." The various supporting reasons given by the *Leon* majority have considerable force, but only in the sense of moving me to a state approaching apoplexy. Suffice it to take note here of only a couple of these reasons. The Court at one point declares that "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion." The notion seems to be that calculated and deliberate noncompliance with the Fourth Amendment is unlikely at the judicial level, from which it follows that the exclusionary rule and its deterrence function have no place there. But once again this is not really what the Fourth Amendment exclusionary rule is all about. Surely many more Fourth Amendment violations result from carelessness than from intentional deviation from the Constitution, and just as surely the exclusionary rule is logically directed to those more common violations. As the Supreme Court itself recognized in *Stone v. Powell*, what the exclusionary rule demonstrates is "that our society attaches serious consequences to violation of constitutional rights," which encourages those making critical search and seizure decisions "to incorporate Fourth Amendment ideals into their value system." In other words, the longstanding applicability of the exclusionary rule in with-warrant cases has served not only to deter the occasional ill-spirited magistrate, but more importantly to influence judicial behavior more generally by—as the Court put it in *United States v. Johnson*—creating an "incentive to err on the side

Most of the commentary on *Leon* has been critical, though there is not complete agreement on *Leon*'s import. For an interesting exchange, see Dripps, Living with Leon, 95 Yale L.J. 906 (1986); Duke, Making Leon Worse, 95 Yale L.J. 1405 (1986); Dripps, More on Search Warrants, Good Faith, and Probable Cause, 95 Yale L.J. 1424 (1986).
128. 468 U.S. at 916.
of constitutional behavior."\textsuperscript{130}

Another critical but equally unsound point in the majority's rationale for the holding in \textit{Leon} is that generally there is no function of police deterrence to be served when a warrant turns out to be constitutionally defective. Once again, the mistaken assumption is that the deterrence function can operate only when the police knew or (at least) should have known that their conduct violated the Fourth Amendment. Not so! Under the pre-\textit{Leon} exclusionary rule, police had come to learn that it was not enough that they had gotten a piece of paper called a warrant. That warrant could later be challenged, and thus there developed in many localities the very sound practice of going through the warrant-issuing process with the greatest of care, often by having the affidavit reviewed by individuals other than the magistrate.\textsuperscript{131} But under \textit{Leon} there is no reason to go through such cautious procedures and every reason not to. Why take the risk that some conscientious prosecutor or police supervisor will say the application is insufficient when, if some magistrate can be induced to issue a warrant on the basis of it, the affidavit is thereafter virtually immune from challenge?

Worse yet, the Court sometimes ignores the deterrence function of the rule entirely, as is illustrated by \textit{United States v. Payner}.\textsuperscript{132} There, an IRS agent, knowing a Bahamian bank official would be in Miami, participated in a burglary scheme whereby the banker's briefcase was stolen long enough to permit the photographing of 400 bank records therein. This led to information establishing Payner and others had money in that bank not reported on their tax returns. Despite unmistakably clear evidence that this scheme was hatched with the understanding that a person such as Payner—precisely the kind of violator being sought—would not have standing to object to the search, the Supreme Court declined to recognize that Payner should have Fourth Amendment standing in such circumstances. As the dis-

\textsuperscript{130} 457 U.S. 537, 561 (1982).
\textsuperscript{131} The two cases which were before the Supreme Court were not at all unusual in this respect. See Sachs, \textit{The Exclusionary Rule: A Prosecutor's Defense}, 1 CRIM. J. ETHICS 27, 30 (1982) (noting that "police-prosecutor consultation is customary in all our cases when Fourth Amendment concerns arise"). In \textit{Leon}, the search warrant application "was reviewed by several Deputy District Attorneys." 468 U.S. at 902. But in the companion case of Massachusetts v. Shepard, 468 U.S. 981, 985 (1984), the detective-affiant had his affidavit checked over by "the district attorney, the district attorney's first assistant, and a sergeant."
\textsuperscript{132} 447 U.S. 727 (1980).
senters concluded, such a holding "effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person." 133

