

Fall 1983

Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)

Wayne R. LaFave

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Wayne R. LaFave, Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 J. Crim. L. & Criminology 1171 (1983)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

FOURTH AMENDMENT VAGARIES (OF IMPROBABLE CAUSE, IMPERCEPTIBLE PLAIN VIEW, NOTORIOUS PRIVACY, AND BALANCING ASKEW)

WAYNE R. LAFAVE*

Fourth amendment aficionados quite understandably maintain a close watch upon the work of the United States Supreme Court. For many years now, each Term of the Court has produced several extremely important rulings on the meaning and force of the amendment. These decisions are, of course, of immediate relevance to police, prosecutors, judges, and others involved in the criminal justice process, but their significance hardly stops there. Every member of the legal profession—indeed, the public at large—is rightly concerned with how the fourth amendment is construed by the Court. This is because the scope given to the protections of the amendment, which occupies “a place second to none in the Bill of Rights,”¹ largely determines “the kind of society in which we live.”²

The October 1982 Term of the Supreme Court was rather extraordinary in that the Court decided a total of nine search and seizure cases touching virtually every major doctrinal area of extant fourth amendment law. On the fundamental question of what constitutes fourth amendment activity, the Court in *Florida v. Royer*³ provided a definition of a “seizure” and in *Texas v. Brown*,⁴ *United States v. Knotts*⁵ and *United States v. Place*⁶ decided, respectively, that it was no “search” for the police to look into a car with the aid of a flashlight, to follow a person with the aid of a transmitter hidden in his effects, or to discover

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

¹ *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

² E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 39 (1975).

³ 103 S. Ct. 1319 (1983).

⁴ 103 S. Ct. 1535 (1983).

⁵ 103 S. Ct. 1081 (1983).

⁶ 103 S. Ct. 2637 (1983).

drugs in luggage with a drug detection dog. Regarding the amendment's "probable cause" requirement, the Court in *Illinois v. Gates*⁷ adopted a new approach to probable cause determinations and then utilized it to find probable cause based upon the partially corroborated tip of an anonymous informant. As for searches or seizures permitted without full probable cause under the so-called balancing test, the Court in *Illinois v. Lafayette*⁸ permitted routine inventory within containers in the possession of an arrestee, in *Royer* examined what type of seizure of a person is permissible on a reasonable suspicion, in *Place* decided that luggage could be temporarily detained on a reasonable suspicion, in *Michigan v. Long*⁹ ruled that a protective search of a car may be conducted incident to detention of an occupant, and in *United States v. Villamonte-Marquez*¹⁰ for the first time upheld a brief seizure (there, of a vessel by customs officers) without requiring either reasonable suspicion or an established routine. As for the fourth amendment's warrant requirement, *Brown* and *Illinois v. Andreas*¹¹ respectively considered when a container could be seized without a warrant and when one could be searched without a warrant. The Court did not rule upon any issue concerning the exclusionary rule itself, though it was in this area that a bombshell was expected. In *Gates* the Court ordered reargument on the specific question of whether a "good-faith" exception to the exclusionary rule should be adopted, but then "with apologies to all" declined to address that issue.

The purpose of this Article is to present a critical evaluation of these nine decisions. However, special attention will be given to the four problem areas which prompted the title's antilogies. These areas, where the Court's analysis seems particularly vulnerable or troublesome, concern: (i) what constitutes a justifiable expectation of privacy deserving of fourth amendment protection; (ii) what quantum of evidence should be required to establish probable cause for a search or seizure; (iii) in what circumstances and manner the balancing test should be utilized to permit certain searches or seizures even without probable cause; and (iv) when a container's contents are sufficiently apparent that permitting a warrantless search would not jeopardize fourth amendment interests.

I. FOURTH AMENDMENT ACTIVITY

In the fourth amendment scheme of things, the precursory issue is whether any activity governed by that particular constitutional provi-

⁷ 103 S. Ct. 2317 (1983).

⁸ 103 S. Ct. 2605 (1983).

⁹ 103 S. Ct. 3469 (1983).

¹⁰ 103 S. Ct. 2573 (1983).

