COMMON FOURTH AMENDMENT
APPLICABILITY ISSUES IN CHILD
PORNOGRAPHY CASES

Professor Thomas K. Clancy

OBJECTIVE:

After this session you will be able to outline the structure of the Fourth Amendment, with emphasis on the following situations where it does not apply to investigations of child pornography: (1) P2P investigations; (2) disclosures to third parties; and (3) private search doctrine -- including hackers, private repair, and unhappy spouses

REQUIRED READING:


Fourth Amendment applicability to Child Pornography investigations: common situations

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published search and seizure appellate ct. decisions

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68 %

applicability and satisfaction

IN EVERY CASE,...

1. Does the 4th Apply?
   A. gov't activity: "Search" or "Seizure"
   B. Protected interest: liberty, possession, privacy

2. Is it Satisfied?
   "Reasonable"
   Warrant Clause requirements

[3. Remedies?]
Digital Evidence Searches and Seizures

1. Is the Fourth Amendment applicable?
   - inside the box vs. outside the box

2. Is it satisfied?
   - two approaches to digital evidence

conceptual difficulties of applying traditional doctrines to digital evidence

Are computers merely containers or something "Special?"

view #1: Data are Documents / Container Analogy
view #2: “Special Approach” to S/ of data on computers

example of special approach

U.S. v. Payton, 573 F.3d 859 (9th Cir. 2008)

FACTS: warrant for search of financial records in drug case - did not explicitly authorize s/ of computers

"It is true ... that pay/owe sheets indicating drug sales were physically capable of being kept on Payton’s computer."

HELD: s/ violated F/A

Contrary ruling "would eliminate any incentive for officers to seek explicit judicial authorization for searches of computers."
People v. Diaz, 244 P.3d 501 (Cal. 2011)

- can SIA: are containers - based on “binding” SCT precedent, can SIA

State v. Smith, 920 N.E.2d 949 (Ohio 2009)

- cannot SIA: are not containers and persons have “higher level of privacy” in info “they contain”

This Session: applicability

A. need Government Intrusion: "Search"
   - assume government is examining digital evidence on computer

B. Intrusion must invade protected interest:
   - reasonable expectation of privacy of suspect

Expectation of Privacy Analysis

- must have legitimate expectation of privacy invaded by gov’t search

two prongs

1. individual has subjective expectation of privacy
2. society recognizes that expectation as justified

*If either prong missing, no protected interest*
this presentation

situations where amendment does not apply

1. P2P investigations
2. disclosures to third parties
3. private search doctrine
   - hackers
   - private repair persons
   - unhappy spouses

Peer-to-Peer (P2P) Networks
file-sharing technology --- creates virtual networks

criminal activity:
- Copyright Infringement
- Computer Hacking
  - Worms -- Viruses -- Theft of information
- Child Exploitation and Pornography

How Gnutella Works
Considerations

- User on Internet voluntarily
- User decides, through settings in software, how much of computer open to others on Internet
- Every download exact duplicate of original

Law Enforcement Response

search file sharing networks for known child porn images

Questions:

- "Search" w/ in meaning of 4th Amendment?
- Does user connected to Internet via P2P have reasonable expectation of privacy in files in shared folders?
Operation Fairplay

Each red dot: computer offering known CP video file — 2 day period, July, 2009

U.S. v. Ganoe, 538 F.3d 1117 (9th Cir. 2008)

P2P network

"To argue that Ganoe lacked the technical savvy or good sense to configure Lime Wire to prevent access to his child pornography files is like saying that he did not know enough to close his drapes."
US v. King, 509 F.3d 1338 (11th Cir. 2007)

- connected own laptop in his dorm room to military base network
- airmen looking for music found porn on King’s computer
- after report, investigator located King’s computer on network
  - found porn file
  - additional CP files

REP?

hard drive contents “akin to items stored in the unsecured areas of a multi-unit apartment building or put in dumpster accessible to the public.”

Information given by suspect to 3rd parties and obtained from 3rd party by gov’t

No F/A Protection from 3rd Party Disclosures to Gov’t

Rationale: Risk Analysis -- Voluntary Exposure

- misplaced belief person will not reveal secret
  - Miller
- such “risk” is “probably inherent” in conditions of human society
  - Hoffa
- vol. exposure to public eliminates F/A protection
  - Katz

same principles applied --- No F/A protection against

1. disclosure of subscriber info by ISPs

2. Email recovered from recipient

3. Internet chat rooms
   doctrines: voluntary exposure assumption of risk

4. Posting Info on a Website
application of principles to --

1. Virtual worlds
2. Cloud computing
3. Web based data storage

What are the relevant considerations?

