The 4th Amendment - annotations

SEARCH AND SEIZURE

History and Scope of the Amendment

History .--Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the utilization of the "writs of assistance." But while the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the Colonies late and as a result of experience, 1 there was also a rich English experience to draw on. "Every man's house is his castle" was a maxim much celebrated in England, as was demonstrated in Semayne's Case, decided in 1603. 2 A civil case of execution of process, Semayne's Case nonetheless recognized the right of the homeowner to defend his house against unlawful entry even by the King's agents, but at the same time recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King's process. Most famous of the English cases was Entick v. Carrington, 3 one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials connected with John Wilkes' polemical pamphlets attacking not only governmental policies but the King himself. 4

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society," and the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature "contrary to the genius of the law of England." 5 Besides its general character, said the court, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. Entick v. Carrington, the Supreme Court has said, is a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide to an understanding of what the Framers meant in writing the Fourth Amendment. 6

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods, and commanding all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance

of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. 7 Otis lost and the writs were issued and utilized, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

Scope of the Amendment .--The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 8 As reported from committee, with an inadvertent omission corrected on the floor, 9 the section was almost identical to the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision. 10

As noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are "reasonable" are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause which need not comply with the second clause. 11 This issue has divided the Court for some time, has seen several reversals of precedents, and is important for the resolution of many cases. It is a dispute which has run most consistently throughout the cases involving the scope of the right to search incident to arrest. 12 While the right to search the person of the arrestee without a warrant is unquestioned, how far afield into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line. 13 In Harris v. United States, 14 it approved as "reasonable" the warrantless search of a four-room apartment pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use

search warrants wherever reasonably practicable." 15 This rule was set aside two years later by another reconstituted majority which adopted the premise that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Whether a search is reasonable, the Court said, "must find resolution in the facts and circumstances of each case." 16 However, the Court soon returned to its emphasis upon the warrant. "The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part." 17 Therefore, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure." 18 Exceptions to searches under warrants were to be closely contained by the rationale undergirding the necessity for the exception, and the scope of a search under one of the exceptions was similarly limited. 19

During the 1970s the Court was closely divided on which standard to apply. 20 For a while, the balance tipped in favor of the view that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions. 21 Gradually, guided by the variable expectation of privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions. 22

By 1992, it was no longer the case that the "warrants-with- narrow-exceptions" standard normally prevails over a "reasonableness" approach. 23 Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively "criminal" in nature. And even within that core area of "criminal" cases, some exceptions have been broadened. The most important category of exception is that of administrative searches justified by "special needs beyond the normal need for law enforcement." Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees. 24 In all of these instances the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest; in all of these instances the government's interest has been found to outweigh the individual's. The broad scope of the administrative search exception is evidenced by the fact that an overlap between law enforcement objectives and administrative "special needs" does not result in application of the warrant requirement; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation. 25 In the law enforcement context, where search by warrant is still the general rule, there has also been some loosening of the requirement. For example, the Court has shifted focus from whether exigent circumstances justified failure to obtain a warrant, to whether an officer had a "reasonable" belief that an exception to the warrant requirement applied; 26 in

another case the scope of a valid search "incident to arrest," once limited to areas within the immediate reach of the arrested suspect, was expanded to a "protective sweep" of the entire home if arresting officers have a reasonable belief that the home harbors an individual who may pose a danger. 27

Another matter of scope recently addressed by the Court is the category of persons protected by the Fourth Amendment--who constitutes "the people." This phrase, the Court determined, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United States] to be considered part of that community." 28 The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country. There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

The Interest Protected .--For the Fourth Amendment to be applicable to a particular set of facts, there must be a "search" and a "seizure," occurring typically in a criminal case, with a subsequent attempt to use judicially what was seized. Whether there was a search and seizure within the meaning of the Amendment, whether a complainant's interests were constitutionally infringed, will often turn upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. Said Lord Camden in Entick v. Carrington: 29 "The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . ." Protection of property interests as the basis of the Fourth Amendment found easy acceptance in the Supreme Court 30 and that acceptance controlled decision in numerous cases. 31 For example, in Olmstead v. United States, 32 one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions. 33 The Court later rejected this approach, however. "The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." 34 Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements. 35

The 4th Amendment - annotations

The test propounded in Katz is whether there is an expectation of privacy upon which one may "justifiably" rely. 36 "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 37 That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion." 38