¹¹ 103 S. Ct. 3319 (1983).

sion has occurred. The amendment has to do only with "searches and seizures," and thus its limitations come into play only if there has been either a search or a seizure undertaken by or on behalf of governmental authority.¹² In most cases whether or not a seizure has occurred is apparent, which may explain why the Supreme Court has had to give relatively little attention to the question of exactly what constitutes a "seizure" in the fourth amendment sense. The Court has declared that the seizure of an object "contemplates a forcible dispossession of the owner,"¹³ and that a seizure of a person occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."¹⁴ Doubtless neither of these definitions is quintessential, but they have proved serviceable in most instances.

By comparison, considerable attention has been given to the question of what constitutes a "search" within the meaning of the fourth amendment. At one time the Supreme Court was of the view that what was required was a physical intrusion into "a constitutionally protected area,"¹⁵ but that test was abandoned in *Katz v. United States*.¹⁶ The Court there held that the electronic monitoring of a telephone booth used by Katz was a search because the government "violated the privacy upon which he justifiably relied while using the telephone booth."¹⁷ Under this new "privacy" formulation, as Justice Harlan noted in his separate concurrence, the fourth amendment protects any expectation of privacy "that society is prepared to recognize as 'reasonable.'"¹⁸

This was unquestionably "a new and more useful approach to the fourth amendment."¹⁹ As Professor Anthony Amsterdam once put it, *Katz* focused upon the ultimate question of "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."²⁰ Illustrative of an unquestionably correct adherence to that cynosure is one of the cases decided last Term, *Texas v. Brown*,²¹ holding it was not a search for an officer to

¹² That is, it acts "as a restraint upon the activities of sovereign authority, and . . . not . . . a limitation upon other than governmental agencies." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

¹³ *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

¹⁴ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

¹⁵ *Silverman v. United States*, 365 U.S. 505, 510 (1961).

¹⁶ 389 U.S. 347 (1967).

¹⁷ *Id.* at 353.

¹⁸ *Id.* at 361 (Harlan, J., concurring).

¹⁹ Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540.

²⁰ Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

²¹ 103 S. Ct. 1535 (1983).

look through an open door into a lawfully stopped vehicle. There the officer utilized a flashlight and bent down to get a better look, but the Court correctly declared those actions "irrelevant to fourth amendment analysis" because in any event the officer saw only that "which may be viewed from outside the vehicle by . . . inquisitive passersby."²²

But as a general matter it is fair to say that the Supreme Court has "failed to pursue the implications of its insight"²³ in *Katz* and, indeed, has often taken an exceedingly narrow view of the principle in that case. Apparently relying upon the fallacious notion that privacy is an all-or-nothing proposition, the Court has taken the position that there is no legitimate privacy expectation vis-a-vis the government concerning information partially exposed in a very limited way to a limited group. A striking example is a case decided by the Court a few years ago, *Smith v. Maryland*,²⁴ concluding the petitioner had no justified expectation of privacy regarding the numbers he dialed on his telephone, obtained by a police-instigated pen register, because the telephone company's switching equipment had the capacity to record that information for certain limited business purposes. The unfortunate consequence of *Smith*, as noted by the dissent, is that "unless a person is prepared to forego use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."²⁵ Much the same complaint can be made about the Court's decisions on this subject last Term, especially the *Knotts* case.

A. USE OF "BEEPER" NO SEARCH

In *United States v. Knotts*,²⁶ a beeper was placed inside a five-gallon container of chloroform then sold by a Minneapolis chemical company to Armstrong, who delivered it in that city to Petschen, who in turn delivered it to Knotts' cabin nearly 100 miles away in rural Wisconsin. For a time police kept track of the container by both visual surveillance and monitoring of the beeper's signals, but during the latter part of the journey the visual surveillance was ended because of Petschen's evasive maneuvers, and the signal from the beeper was lost at about the same time. An hour later the now stationary signal was picked up at the cabin, for which a search warrant was obtained after three days of intermittent visual surveillance. The Court concluded that this monitoring was "neither a 'search' nor a 'seizure' within the contemplation of the fourth amendment" because it did not "invade any legitimate expecta-

²² *Id.* at 1542.

²³ Allen, *supra* note 19, at 540.

²⁴ 442 U.S. 735 (1979).

²⁵ *Id.* at 750 (Marshall, J., dissenting).