Getting more cloudy!
Quon: some answers?

- cop sent text messages to wife, mistress via govt issued pager
- agency reviewed printouts obtained from provider to determine if needed more capacity for police business

issues:
1. Quon have REP in messages?
2. Wife / mistress have REP in messages?
3. Was search R -- ?

**City of Ontario v. Quon, 130 S. Ct. 2619 (2010)**

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**Formal Written Policy**

- explicitly said user had no REP
- could audit, monitor, or log all activity
- not for personal use
- Quon aware of and signed

"Informal Policy"

- Lt. Duke: you pay overages, will not audit

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**Quon: NO answers**

- "case touches issues of far reaching significance," but disposed "by settled principles determining when a search is reasonable"

- concern: "broad holding" on REP "vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted"

1. assumed Quon / women had REP
2. search reasonable - did not even decide if Scalia or plurality approaches in O'Connor v. Ortego proper!
Reasonable as to Quon because ...

had very "limited" REP legitimate gov't purpose for search scope of search reasonable
  • redacted transcripts -- on duty hours
  • only 2 months examined
  • rejected least intrusive means
  • etc

Reasonable as to the Women?

Respondents:
• If unreasonable as to Quon, also unreasonable as to correspondents
• No argument unreasonable even if Quon s/reasonable

Court:
• "In light of this litigating position," since search reasonable as to Quon, others lose

dicta on REP analysis -- some possible factors
• Duke's statements change in policy?
• did Duke have "fact or appearance" of authority to change / guarantee REP
• should public/private employees be treated differently
• gov't had interests to review messages:
  • performance evaluations
  • litigation on lawfulness of police actions
  • comply w/ open records laws
Rapid changes in communication
many employers expect / tolerate personal use
  - often increases worker efficiency
employer policies concerning communications shape REP, "especially" when "clearly communicated"
some state statutes require employers to notify when monitoring electronic communications
uncertain evolution of workplace norms / law's treatment

Cell phone / text messaging pervasive -- hence:
  - one view:
    "essential means or necessary instruments for self-expression, even self-identification"
  - another view:
    due to ubiquity / affordability employees can buy own

Scalia, concurring
Applicability discussion "unnecessary" & "exaggerated"
rejects "implication" about electronic privacy that Ct should decide less than otherwise would -
The-times-they-are-a-changin' is a feeble excuse for disregard of duty.
courts/litigants likely to use dicta as "heavy-handed hint about how they should proceed"

Standard unworkable:

"Any rule that requires evaluating whether a given gadget is a 'necessary instrument for self-expression, even self-identification,' on top of assessing the degree to which 'the law's treatment of workplace norms has evolved,' is (to put it mildly) unlikely to yield objective answers."

Does the Amendment apply?

A. need Government Intrusion: "Search"

1. purely private activity
2. govt activity replicates private

B. Intrusion must invade reasonable expectation of privacy

Private Searches and Seizures

Part #1: F/A applies only to gov't activity

S. Ct. test: totality of circumstances

- turns on % of Gov't participation in private party's activities

two-part test of many lower courts:
- did gov't know or acquiesce in private party's conduct
- was private party's purpose to assist law enforcement or own ends
Computer searches and seizures: private searches

1. Computer Technicians
   - F/A inapplicable --- when performing repair work
   - agency found: expanding S/ upon police request
     - viewing additional files
     - copying entire hard drive

2. Hackers

   "Unknownuser" obtained access via Trojan horse program attached to picture he posted to news group frequented by persons interested in porn. Pic downloaded; After finding child porn, Unknownuser reported to law enforcement

   case #1: truly unknown -- private S/

   FBI agent thanked & added:
   "If you want to bring other information forward, I am available."

   case #2: -- mere expression of gratitude

   not agency relationship --- otherwise any thanks transforms subsequent S/ into gov't S/

Case #3 ??