VI. "... AND IN CONCLUSION"

At this juncture, I beg your indulgence while I recount one more Villanova reminiscence from my brief untenured tenure here. It involves my last official act as a Villanova employee, attendance at the University-wide graduation ceremony, which at least then was mandatory for all faculty. Not wishing to risk impoundment of my final paycheck, I dutifully acquired the necessary academic regalia and marched with other faculty, graduates and parents into the football stadium. I did so with some trepidation, for the announced speaker was Cardinal Richard Cushing of Boston, who had only a few months before demonstrated to the entire nation his torpid desinential faculties. The earlier occasion was the inauguration of President John Kennedy, at which the esteemed prelate was called upon to deliver the invocation. Cushing prayed and prayed and prayed some more, with no end in sight, when suddenly smoke began billowing from beneath the platform, apparently because a heater had started a fire. After several nervous glances at the worsening situation, the Cardinal was compelled to utter a concluding "amen." 134 Quite obviously, the prayers of those assembled had been answered!

My worse fears were realized, for at the graduation Cardinal Cushing commenced his address with great vigor and never slackened his pace for what surely was well over an hour but seemed an eternity. The crowd was obviously becoming restless, and when the Cardinal in his distinctive, booming voice uttered the phrase "and in conclusion," the assemblage responded with a roar the likes of which I am sure has not been heard on this campus since (save perhaps when Villanova won the NCAA Tournament). But the celebration was premature, for the conclusion took another twenty minutes, by which time the audience was absolutely numb. Father John Klekotka, President of Villanova University, then proceeded to introduce the several dignitaries on the podium, apparently in an effort to ascertain which of them might be in need of resuscitation. When he came to the Archbishop of

133. Id. at 738 (Marshall, J., dissenting).
Philadelphia, Father Klekotka declared: “This is a very special day for him, for his son is among those graduating here today.” That brought the crowd out of its lethargy, and in the ensuing cachinnation few heard Klekotka’s rectifier, “I mean his nephew.”

Whether at this point in today’s proceedings you feel some affinity with that 1961 graduation throng is a matter about which I prefer not to speculate. But in any event, the time has come for me to utter those encouraging words “and in conclusion,” though I hasten to add the assurance that what lies ahead are two more minutes, not twenty. I wish only to summarize what I hope we have all learned from my Fourth Amendment exegesis.

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

Secondly, the two favorable trends I have just noted also serve to reflect just how unfortunate it is that the Court has circumscribed the boundaries of the Fourth Amendment as it has. Such cases as the Miller-Ciraolo series fail to recognize that privacy should not be viewed as “a discrete commodity, possessed absolutely or not at all,” 135 and that there is a critical difference between revealing bits and pieces of information sporadically to a small and often select group for a limited purpose and a focused police examination of the totality of that information. Clearly, the Court needs to recall and take to heart the admonition in the Boyd case that “unconstitutional practices get their first footing” by

"the obnoxious thing in its mildest and least repulsive form."\textsuperscript{136}

As for the exclusionary rule sanction, the news is again bad. It has been rendered inapplicable in a variety of circumstances because of the Court's propensity to take a distorted view of the deterrence rationale. Worse than that, cases such as Payner show that the Court is prepared to invoke the deterrent objective of the exclusionary rule in order to constrict the rule, but not to expand it.

But I remain the eternal optimist, and thus would venture the auspice that there will come a time when it is once again fully appreciated that Fourth Amendment freedoms "are not mere second-class rights."\textsuperscript{137} That is, I share the hope, as recently expressed by Justice Brennan, "that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom."\textsuperscript{138} And thus, should you be so kind as to invite me back for the Tricentennial, I expect that I will be commenting not only upon the remarkable advances of medical science, but also upon the equally impressive developments in Fourth Amendment jurisprudence.

\textsuperscript{136} 116 U.S. 616, 635 (1886).