²⁶ 103 S. Ct. 1081 (1983).

tion of privacy":²⁷

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Admittedly, because of the failure of the visual surveillance, the beeper enabled the law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car.²⁸

It is this assumed equivalence between mere "visual surveillance" and "scientific enhancement" in *Knotts* which is troublesome.²⁹ Under the *Katz* expectation-of-privacy test, the two investigative techniques simply are not the same. As explained in *United States v. Bobisink*,³⁰ "the placement of a signalling device upon one's possessions, to permit the Government to confirm their whereabouts intermittently, goes far beyond any ordinary powers of observation about which citizens are reasonably put on notice." The use of an electronic tracking device permits a much more extended and thorough surveillance of an individual than would otherwise be possible. Moreover, especially as this equipment be-

²⁷ *Id.* at 1087.

²⁸ *Id.* at 1085, 1087. There was, somewhat surprisingly, no dissent in *Knotts*. Justice Brennan, joined by Justice Marshall, concurring in the judgment, added that "this would have been a much more difficult case if respondent had challenged, not merely certain aspects of the monitoring of the beeper installed in the chloroform container purchased by respondent's compatriot, but also its original installation," which he apparently did not question because he was not the purchaser and thus assumed he was without standing, in that "when the government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." *Id.* at 1087 (emphasis in original). Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, concurring in the judgment, objected to the "unnecessary" reliance upon the open fields doctrine. *Id.* at 1088. Justice Stevens, joined by Justices Brennan and Marshall, concurring in the judgment, objected to the broad implication that the fourth amendment does not ever inhibit the police "from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them." *Id.* at 1089.

²⁹ The court in *United States v. Holmes*, 521 F.2d 859, 866 n.13 (5th Cir. 1975), *aff'd en banc by equally divided court*, 537 F.2d 227 (5th Cir. 1976), noted: "If this be true . . . then there is no need for the device in the first place. Its value lies in its ability to convey information not otherwise available to the government."

³⁰ 415 F. Supp. 1334, 1339 (D. Mass. 1976).

comes more sophisticated, less expensive, and more readily available, there is the risk that it will be utilized to carry out a volume of surveillance activity far beyond that which would otherwise be feasible with available manpower and resources. It is precisely this potential for surveillance of such amplitude which merits the conclusion that the use of beepers must be subjected to some fourth amendment restraints.³¹

The Court in *Knotts* asserted that the latter problem could be dealt with as the need arose: "[I]f such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."³² But in providing this anodyne the Court did not suggest by what theory it could later be concluded that the use of a beeper against one person is not fourth amendment activity but its indiscriminate use against many is. The Court in *Knotts* would thus have been well advised to ponder the wisdom of the teaching in *Boyd v. United States*:³³ "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

The *Knotts* decision is also objectionable because it marks yet another occasion on which the *Katz* expectation-of-privacy test was distorted and narrowed. In *Knotts*, it is extremely doubtful that visual surveillance alone would have revealed the delivery point of the container—even with monitoring of the beeper, the police lost track of Petschen for an hour when he began evasive maneuvers after apparently discovering he was being followed. But this makes no difference, the Court concluded, because Petschen "voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction . . . and the fact of his final destination when he exited from public roads onto private property."³⁴ But "anyone who wanted to look" would not have known what the beeper revealed: that the container purchased at the Minneapolis chemical company was now at a certain cabin in a secluded area of rural northern Wisconsin. Only an army of bystanders, conveniently strung out on Petschen's route, who not only "wanted to look" but also wanted to pass on what they observed to the next in line, would—to use the language in *Knotts*—"have

³¹ Just what the restraints should be is another matter. See, e.g., *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977) (concluding that full probable cause but no search warrant is needed to monitor a car's movements with a beeper).

³² 103 S. Ct. at 1086.

³³ 116 U.S. 616, 635 (1886).