After case #2, FBI agent told Unknownuser -

- could not ask him to S/ for more cases
  * would be gov't agent
  * make info unusable
- feel free to send additional info obtained
- no prosecution for hacking

Fourth Circuit: proverbial "wink and nod"
Part#2: Replicating Private Search --- F/A Inapplicable

F/A applies only to extent gov’t exceeds scope of private S/
Rationale: P/S eliminates REP in object

[ex] Jacobsen
- Fed Ex opened damaged package
- plastic bags of white powder inside tube wrapped in newspaper
- repackaged, summoned federal agents
- agent repeated Fed Ex actions

NO SEARCH
- learned “nothing that had not previously been learned during P/S
- REP “frustrated” by P/S

Part#3: “context” in which object found may lead to no REP

by replicating P/S, may be no REP in part of obj. NOT examined by P/S

[ex] Jacobsen:
- although P/P did not examine contents of package containing white powder, no REP left in package
- accord Brennan dissenting:
  - no REP - “virtual certainty” DEA agent could identify it

Note ---- bag not opaque !!

hypothetical

Folder: “Kid Sex”

files:
- littlegirls.under16.sexual intercourse
- littlegirls.under15.sexual intercourse
- littlegirls.under14.sexual intercourse
- littlegirls.under13.sexual intercourse
- littlegirls.under12.sexual intercourse
- littlegirls.under10.sexual intercourse
- littlegirls.under9.sexual intercourse

- P/S opens 16, 15, 14 -- finds young girls engaged in sexual intercourse
- Gov’t opens 13 to 9 -- Is 13 to 9 a SEARCH?
Is scope of P/S exceeded when police open more files than preceding P/S?

**VIEWS:**

- **YES:** exceed P/S when police open container P/S did not

- Opening additional files not determinative

  [ex] P/S found child porn in two file folders replete w/ file titles plainly suggesting images of like kind

  no REP in image files in same two file folders

  *Emerson*

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<td>police knew w/ <strong>substantial certainty</strong> what was inside based on e.g.,</td>
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<td>got no additional Knowledge and no new REP frustrated</td>
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**Application of view #2: Runyan**

- wife gave data storage devices to police

- wife examined some files on floppy disks, CDs; none on ZIP disks

- govt examined all

**Runyan Ruling:**

A. police exam of disks **not** examined by P/S exceeded scope of P/S:

   * no substantial certainty all disks had child porn

B. Did **not** exceed scope of P/S when examined more files on each disk than P/S:

   * merely examined “container” more thoroughly

   "police do not exceed P/S when they examine more items w/ n closed container than did P/Sers"
review & case update

Best Buy employee discovered CP while installing new hard drive
- six thumbnail pics of child in "my pictures" directory
  (automatically opened when tech went to "my pics")
- police responded
  -- shown same pictures
  -- viewed additional images in same directory
- got warrant -- recovered more CP

1. Was this a search w/in meaning of 4th Amendment?

   HELD: viewing of additional image WAS a search

2. Was defendant entitled to suppression of
   1. original CP viewed by tech?
   2. pics observed by cop at shop?
   3. pics recovered under warrant?


good case law summary of --

- REP principles
- private search doctrine
- when REP in remote storage

facts
- Def had password-protected CP on Sprint PCS website but had disclosed access info to 3rd party who viewed pics and then gave gov't tip + access info
- gov't agent repeated tipster's search
extended discussion in ---


www.NCJRL.org
The Fourth Amendment

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

Analytical structure of all Fourth Amendment claims

Step #1. Does the Fourth Amendment apply?
part A: Does the governmental activity constitute a “search” or “seizure”?
part B: Does that activity invade an individual’s protected interest, that is, her right to be secure?

Step #2. If the Amendment applies, is it satisfied?

Step #3. If the Amendment applies but is not satisfied, is there an available remedy?

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OVERVIEW: Analytical Structure of all Fourth Amendment Claims

The Fourth Amendment is the most implicated and litigated portion of the Constitution. In analyzing any case involving a Fourth Amendment claim, three separate questions must be answered. First, is the Amendment applicable? The applicability question, in turn, is a two-sided inquiry: (a) does the governmental activity—which must be either a search or a seizure—invoke (b) an individual interest protected by the Amendment? If the Amendment does not apply, that ends the inquiry; it does not matter if the governmental actions are reasonable or not. Second, if the Amendment does apply, is it satisfied? If it is found that the Amendment is applicable but not satisfied, a third question must be answered: what is the remedy, if any, for the violation? That third question is not a Fourth Amendment issue, given that the Supreme Court has, since 1974, stated that the exclusionary rule is not constitutionally mandated. My treatise is structured to provide analysis of these three questions. An overview is offered here.

Step #1. Does the Fourth Amendment apply?

Unless a “search” or “seizure” invades a protected interest, the Amendment does not apply and there is no inquiry into the reasonableness of the governmental activities. The applicability step is a two-sided question:

Part A: Does the governmental activity constitute a “search” or “seizure”?

The Fourth Amendment is applicable only to governmental activity; it does not regulate private searches and seizures. As a consequence, a rather complex jurisprudence has developed to distinguish between governmental searches and private party searches. Moreover, the Amendment applies to only two types of governmental activity: searches and seizures. These terms are not self-defining.