The two-part test that Justice Harlan suggested in Katz 39 has purported to guide the Court in its deliberations, but its consequences are unclear. On the one hand, there is no difference in result between many of the old cases premised on property concepts and more recent cases in which the reasonable expectation of privacy flows from ownership concepts. 40 On the other hand, many other cases have presented close questions that have sharply divided the Court. 41 The first element, the "subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our 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." 42 As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." 43 Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others; 44 but ownership of other things, i.e., automobiles, does not carry a similar high degree of protection. 45 That a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation. 46 Some expectations, the Court has held, are simply not those which society is prepared to accept. 47 While perhaps not clearly expressed in the opinions, what seems to have emerged is a balancing standard, which requires "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." As the intrusions grow more extensive and significantly jeopardize the sense of security of the individual, greater restraint of police officers through the warrant requirement may be deemed necessary. 48 On the other hand, the Court's solicitude for law enforcement objectives may tilt the balance in the other direction.

Application of this balancing test, because of the Court's weighing in of law enforcement investigative needs 49 and the Court's subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding-tier scale of privacy interests. The privacy test was originally designed to permit a determination that a Fourth Amendment protected interest had been invaded. 50 If it had been, then ordinarily a warrant was required, subject only to the narrowly

defined exceptions, and the scope of the search under those exceptions was "strictly tied to and justified by the circumstances which rendered its initiation permissible." 51 But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it; 52 if the individual has a lesser expectation of privacy, then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion. 53 Exceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, e.g., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception. 54 The result has been a considerable expansion, beyond what existed prior to Katz, of the power of police and other authorities to conduct searches.

Arrests and Other Detentions .--That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall 55 and is now established law. 56 At the common law, it was proper to arrest one who had committed a breach of the peace or a felony without a warrant, 57 and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained. 58 However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant. 59 The Fourth Amendment applies to "seizures" and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants or probable cause in instances in which warrants may be forgone. 60 Some objective justification must be shown to validate all seizures of the person, including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary. 61

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure--unlike evidence obtained as a result of an unlawful search--remains subject to custody and presentation to court. 62 But the application of self-incrimination and other exclusionary rules to the States and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded. 63 Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former. 64 Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed. 65

Searches and Inspections in Noncriminal Cases .--Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory

purposes, 66 and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant. 67 But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects. 68 "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 69 Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute. 70

Camara and See were reaffirmed in Marshall v. Barlow's, Inc., 71 in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations. But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, inasmuch as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused. 72

In Donovan v. Dewey, 73 however, Barlow's was substantially limited and a new standard emerged permitting extensive governmental inspection of commercial property, 74 absent warrants. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a "greater latitude" to conduct warrantless inspections of commercial property than of homes, because of "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity

accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections." 75

Dewey was distinguished from Barlow's in several ways. First, Dewey involved a single industry, unlike the broad coverage in Barlow's. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, deference was due Congress' determination that unannounced inspections were necessary if the safety laws were to be effectively enforced. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied. 76 The standard of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to "absurd results," in that new and emerging industries posing great hazards would escape regulation. 77 Dewey suggests, therefore, that warrantless inspections of commercial establishments are permissible so long as the legislature carefully drafts its statute.

Dewey was applied in New York v. Burger 78 to inspection of automobile junkyards and vehicle dismantling operations, a situation where there is considerable overlap between administrative and penal objectives. Applying the Dewey three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served: e.g., establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. "[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process. 79

In other contexts, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. Thus, in Michigan v. Tyler, 80 it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant. 81

One curious case has approved a system of "home visits" by welfare caseworkers, in which the recipients are required to admit the worker or lose eligibility for benefits. 82 In another unusual case, the Court held that asheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a "seizure" of the home. Supp.1

In addition, there are now a number of situations, some of them analogous to administrative searches, where '"special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements." 83 In one of these cases the Court, without acknowledging the magnitude of the leap from one context to another, has taken the Dewey/Burger rationale--developed to justify warrantless searches of business establishments--and applied it to justify the significant intrusion into personal privacy represented by urinalysis drug testing. Because of the history of pervasive regulation of the railroad industry, the Court reasoned, railroad employees have a diminished expectation of privacy that makes mandatory urinalysis less intrusive and more reasonable. 84

With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions were condemned as too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual's legitimate expectations of privacy. 85 On the other hand, in South Dakota v. Opperman, 86 the Court sustained the admission of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

Footnotes

[Footnote 1] Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, in the drafting of which Samuel Adams took the lead. 1 B. Schwartz, The Bill of Rights: A Documentary History 199, 205-06 (1971).