³⁴ 103 S. Ct. at 1085.

sufficed to reveal all of these facts to the police.”³⁵ Just why the disclosure of these fragments to an imaginary line of bystanders must be treated as a total surrender of one’s privacy concerning his peregrinations is never explained in *Knotts*. The Court has thus continued farther down the same path as in *Smith v. Maryland*,³⁶ significantly the prior decision most relied upon in *Knotts*. By similar analysis, even the facts of the *Katz* case itself could be characterized as not involving a search.³⁷

In concluding that the monitoring was not a search, the Court reasoned that while *Knotts* “had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned,” “no such expectation of privacy extended to the visual observation of Petschen’s automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the ‘open fields.’”³⁸ As for *Knotts*’ claim, accepted by the court of appeals,³⁹ that there was an intrusion into the sanctity of his residence, the Court responded this was not so in light of “the limited use which the government made of the signals.”⁴⁰ Specifically, the record did not indicate the signal was received “after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent’s premises,” and thus there was “no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have

³⁵ *Id.* at 1086.

³⁶ 442 U.S. 735 (1979).

³⁷ In *Katz*, FBI agents attached a listening and recording device to the outside of a public phone booth and in that way heard only the defendant’s end of several phone conversations he initiated there. The Court summarily dismissed the government’s emphasis upon “the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside.” 389 U.S. at 352. But a *Smith-Knotts* type of analysis could well have produced the result that *Katz* lacked an expectation of privacy because what he said could have been determined by a lipreader some distance away or by a hypothetical bystander immediately adjacent to the booth.

³⁸ 103 S. Ct. at 1085-86. Just what the latter part of this statement is intended to refer to is far from clear. As Justice Stevens, joined by Justices Brennan and Marshall, concurring in the judgment, pointed out, while “the Court implies that the chloroform drum was parading in ‘open fields’ outside of the cabin, in a manner tantamount to its public display on the highways,” the “record does not support that implication.” *Id.* at 1088-89.

³⁹ *United States v. Knotts*, 662 F.2d 515, 518 (8th Cir. 1981), *rev’d*, 103 S. Ct. 1081 (1983). The court of appeals reasoned that

a principal rationale for allowing warrantless tracking of beepers, particularly beepers in or on an auto, is that beepers are merely a more effective means of observing what is already public. But people pass daily from public to private spheres. When police agents track bugged personal property without first obtaining a warrant, they must do so at the risk that this enhanced surveillance, intrusive at best, might push fortuitously and unreasonably into the private sphere protected by the Fourth Amendment. It did so in this case, where the beeper’s signal was lost and found again only after the beeper-laden drum was on private property out of public view.

⁴⁰ 103 S. Ct. at 1087.

been visible to the naked eye from outside the cabin."⁴¹

Because the Court in *Knotts* deemed it necessary to respond to the defendant's contention in this particular way, it seems that there are many possible uses of beepers which do not come within that decision and consequently are subject to some fourth amendment limitations. That is, when beeper monitoring discloses activity within premises or other information not open to observation except with such "scientific enhancement," then it is not covered by the above *Knotts* analysis. For example, if during the earlier part of Petschen's journey, when he stopped at his own farmhouse, he had driven his vehicle into a garage or barn where any unloading could not be seen by a lawfully positioned bystander, so that when the car departed the surveilling officers had to monitor the beeper in order to determine whether the container was still in the car, there would have been a search under *Knotts*. The same would be true had the unloading at Knotts' cabin occurred in like circumstances.

This being so, one might think that the *Knotts* case is deficient in not elaborating exactly what the unloading circumstances were.⁴² But this omission is perfectly understandable. The prosecution could not tender direct evidence on this point even if it wanted to, since the delivery occurred at a time and place where there was no visual surveillance, and the defense apparently saw no need to make those circumstances known nor any advantage in doing so. In future cases, however, it can be expected that defendants, as part of their traditional burden of proving that a search has occurred,⁴³ will attempt to show whenever possible that the nature of the activity and its circumjacent circumstances were such that what was established by the beeper monitoring could not have been ascertained through visual surveillance, even by the *Knotts* hypothetical bystander. Upon such proof, it must be concluded that the monitoring was a search and that consequently its fruits must be suppressed unless whatever fourth amendment limits apply to this particular activity have not been exceeded.

B. USE OF DRUG DETECTION DOG NO SEARCH

In *United States v. Place*,⁴⁴ a suspected drug courier's luggage was seized for a period of ninety minutes so that it could be transported to

⁴¹ *Id.*

⁴² The Court asserted, without explanation, that visual surveillance "adjoining Knotts' premises would have sufficed to reveal all of these facts to the police," *id.* at 1086, which seems to assume that the transfer of the drum from Petschen's car to its location under the barrel was done in such a way that it could have been seen from neighboring land.