Searches. The word “search” is a term of art in Fourth Amendment jurisprudence and is not used in its ordinary sense. The conclusion that a search has occurred varies depending on the type of governmental activity utilized to obtain the evidence. That activity may include physical manipulation, visual observation, or other use of the senses, as well as the employment of instrumentalities such as a dog’s nose or technological devices. In Supreme Court jurisprudence, physical manipulation by the police comes closest to a common sense understanding of what is a

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1 This material is based on Chapter 1 of Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation (Carolina Academic Press 2008) www.cap-press.com/books/1795

2 E.g., United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (en banc) (noting that there are 700 million airline passengers boarding commercial flights in the United States each year).

search. That literal view must be contrasted with other situations, particularly those involving sense-enhancing devices, where the legal definition is divorced from the ordinary meaning of the term, thus permitting the Court to conclude that no search has occurred. The use of technological devices to learn something that otherwise would not be discovered is so rapidly expanding that it is difficult to grasp the myriad ways the government can obtain tangible evidence or information. Unfortunately, the Court has not provided a comprehensive definition of the concept of a search to ascertain when the Amendment is implicated by a device that the government employs.

**Seizures of persons.** The Supreme Court’s attempts to define a seizure of a person are of surprisingly recent vintage. Only in 1968 did it confront the issue directly for the first time. That case, *Terry v. Ohio*, remains viable today as a basic source of understanding what the concept of a seizure means. In *Terry*, Officer McFadden was walking his beat when he observed three men whom he believed were planning to rob a store. He approached them, identified himself as a police officer, and asked their names. When one of the men, Terry, “mumbled something” in reply, the officer grabbed Terry and patted down the outside of his clothing, ultimately recovering a pistol. Recognizing that the Fourth Amendment applied when the officer took hold of Terry and patted down the outer surfaces of his clothing, the Court provided a broadly-stated view of a seizure: “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”

This definition, which is used repeatedly in later cases, involves two elements: accosting and restraint of freedom. The *Terry* Court noted, however, that “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Thus, beginning with its first effort to define a seizure, the Court recognized two ways in which an officer can seize a person: by physical force or by show of authority. Adding precision to these two concepts in subsequent cases has proven to be difficult and controversial. Although the Court has since comprehensively—and more concretely—defined the concept of a seizure, it has continued to recognize that a seizure only results from either the application of physical force or through a show of authority.

After *Terry*, the Court eventually settled on the “reasonable person” test to define a seizure, which focused on the objective aspects of the encounter’s effect on the mind of a reasonable person and asked the question whether a reasonable person would feel free to leave. That test was widely viewed as implicating the Fourth Amendment early in the encounter, focusing exclusively on the coercive nature of the police officer’s words or conduct. A citizen’s reaction to that coercive activity was immaterial.

In 1991, in *California v. Hodari D.*, the Supreme Court redefined the concept of a seizure. That case establishes that a seizure occurs only when a suspect submits to a show of authority or is physically touched by law enforcement officials, who do so with the intent to seize. A seizure may

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4 392 U.S. 1 (1968).

result in either a stop or an arrest but it may only occur in one of those two ways. Seizures from physical contact require two elements: touching and an intent to seize, with that intent measured objectively. In the vast majority of cases involving physical restraint, the question whether an intent accompanied that restraint is obvious and no extended analysis is needed. Show of authority seizures also require two elements: a show of authority and submission. The submission must be in response to a show of authority that a reasonable person would interpret as a demonstration of the officer’s intent to seize. Show of authority seizures require determining if, when, and how the person accosted submits. If the suspect responds inappropriately to a specific command, that response may not be considered submission or a fruit of that command. There has now developed a substantial body of case law and commentary addressing the implications of the *Hodari D.* definition. The case law demonstrates that the police have adapted their tactics to take advantage of that definition, resulting in a dramatic shift in the Fourth Amendment balance between security and law enforcement in favor of the police.

**Seizures of property.** To determine if a seizure of property has occurred, the Court has often repeated the following definition: a “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” 6 It has sometimes also stated that a seizure “deprives the individual of dominion over his or her property.” 7 One could question whether such definitions adequately convey the full nature of the individual’s interests implicated by a seizure and some observations regarding that matter are offered. Nonetheless, the Court’s inquiry has focused on possession and lower court opinions relentlessly reflect that focus. Unlike seizures of persons, seizures of property have generated comparatively little Supreme Court case law and the definition has been relatively stable. Most seizures of property are obvious takings of physical possession and require little analysis. There are some situations where a property seizure is not so patent, including those in which the property is in transit and unaccompanied by the owner. Other conceptual problems include using the Supreme Court’s definition of a seizure of property in cases involving the acquisition of digital evidence or other intangible property.