[Footnote 2] 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter, the rain may enter--but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenement."

[Footnote 3] 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

[Footnote 4] See also Wilkes v. Wood, 98 Eng. 489 (C.P. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), aff'd 19 Howell's State Trials 1002, 1028; 97 Eng. Rep. 1075 (K.B. 1765).

The 4th Amendment - annotations

[Footnote 5] 5 Eng. Rep. 817, 818.

[Footnote 6] Boyd v. United States, 116 U.S. 616, 626 (1886).

[Footnote 7] The arguments of Otis and others as well as much background material are contained in Quincy's Massachusetts Reports, 1761-1772, App. I, pp. 395-540, and in 2 Legal Papers of John Adams 106-47 (Wroth & Zobel eds., 1965). See also Dickerson, Writs of Assistance as a Cause of the American Revolution, in The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene 40 (R. Morris, ed., 1939).

[Footnote 8] 1 Annals of Congress 434-35 (June 8, 1789).

[Footnote 9] The word "secured" was changed to "secure" and the phrase "against unreasonable searches and seizures" was reinstated. Id. at 754 (August 17, 1789).

[Footnote 10] Id. It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 101-03 (1937).

[Footnote 11] The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of warrants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable, and this reading has indeed been effectuated in certain cases, although for independent reasons. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967); but see id. at 303 (reserving the question whether "there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.")

[Footnote 12] Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. United States v. United States District Court, 407 U.S. 297, 320 (1972).

[Footnote 13] Compare Marron v. United States, 275 U.S. 192 (1927), with Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), and United States v. Lefkowitz, 285 U.S. 452 (1932).

The 4th Amendment - annotations

[Footnote 14] 331 U.S. 145 (1947).

[Footnote 15] Trupiano v. United States, 334 U.S. 699, 705 (1948). See also McDonald v. United States, 335 U.S. 451 (1948).

[Footnote 16] United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

[Footnote 17] Chimel v. California, 395 U.S. 752, 761 (1969).

[Footnote 18] Terry v. Ohio, 392 U.S. 1, 20 (1968). In United States v. United States District Court, 407 U.S. 297, 321 (1972), Justice Powell explained that the "very heart" of the Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U.S. 443, 473 -84 (1971). See also Davis v. Mississippi, 394 U.S. 721, 728 (1969); Katz v. United States, 389 U.S. 347, 356 -58 (1967); Warden v. Hayden, 387 U.S. 294, 299 (1967).

[Footnote 19] Chimel v. California, 395 U.S. 752, 762 -64 (1969) (limiting scope of search incident to arrest). See also United States v. United States District Court, 407 U.S. 297 (1972) (rejecting argument that it was "reasonable" to allow President through Attorney General to authorize warrantless electronic surveillance of persons thought to be endangering the national security); Katz v. United States, 389 U.S. 347 (1967) (although officers acted with great self-restraint and reasonably in engaging in electronic seizures of conversations from telephone booth, self-imposition was not enough and magistrate's judgment required); Preston v. United States, 376 U.S. 364 (1964) (warrantless search of seized automobile not justified because not within rationale of exceptions to warrant clause). There were exceptions, e.g., Cooper v. California, 386 U.S. 58 (1967) (warrantless search of impounded car was reasonable); United States v. Harris, 390 U.S. 234 (1968) (warrantless inventory search of automobile).

[Footnote 20] See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973), Justices Stewart, Douglas, Brennan, and Marshall adhered to the warrant-based rule, while Justices White, Blackmun, and Rehnquist, and Chief Justice Burger placed greater emphasis upon the question of reasonableness without necessary regard to the warrant requirement. Id. at 285. Justice Powell generally agreed with the former group of Justices, id. at 275 (concurring).

[Footnote 21] E.g., G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 -53 (1977) (unanimous); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous); Arkansas v. Sanders, 442 U.S. 743, 758 (1979); United States v. Ross, 456 U.S. 798, 824 -25 (1982).