⁴³ *Nardone v. United States*, 308 U.S. 338 (1939).

⁴⁴ 103 S. Ct. 2637 (1983).

another airport and exposed to a drug detection dog there. The majority held that on the facts presented a dispossession of this length could not be justified under the *Terry v. Ohio*⁴⁵ balancing test, but then went on to say that a shorter dispossession for this purpose would be lawful because it could not be said that "the investigative procedure is itself a search requiring probable cause."⁴⁶ In reaching this conclusion, the Court fortunately did not draw an analogy to *Knotts* or rely upon the dubious theory of some lower courts that use of a dog is equivalent to an officer using his own sense of smell or that it simply augments the officer's sense of smell.⁴⁷ Rather, the Court placed primary emphasis upon the unique nature of the investigative technique, which disclosed only criminality and nothing else:

We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the fourth amendment. . . . A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.⁴⁸

The three concurring members of the Court quite properly chided the majority for getting into this issue at all. As they correctly noted, resolution of the dog sniff issue was not necessary to the decision.⁴⁹

⁴⁵ 392 U.S. 1 (1968).

⁴⁶ 103 S. Ct. at 2644.

⁴⁷ *E.g.*, *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975). Justice Brennan, joined by Justice Marshall, concurring in the result in *Place*, correctly noted that "a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception." 103 S. Ct. at 2651.

⁴⁸ 103 S. Ct. at 2644-45.

⁴⁹ This is because once it was decided that the dispossession of the luggage was too long in any event, there was no need for the Court to address the question of the permissibility of the

Moreover, the Court's decision on this point can hardly be characterized as an informed one; as Justice Brennan observed, the matter was not at issue in the district court, was not reached or discussed by the court of appeals, and "was not briefed or argued in this Court."⁵⁰ Reaching out in such circumstances is especially unwise when there is more than one solution which has sufficient merit to deserve careful consideration. As Justice Blackmun put it, "While the Court has adopted one plausible analysis of the issue, there are others. For example, a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion."⁵¹

Whether the *Place* majority's explanation or that suggested by Justice Blackmun should prevail is, to be sure, a close question. The choice between the two depends on whether the authorities need to be constitutionally restrained in the use of this investigative device so that it is permitted only where a reasonable suspicion exists (which, incidentally, it did in *Place*), or whether the police should be unrestrained and thus free to utilize this procedure in a wholesale fashion, at random, or on nothing more than a whim or hunch. The argument in support of the *Place* approach is that use of this very limited procedure even in these latter circumstances is unobjectionable because no intrusion upon an innocent person's privacy interests occurs. On this theory, it is not untoward (to take the facts revealed in a few recent cases) that the police work these dogs at random on baggage passing through a certain airport⁵² or packages awaiting delivery by a certain freight service.⁵³ In such instances, no one's possessory interests are interfered with, and the only privacy interests interfered with are those of the traveller or shipper who is transporting drugs.

One commentator recently suggested that "the fourth amendment exists to protect the innocent and may normally be invoked by the guilty only when necessary to protect the innocent," so that "if a device could be invented that accurately detected weapons and did not disrupt the normal movement of people, there could be no fourth amendment objection to its use."⁵⁴ But this reasoning, he goes on to note, does not

dog sniffing had the seizure been for a shorter duration. Such was the manner in which the court of appeals resolved the case. 660 F.2d 44 (2d Cir. 1981), *aff'd*, 103 S. Ct. 2637 (1983).

⁵⁰ 103 S. Ct. at 2651 (Brennan, J., concurring).

⁵¹ *Id.* at 2653 (Blackmun, J., concurring).

⁵² *State v. Morrow*, 128 Ariz. 309, 625 P.2d 898 (1981).

⁵³ *State v. Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979).