**part B: Does that activity invade an individual’s protected interest, that is, her right to be secure?**

If the individual does not have a protected interest, actions that might otherwise be labeled a search or seizure do not implicate the Fourth Amendment. If a person has a protected interest, then the applicability question turns on whether the governmental techniques used to obtain tangible things or information are considered searches or seizures. The Supreme Court has identified three interests protected by the Amendment: liberty; possession; and privacy. A seizure implicates a

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6 United States v. Jacobsen, 466 U.S. 109, 114 (1984). *Jacobsen* observed that, although “the concept of a ‘seizure’ of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the ‘seizure’ of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual’s freedom of movement.” *Id.* at 114 n.5.

person's liberty or possessory interests; a search implicates a person's reasonable expectation of privacy.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects.” There are two aspects to the analysis of this provision: what objects are protected; and to what extent is each object protected? Grammatically, there is a relational aspect to the right set forth in the Amendment, which speaks of certain objects protected—people, houses, papers, and effects. But those objects are not absolutely shielded. Instead, the right to be “secure” is protected. If one does not know what is protected by the Amendment, then it cannot be determined what the government can do without implicating it. If one does know what is protected, governmental intrusions of that protected interest must be analyzed to determine whether they are considered a search or seizure and accordingly justified as reasonable. As one distinguished commentator has observed: “The key to the Amendment is the question of what interests it protects.”

Currently, according to the Supreme Court, “[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.” Following that command, one must distinguish between searches and seizures. Seizures of property implicate a person’s right to possess it; seizures of persons implicate that person’s liberty and freedom of movement; and searches implicate a person’s reasonable expectation of privacy. As a consequence, it must be determined which individual interest has been affected by the governmental action. To illustrate, although mere passengers in an automobile ordinarily have no recognized reasonable expectation of privacy impacted by a search of the vehicle, they do have a right to challenge the stop of a vehicle in which they are riding because they are seized when the vehicle is stopped.

The Supreme Court initially grounded Fourth Amendment protections in common law property concepts. Pursuant to that property–based analysis, the Court created a hierarchy of property rights and restricted the ability of the government to search and seize to only those situations where the government had a superior property right. It also used property concepts to limit the protections of the Amendment to the physical aspects of the four objects listed in the Amendment, dividing the world into areas that were constitutionally protected and those that were not. Those property–based theories were repudiated by the Court in Warden v. Hayden and Katz v. United States.

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The Court in the last third of the twentieth century adopted and generally still employs the reasonable expectation of privacy test to define, in large part, the right to be secure. To have a protected interest, that two-pronged test requires that a person exhibit a subjective expectation of privacy, which must be recognized by society as reasonable. Pursuant to that test, the Court has created a hierarchy of expectations, with long lists of situations where it has found either no reasonable expectation of privacy or a reduced one. If no reasonable expectation of privacy is found (and no other protected interest is present), the Amendment is inapplicable to regulate the government action. If the Court finds a reduced expectation of privacy, the governmental intrusion has been almost uniformly upheld, with the Court utilizing a test for reasonableness favorable to the government.

As the reasonable expectation of privacy test has demonstrated its limitations, the Court has sometimes looked beyond that approach to find other values that animate the right to be secure. Now, the Court recognizes that the Amendment protects certain property interests as such, as well as possessory and liberty interests. Hence, although the Court in adopting the expectations test emphatically rejected a property–based analysis, that ground has regained viability. The home has a special status as a protected place, even when the owner is not present. Indeed, the physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed.”

As to the person’s right to be secure from an unreasonable seizure, that interest has been variously described as the right to be left alone, individual freedom, the “inviolability of the

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17 See, e.g., Wilson v. Schnettler, 365 U.S. 381, 394 (1961) (Douglas, J., dissenting) (“Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone . . . .”). But see Katz v. United States, 389 U.S. 347 (1967) (the Fourth Amendment is not coextensive with any right to be left alone).
18 See, e.g., Ker v. California, 374 U.S. 23, 32 (1963) (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom.”).
person,”19 and the right of free movement.20 In *Terry v. Ohio*,21 which involved the stop and frisk of a person, the Court emphasized the words chosen by the Framers to define the nature of the interest protected, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” Indeed, the Court said: “‘No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’”

As to effects, the Court has clearly distinguished one other protected interest in addition to privacy, that is, the individual’s possessory interest in an object.22 This has occurred in the context of distinguishing between searches and seizures: although a search implicates privacy concerns, a seizure implicates the person’s interest in retaining possession of his or her property.23

There are other indications of a broader meaning to the concept of security. Indeed, although often unstated in Supreme Court opinions, the essential attribute of the right to be secure is the ability of the individual to exclude the government from unreasonably searching or seizing one’s person, house, papers, and effects. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: protection against unjustified intrusions by the government.