[Footnote 22] E.g., Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile taken to police station); Texas v. White, 423 U.S. 67 (1975) (same); New York v. Belton, 453 U.S. 454 (1981) (search incident to arrest); United States v. Ross, 456 U.S. 798 (1982) (automobile search at scene). On the other hand, the warrant-based standard did preclude a number of warrantless searches. E.g., Almeida- Sanchez v. United States, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (warrantless administrative inspection of business premises); Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search of home that was "homicide scene").

[Footnote 23] Of the 1992 Justices, only Justice Stevens has frequently sided with the warrants-with-narrow-exceptions approach. See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 189 (Justice Stevens joining Justice Marshall's dissent); New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Justice Stevens dissenting); California v. Acevedo, 500 U.S. 565, 585 (1991) (Justice Stevens dissenting).

[Footnote 24] See various headings infra under the general heading "Valid Searches and Seizures Without Warrants."

[Footnote 25] New York v. Burger, 482 U.S. 691 (1987).

[Footnote 26] Illinois v. Rodriguez, 497 U.S. 177 (1990).

[Footnote 27] Maryland v. Buie, 494 U.S. 325 (1990).

[Footnote 28] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

[Footnote 29] 19 Howell's State Trials 1029, 1035, 95 Eng. Reg. 807, 817- 18 (1765).

[Footnote 30] Boyd v. United States, 116 U.S. 616, 627 (1886); Adams v. New York, 192 U.S. 585, 598 (1904).

[Footnote 31] Thus, the rule that "mere evidence" could not be seized but rather only the fruits of crime, its instrumentalities, or contraband, turned upon the question of the right of the public to possess the materials or the police power to make possession by the possessor unlawful. Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967). See also Davis v. United States, 328 U.S. 582 (1946). Standing to contest unlawful searches and seizures was based upon property interests, United States v. Jeffers, 342 U.S. 48 (1951); Jones v. United States, 362 U.S. 257 (1960), as well as decision upon the validity of a consent to search. Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964); Frazier v. Culp, 394 U.S. 731, 740 (1969).

[Footnote 32] 277 U.S. 438 (1928). See also Goldman v. United States, 316 U.S. 129 (1942) (detectaphone placed against wall of adjoining room; no search and seizure).

[Footnote 33] Silverman v. United States, 365 U.S. 505 (1961) (spike mike pushed through a party wall until it hit a heating duct).

[Footnote 34] Warden v. Hayden, 387 U.S. 294, 304 (1967).

[Footnote 35] Katz v. United States, 389 U.S. 347, 353 (1967). But see California v. Hodari D., 499 U.S. 621, 626 (1991) (Fourth Amendment "seizure" of the person is the same as a common law arrest; there must be either application of physical force or submission to the assertion of authority).

[Footnote 36] 389 U.S. at 353 . Justice Harlan, concurring, formulated a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361.

[Footnote 37] Id. at 351-52.

[Footnote 38] Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized). Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest in home has a reasonable expectation of privacy). Cf. Rakas v. Illinois, 439 U.S. 128 (1978). Property rights are still protected by the Amendment, however. A "seizure" of property can occur when there issome meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466U.S. 109, 120-21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[Footnote 39] Justice Harlan's opinion has been much relied upon. E.g., Terry v. Ohio, 392 U.S. 1, 19 (1968); Rakas v. Illinois, 439 U.S. 128, 143 -144 n.12 (1978); Smith v. Maryland, 442 U.S. 735, 740 -41 (1979); United States v. Salvucci, 448 U.S. 83, 91 -92 (1980); Rawlings v. Kentucky, 448 U.S. 98, 105 -06 (1980).

The 4th Amendment - annotations

[Footnote 40] E.g., Alderman v. United States, 394 U.S. 165 (1969) (home owner could object to electronic surveillance of conversations emanating from his home, even though he was not party to the conversations).

[Footnote 41] E.g., Rakas v. Illinois, 439 U.S. 128 (1978) (4-1-4 decision: passengers in automobile who own neither the car nor the property seized had no legitimate expectation of privacy in areas searched).

[Footnote 42] United States v. White, 401 U.S. 745, 786 (1971). See Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the "legitimate expectation of privacy").

[Footnote 43] Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

[Footnote 44] E.g., Alderman v. United States, 394 U.S. 165 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Payton v. New York, 445 U.S. 573 (1980).