⁵⁴ Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246, 1248 (1983); see also Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978).

support the "carte blanche use of marijuana-sniffing dogs"⁵⁵ such as is permissible under the *Place* decision. Those dogs are not infallible and thus their use sometimes leads to serious intrusions upon the privacy of innocent people. The classic example is *Doe v. Renfrow*,⁵⁶ where such a dog "alerted" to a thirteen-year-old girl during a school-wide "sniff" of all students. This dog continued to "alert" even after she emptied her pockets, so she was then subjected to a nude search by two women. No drugs were found, but it was later discovered that she had been playing that morning with her dog, then in heat. This was not an isolated instance of error. The dogs used in this reconnoiter alerted to some fifty students, only seventeen of whom were found to be in possession of drugs. The benefit of the approach suggested by Justice Blackmun, whereby the sniff would be deemed a minor search permissible only on reasonable suspicion, is that it would reduce considerably the likelihood of such unfortunate consequences as occurred in *Doe*. That is, if the dogs could not be used wholesale fashion but only against persons and effects for which an independent reasonable suspicion of drug possession already existed, then the opportunity for such erroneous alerts would be substantially reduced.

It may be argued, of course, that this objection is irrelevant to the matter here under discussion. If these dogs are not as accurate as the Court assumed in *Place*, then, it might be reasoned, this bears not so much on the question of whether the dog's sniffing is itself a search as it does on the question of whether the dog's "alert" standing alone constitutes probable cause supporting a real search of the effects or person to which the dog reacted. By thus focusing upon the probable cause issue, one of two conclusions would be reached: (1) that the "well-trained narcotics detection dog" referred to in *Place* may sometimes be mistaken (as in *Doe*), but nonetheless is sufficiently accurate to provide the degree of probability of contraband needed⁵⁷ under the fourth amendment's probable cause test; or (2) that because of the possible unreliability some independent corroboration is needed, meaning not that the wholesale use of dogs described earlier would be impermissible, but rather that once the dog alerted to a particular container additional investigation disclosing other suspicious circumstances would be necessary before a warrant could issue. While the lower courts⁵⁸ and a plurality of the

⁵⁵ Loewy, *supra* note 54, at 1246.

⁵⁶ 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981).

⁵⁷ Courts typically require a higher probability on the question of whether any crime has occurred. See 1 W. LAFAVE, SEARCH AND SEIZURE § 3.2(e) (1978).

⁵⁸ See, e.g., *United States v. Race*, 529 F.2d 12 (1st Cir. 1976).

Supreme Court⁵⁹ appear to accept the first of these conclusions, it is well to remember that with rare exception⁶⁰ the cases have involved situations in which the alert occurred after a pre-existing reasonable suspicion. In any event, acceptance of the latter conclusion makes the *Place* reasoning more convincing, for whether this problem of reliability is seen as one of probable cause or fourth amendment intrusion, it is unquestionable that any risk of error weakens the Court's claim that "only the presence or absence of narcotics" will be disclosed.

It is extremely important to recognize that the *Place* holding does not validate the use of drug detection dogs in all circumstances. The Court said only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment."⁶¹ For one thing, this means that if an encounter between a dog and a person or object is achieved by bringing the dog into an area entitled to fourth amendment protection, that entry is itself a search subject to constitutional restrictions.⁶² For another, it means that if the place is public but the encounter can be accomplished only by a temporary seizure of the person or object, then the encounter will again be constitutionally impermissible unless there are *Terry-Place* grounds for such a seizure or it is otherwise permissible under a *Delaware v. Prouse*⁶³ standardized procedure approach.⁶⁴

Moreover, even if there has been no search into a protected area and no stopping of a person or container, there still may be instances in which utilization of the dogs is properly subject to fourth amendment restraints even after *Place*. In that case, it is well to recall, the Court addressed only the exposure of luggage to the dog in the suspect's absence. What then if the agents, anticipating *Place*'s arrival, had simply been standing by with a drug detection dog and, when *Place* paused

⁵⁹ In *Florida v. Royer*, 103 S. Ct. 1319, 1329 (1983), the plurality stated:

If [a drug detection dog] had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.

⁶⁰ See, e.g., *supra* text accompanying notes 52 and 53.

⁶¹ 103 S. Ct. at 2644-45.

⁶² *People v. Williams*, 51 Cal. App. 3d 346, 124 Cal. Rptr. 253 (1975).

⁶³ 440 U.S. 648 (1979).