The Fourth Amendment provides that the right of the people to be secure against unreasonable searches and seizures applies to four specified objects—persons, houses, papers, and effects. The government can intrude into any non-protected item at will because the Fourth Amendment is inapplicable.24 Interpreting the Amendment literally, the Court in *Olmstead v. United States*25 and

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23 United States v. Jacobsen, 466 U.S. 109, 113 (1984) (“‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed,” whereas “‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property”).

24 E.g., Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that open fields are not protected by the Fourth Amendment); Hester v. United States, 265 U.S. 57, 59 (1924) (same).

its progeny divided the country into areas that were constitutionally protected and locations that were not. Several decades later, after some significant erosion of that approach, the Court in *Katz v. United States*\(^{26}\) explicitly rejected *Olmstead* and the concept of “constitutionally protected areas,” stating that the Amendment protected people, not places. The Court ultimately adopted Justice Harlan’s concurring view in *Katz*, establishing that the Amendment protects reasonable expectations of privacy. That test defines the *quality* protected—at least in part—but does not define what objects are protected. The reasonable expectation of privacy test generally has been used as an overlay to determine whether a person has a reasonable expectation of privacy—a protected interest—in the items listed in the Amendment. Hence, despite the sweeping possibilities implicit in *Katz*’s approach, the four items listed in the Amendment as the protected objects remain central to understanding the scope of what the Amendment protects.\(^{27}\)

**Step #2. If the Amendment applies, is it satisfied?**

The fundamental command of the Amendment is “reasonableness,” which regulates both the permissibility of the initial intrusion and the scope of the intrusion. A second satisfaction question is—if a warrant is required—whether it was issued pursuant to the requirements of the Warrant Clause. Modern Supreme Court reasonableness analysis increasingly rejects the traditional warrant preference rule and looks to balancing and other criteria to measure reasonableness.

**The reasonableness command.** The first clause of the Fourth Amendment requires that a search or seizure not be “unreasonable.” This is the “fundamental command”\(^{28}\) of the Amendment and this “imprecise and flexible term” reflects the Framers’ recognition “that searches and seizures were too valuable to law enforcement to prohibit them entirely” but that “they should be slowed down.”\(^{29}\) Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions.\(^{30}\)

The wide scope of the Amendment’s applicability continually creates new and unprecedented challenges to traditional notions of reasonableness. In the face of such challenges, the reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court’s view of what constitutes a reasonable search or seizure. For some time, the Court created substantive restrictions on the government’s ability to search and seize, that is, there were categories of papers that could not be the target of a search or seizure. Those substantive restrictions were rejected in the latter part of the twentieth century and reasonableness is viewed as a procedural

\(^{26}\) 389 U.S. 347 (1967).


mechanism that regulates the circumstances when the government can intrude and the scope of that intrusion.

There are at least five principal models that the Court currently chooses from to measure reasonableness: the warrant preference model; the individualized suspicion model; the totality of the circumstances test; the balancing test; and a hybrid model giving dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, the Court in any situation may choose whichever model it sees fit to apply. Thus, cases decided within weeks of each other have had fundamentally different—and irreconcilable—approaches to measuring the permissibility of an intrusion.

**Warrant issues, including issuance, review, and execution.** The second clause of the Amendment sets forth the criteria for a warrant to issue: “and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Regardless of whether a warrant is **required** by a particular view of reasonableness, it is still the **preferred** manner of searching and seizing. Hence, the standards by which courts review a magistrate’s decision to issue a warrant are quite deferential. The good faith doctrine has significantly influenced this review. The Warrant Clause of Fourth Amendment regulates when a warrant may issue but says nothing about the execution of a warrant. Instead, warrant execution issues are regulated by the Reasonableness Clause.\(^31\)

**Step #3. If the Amendment applies but is not satisfied, what remedies are available?**

The chief enforcement mechanism to insure compliance with the Fourth Amendment is the exclusionary rule, which prohibits the introduction of illegally obtained evidence in the government’s case-in-chief.\(^32\) Although the rule was for some time considered constitutionally mandated, the Court now believes that the exclusionary sanction is a judicially created remedy designed to deter future police misconduct. It is not “a personal constitutional right of the party aggrieved” and it “is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”\(^33\) Where appropriate, the remedy of exclusion extends to direct and indirect products of illegal intrusions, that is, “any ‘fruits’ of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest

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\(^{31}\) *E.g.*, United States v. Grubbs, 547 U.S. 90 (2006); Dalia v. United States, 441 U.S. 238 (1979). *See also* United States v. Banks, 540 U.S. 31 (2003) (stating that there is no “template” for when police must knock and announce before entering a house when executing a warrant and, in such cases, the “notion of [a] reasonable execution” of a warrant has to be “fleshed out” on a case-by-case basis).

\(^{32}\) *E.g.*, Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

and detention,”34 and to testimony concerning knowledge acquired during an unlawful intrusion.35

An overriding consideration in contemporary exclusionary rule cases is the Court’s use of a cost-benefit test to decide whether the rule ought to be applied. According to the Court, exclusion of evidence “exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case”36 and permits “some guilty defendants [to] go free or receive reduced sentences as a result of favorable plea bargains.”37 Thus, the Court has restricted application of the exclusionary rule to instances where its “remedial objectives are thought most efficaciously served.”38 Where the exclusionary rule does not result in appreciable deterrence of future police misconduct, the Court views its use as unwarranted.39 Deterrence is now the rule’s sole purpose, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.

The debate over application of the exclusionary rule often has been accompanied by references to the efficacy of alternative remedies, with a chief alternative being civil suits for damages. Other considerations include administrative sanctions against police officers and training programs to increase compliance with Fourth Amendment requirements. Traditionally, the Court has been skeptical about such alternatives—at least in the criminal trial context. Recently, however, a majority of the Court in *Hudson v. Michigan*40 pointed to the availability of such alternatives and higher levels of police professionalism and training in the context of creating a *per se* exception to the exclusionary rule for knock and announce violations. The breadth of the majority’s opinion puts in doubt the continued existence of the exclusionary rule. Nonetheless, *Hudson* may be just another of a long line of inconsistent Supreme Court opinions. Indeed, the Court has candidly noted that the “debate” within the Court concerning the rule has always been a warm one and “the evolution of the exclusionary rule has been marked by sharp divisions in the Court.”41


This brings us to *United States v. Herring*. That case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Herring*, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language employed in *Herring* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

Narrowly, the issue in *Herring* was whether the good faith doctrine should be applied when police officers in one jurisdiction checked with employees of the sheriff’s office in another jurisdiction and were told that there was an outstanding warrant for Herring, who was then arrested. Contraband was discovered during the search incident to Herring’s arrest. The report was in error and the warrant should have been removed from the records but had not been due to the negligence of personnel in the reporting jurisdiction’s sheriff’s office.

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement by the majority of its holding: “Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.”

Words of limitation jump out from these sentences: “isolated negligence;” attenuation. Hence, some may see *Herring* as a narrow expansion of good faith that has little application.

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43 555 U.S. at __.

44 Consistent with a narrow view, Roberts later asserted: “An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.” *Id.* at __.

45 Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, might be attracted to such a view. He joined the Court’s opinion in *Herring*. In *Hudson*, the majority viewed the knock and announce violation attenuated from the recovery of the evidence in the house. It stated: “Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” 547 U.S. at __. Kennedy wrote a concurring opinion in which he stated that the *Hudson* “decision determines only that in the specific context of the knock--and--announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. *Id.* at __ (Kennedy, J., concurring in part and concurring in the judgment). He added that “the causal link between a violation of the knock--and--announce requirement and a later search is too attenuated to allow suppression.” *Id.* at __. The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* §§ 13.3.1.2., 13.3.6. (2008).
In contrast, the rest of the majority opinion is very broadly written and represents a significant recasting of modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; instead, he viewed *United States v. Leon*, the genesis of that exception, as follows:

When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance “good faith.”

Roberts also expansively reframed exclusion analysis; he asserted that suppression “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” He later repeated: “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.” He added:

Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.”

Exclusion—and deterrence—appears justified after *Herring* based on culpability. It does not further that inquiry, it appears, to label the situation as a “good faith” exception to the exclusionary rule. Thus, Roberts recounted several cases of “intentional” and “flagrant” misconduct, including in

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47 555 U.S. at __. The label “good faith” is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses “expressly and exclusively on the objective reasonableness of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).” People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994). See also United States v. Leon, 468 U.S. 897, 918 (1984) (stating that the Court has “frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment”). However, labeling the officer’s conduct as “objectively reasonable” has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court’s characterization of the police’s conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because “when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution.” *Id.* at 975 (Stevens, J., dissenting).