[Footnote 45] E.g., United States v. Ross, 456 U.S. 798 (1982). See also Donovan v. Dewey, 452 U.S. 594 (1981) (commercial premises); Maryland v. Macon, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[Footnote 46] E.g., United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967). But cf. South Dakota v. Opperman, 428 U.S. 364 (1976) (no legitimate expectation of privacy in automobile left with doors locked and windows rolled up). In Rawlings v. Kentucky, 448 U.S. 98 (1980), the fact that defendant had dumped a cache of drugs into his companion's purse, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.

[Footnote 47] E.g., United States v. Miller, 425 U.S. 435 (1976) (bank records); Smith v. Maryland, 442 U.S. 735 (1979) (numbers dialed from one's telephone); Hudson v. Palmer, 468 U.S. 517 (1984) (prison cell); Illinois v. Andreas, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee); California v. Greenwood, 486 U.S. 35 (1988) (garbage in sealed plastic bags left at curb for collection).

[Footnote 48] United States v. White, 401 U.S. 745, 786 -87 (1971) (Justice Harlan dissenting).

[Footnote 49] E.g., Robbins v. California, 453 U.S. 420, 429 , 433-34 (1981) (Justice Powell concurring), quoted approvingly in United States v. Ross, 456 U.S. 798, 815 -16 & n.21 (1982).

[Footnote 50] Katz v. United States, 389 U.S. 347, 351 -52 (1967).

[Footnote 51] Terry v. Ohio, 392 U.S. 1, 19 (1968).

[Footnote 52] The prime example is the home, so that for entries either to search or to arrest, "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." Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981). And see Mincey v. Arizona, 437 U.S. 385 (1978).

[Footnote 53] One has a diminished expectation of privacy in automobiles. Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (collecting cases); United States v. Ross, 456 U.S. 798, 804 -09 (1982). A person's expectation of privacy in personal luggage and other closed containers is substantially greater than in an automobile, United States v. Chadwick, 433 U.S. 1, 13 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979), although if the luggage or container is found in an automobile as to which there exists probable cause to search, the legitimate expectancy diminishes accordingly. United States v. Ross, supra. There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. California v. Carney, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

[Footnote 54] E.g., Texas v. White, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); United States v. Robinson, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); United States v. Edwards, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). But see Ybarra v. Illinois, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).

[Footnote 55] Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806).

[Footnote 56] Giordenello v. United States, 357 U.S. 480, 485 -86 (1958); United States v. Watson, 423 U.S. 411, 416 -18 (1976); Payton v. New York, 445 U.S. 573, 583 -86 (1980); Steagald v. United States, 451 U.S. 204, 211 -13 (1981).

[Footnote 57] 1 J. Stephen, A History of the Criminal Law of England 193 (1883).

[Footnote 58] United States v. Watson, 423 U.S. 411 (1976). See also United States v. Santana, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. Gerstein v. Pugh, 420 U.S. 103 (1975).

[Footnote 59] Payton v. New York, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); Steagald v. United States, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B's home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home); Hayes v. Florida, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[Footnote 60] United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Justice Stewart) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). See also Reid v. Georgia, 448 U.S. 438 (1980); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16 -19 (1968). Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. See, e.g., Tennessee v. Garner, 471 U.S. 1 (1985) (police officer's fatal shooting of a fleeing suspect); Brower v. County of Inyo, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash).

[Footnote 61] Adams v. Williams, 407 U.S. 143, 146 -49 (1972); Delaware v. Prouse, 440 U.S. 648, 661 (1979); Brown v. Texas, 443 U.S. 47, 51 (1979); Reid v. Georgia, 448 U.S. 438, 440 (1980); Michigan v. Summers, 452 U.S. 692 (1981).

[Footnote 62] Ker v. Illinois, 119 U.S. 436, 440 (1886); see also Albrecht v. United States, 273 U.S. 1 (1927); Frisbie v. Collins, 342 U.S. 519 (1952).

[Footnote 63] Wong Sun v. United States, 371 U.S. 471 (1963). Such evidence is the "fruit of the poisonous tree," Nardone v. United States, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. Colombe v. Connecticut, 367 U.S. 568 (1961).

[Footnote 64] Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of "an intervening . . . act of free will." Wong Sun v. United States, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time

between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, Miranda warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. Brown v. Illinois, 422 U.S. 590 (1975) (Miranda warnings alone insufficient); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982). In Johnson v. Louisiana, 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

[Footnote 65] Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982). In United States v. Crews, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. See also Hayes v. Florida, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

[Footnote 66] In re Strouse, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); In re Meador, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).

[Footnote 67] Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[Footnote 68] Camara v. Municipal Court, 387 U.S. 523 (1967) (home); See v. City of Seattle, 387 U.S. 541 (1967) (commercial warehouse).

[Footnote 69] Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

[Footnote 70] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972). Colonnade, involving liquor, was based on the long history of close supervision of the industry. Biswell, involving firearms, introduced factors that were subsequently to prove significant. Thus, while the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, inasmuch as the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

[Footnote 71] 436 U.S. 307 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id. at 325.

[Footnote 72] Administrative warrants issued on the basis of less than probable cause but only on a showing that a specific business had been chosen for inspection on the basis of a general

administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and was properly authorized. Id. at 321, 323. The dissenters objected that the warrant clause was being constitutionally diluted. Id. at 325. Administrative warrants were approved also in Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them as to criminal searches and seizures. Frank v. Maryland, 359 U.S. 360, 373 (1959). See also Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Justice Powell concurring) (suggesting a similar administrative warrant procedure empowering police and immigration officers to conduct roving searches of automobiles in areas near the Nation's borders); id. at 270 n.3 (indicating that majority Jusitces were divided on the validity of such area search warrants); id. at 288 (dissenting Justice White indicating approval); United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

[Footnote 73] 452 U.S. 594 (1981).

[Footnote 74] There is no suggestion that warrantless inspections of homes is broadened. Id. at 598, or that warrantless entry under exigent circumstances is curtailed. See, e.g., Michigan v. Tyler, 436 U.S. 499 (1978) (no warrant required for entry by firefighters to fight fire; once there, firefighters may remain for reasonable time to investigate the cause of the fire).

[Footnote 75] Donovan v. Dewey, 452 U.S. 594, 598 -99 (1981).

[Footnote 76] Id. at 596-97, 604-05. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and Dewey had been assessed a penalty of $1,000. Id. at 597 n.3. It was also true in Barlow's that the Government resorted to civil process upon refusal to admit. 436 U.S. at 317 & n.12.

[Footnote 77] Donovan v. Dewey, 452 U.S. 594, 606 (1981). Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. Ibid. Accord, New York v. Burger, 482 U.S. 691 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).

[Footnote 78] 482 U.S. 691 (1987).

[Footnote 79] 482 U.S. at 712 (emphasis original).

[Footnote 80] 436 U.S. 499 (1978).

[Footnote 81] The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. Id. at 510-11. But cf. Michigan v. Clifford, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[Footnote 82] Wyman v. James, 400 U.S. 309 (1971). It is not clear what rationale the majority utilized. It appears to have proceeded on the assumption that a "home visit" was not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under Camara and its progeny, although Camara preceded Wyman. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

[Footnote 1 (1996 Supplement)] Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home "was not only seized, it literally was carried away, giving new meaning to the term 'mobile home'").

[Footnote 83] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (administrative needs of probation system justify warrantless searches of probationers' homes on less than probable cause); Hudson v. Palmer, 468 U.S. 517, 526 (1984) (no Fourth Amendment protection from search of prison cell); New Jersey v. T.L.O., 469 U.S. 325 (1985) (simple reasonableness standard governs searches of students' persons and effects by public school authorities); O'Connor v. Ortega, 480 U.S. 709 (1987) (reasonableness test for work-related searches of employees' offices by government employer); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (neither probable cause nor individualized suspicion is necessary for mandatory drug testing of railway employees involved in accidents or safety violations). All of these cases are discussed infra under the general heading "Valid Searches and Seizures Without Warrants."

[Footnote 84] Skinner, supra n.83, 489 U.S. at 627 .

[Footnote 85] Delaware v. Prouse, 440 U.S. 648 (1979). Standards applied in this case had been developed in the contexts of automobile stops at fixed points or by roving patrols in border situations. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[Footnote 86] 428 U.S. 364 (1976). See also Cady v. Dombrowski, 413 U.S. 433 (1973) (sustaining admission of criminal evidence found when police conducted a warrantless search of an out-of-state policeman's automobile following an accident, in order to find and safeguard his service revolver). The Court in both cases emphasized the reduced expectation of privacy in automobiles and the noncriminal purposes of the searches.

The 4th Amendment - annotations

- See more at: http://constitution.findlaw.com/amendment4/annotation01.html#5