48 555 U.S. at __.

49 555 U.S. at __.

50 *Id.* at __, quoting *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (footnotes omitted) and citing *Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) (“[T]he deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of Fourth Amendment rights”).
Weeks, which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion. He ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of the exclusionary rule and stated:

[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” In such a case, the criminal should not “go free

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52 555 U.S. at __.
53 555 U.S. at _. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but “the conduct at issue was not so objectively culpable as to require exclusion.” Id. at __. He noted: “If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.” Id. at __.
54 Id. at __ n.4. Despite all of the Court’s references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers[,]’” Id. at __. Factors in making that determination include a “particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent[,]” Id. at __.

Perhaps the Chief Justice was seeking to preserve the Court’s general approach to measuring reasonableness, which has been an objective analysis of the facts. See Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 11.6.2.1. (2008) (summarizing the Court’s general approach to measuring reasonableness). Nonetheless, in situations where a police officer intentionally or recklessly places false information in a warrant (or omits such information), the inquiry has required an examination of the officer’s actual state of mind. See id. § 12.3.3. (collecting authorities); Franks v. Delaware, 438 U.S. 154 (1978). Indeed, the concepts of knowledge, recklessness, and negligence are familiar criminal law concepts, each requiring inquiry into the actor’s actual state of mind. E.g., Model Penal Code § 2.02. Herring seems to create the bizarre principle that, to ascertain if an officer was intentionally or recklessly violating a person’s Fourth Amendment rights, that inquiry is an objective one.
because the constable has blundered.”

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented. Justice Ginsburg certainly did not view the Herring decision as narrow. She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court has clearly suggested that the exclusionary rule may be constitutionally based. Addressing what she perceived as the Court’s creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other, Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in Herring justified its application and concluded:

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule.

My purpose here is not to argue the merits of Herring but simply to predict that, if its broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after Herring becomes a quest to ascertain police culpability: was


56 Justice Breyer, in a separate dissent joined by Justice Souter, applied a traditional good faith analysis and concluded that it should not apply in Herring. He added that negligent record keeping errors were susceptible to deterrence through application of the exclusionary rule.

57 Ginsburg stated:

Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” I share that vision of the Amendment.

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment's prohibitions “are observed in fact.” The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule “is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people-all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

55 U.S. at __ (citations omitted).

58 555 U.S. at __.

59 555 U.S. at __.
there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers as in *Herring*—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment. Based on a broad reading of *Herring*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

In *Pearson v. Callahan*, the Court in the 2008 term changed the manner in which courts must address qualified immunity analysis in civil cases. Prior to *Pearson*, the Court required lower courts to address the merits of the Fourth Amendment claim in each case. It now permits courts the discretion to skip the preliminary step of establishing whether the Fourth Amendment has been violated. It takes little insight to observe that that mode of analysis will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds. What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, “[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.” Those standards will not be further clarified if courts address only the second question. Indeed, *Pearson* itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the

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60  *E.g.*, Moore v. State, 96 So. 2d 928, 934-35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).


62  The standard for qualified immunity is equivalent to the good faith exception to the exclusionary rule. *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). In *United States v. Leon*, 468 U.S. 897 (1984), the Court established that evidence seized pursuant to a judicial warrant should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. *Id.* at 922-23. The Court explained that lower courts had “considerable discretion” either to “guide future action by law enforcement officers and magistrates” by deciding the substantive Fourth Amendment question “before turning to the good-faith issue” or to “reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers’ good faith.” *Id.* at 924-25. In light of that discretion, many courts opt to dispose of cases on the basis of good faith, without first considering whether there was a Fourth Amendment violation. *E.g.*, *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007).

63  *Saucier*, 533 U.S. at 209.
“consent–once–removed” doctrine, which has been recognized by some courts, permitted the warrantless intrusion. The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of *Pearson* may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

*Pearson*’s new battle order–and the result in *Pearson*–is likely to make the avoidance of difficult Fourth Amendment questions the norm in cases where a defense of qualified immunity is available. Hence, many civil cases will no longer be decided by the lower courts on the merits of the Fourth Amendment claims and, therefore, there will be less cases worthy of review by the Supreme Court. The end result is that the Court will not take as many cases for review because it can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.

64 The “consent-once-removed” doctrine has been applied by some courts when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. See United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); United States v. Yoon, 398 F.3d 802, 807 (6th Cir. 2005).