⁶⁴ *But see* *United States v. Beale*, 674 F.2d 1327, 1336 (9th Cir. 1982)

([i]t goes without saying that the alternative to random checkpoint stops cited in *Delaware v. Prouse*, i.e., "[q]uestioning . . . incoming traffic at roadblock-type stops," . . . is totally unpalatable in the canine sniffing context. Nothing would invoke the specter of a totalitarian police state as much as the indiscriminate blanket use of trained dogs at roadblocks, airports, and train stations.).

momentarily in the corridor, confronted him with the dog who reacted positively? Or what if, as in *Doe*, the tactic is exposure of the dog to people only, rather than containers (as in *Place*) or people carrying containers (as in the hypothetical just put)? Such practices are not covered by the *Place* holding⁶⁵ or by the many lower court cases allowing the use of dogs for "the sniffing of inanimate and unattended objects rather than persons"⁶⁶ and might well require a different result. Certainly "the very act of being subjected to a body sniff by a German Shepherd may be offensive at best or harrowing at worst" even "to the innocent sniffer,"⁶⁷ and a sniff directed at objects being carried by the person is no less objectionable, especially when done in an airport corridor in circumstances amounting to a public accusation of crime.

Perhaps these investigative activities do not involve an intrusion into privacy or possession or freedom of movement, the interests traditionally protected by the fourth amendment. But such cases as *Place* and *Terry* suggest that there are other interests also deserving such protection. In *Place*, allowing the use of dogs on luggage not then in the suspect's possession, the Court emphasized that the practice lacked the "embarrassment . . . entailed in less discriminate and more intrusive investigative methods."⁶⁸ And in *Terry* the Court stressed that the fourth amendment imposes upon courts the "responsibility to guard against police conduct which is overbearing or harassing."⁶⁹ The kind of confrontation under discussion here—which, again, was not present in *Place*—is embarrassing, overbearing, and potentially harassing, and thus should be subject to fourth amendment restraints.

C. NONSEIZURE POLICE-CITIZEN ENCOUNTERS

Because, as the Court observed in *Terry v. Ohio*,⁷⁰ "encounters between citizens and police officers are incredibly rich in diversity," it is apparent that not every such convergence constitutes a fourth amendment seizure. But just what it takes to make an encounter a seizure was not addressed in *Terry* or in several of the Court's subsequent cases.⁷¹

⁶⁵ Shortly after *Place* was decided, the Court refused to hear an appeal by a Texas school district from the ruling in *Horton v. Goose Creek School District*, 690 F.2d 470 (5th Cir. 1982), that use of specially trained dogs to sniff students in class was a search. 103 S. Ct. 3536 (1983).

⁶⁶ *Doe v. Renfrow*, 451 U.S. 1022, 1026 (1981) (Brennan, J., dissenting from denial of certiorari).

⁶⁷ Loewy, *supra* note 54, at 1246-47.

⁶⁸ 103 S. Ct. at 2644.

⁶⁹ 392 U.S. at 15.

⁷⁰ 392 U.S. 1, 13 (1968).

⁷¹ In *Terry*, the Court had no occasion to determine the precise point at which the defendant was seized, as no evidence was obtained prior to the frisk and nothing happened after the commencement of the encounter which was relied upon to justify the frisk. The companion

Then came *United States v. Mendenhall*,⁷² where Justice Stewart's opinion announcing the judgment of the Court declared:

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.⁷³

The Court in *Mendenhall* was split in such a way that it cannot be said with confidence that this position was shared by a majority of the Court.⁷⁴ Quite significant, therefore, is the decision last Term in *Florida v. Royer*,⁷⁵ also involving a confrontation with a suspected drug courier at an airport, where the Stewart standard was unobtrusively embraced by a now-Stewartless Court.⁷⁶

One virtue of this standard is that it is an objective one focusing upon what "a reasonable person would have believed." What the particular suspect actually thought is thus not determinative,⁷⁷ just as the officer's intentions are not controlling. This is as it should be. Were it otherwise, the matter would

be decided by swearing contests in which officers would regularly maintain

case of *Sibron v. New York*, 392 U.S. 40 (1968), is equally unrevealing, as is *Adams v. Williams*, 407 U.S. 143 (1972), which involved a suspect in a parked car who rolled down his window in response to a police request.

⁷² 446 U.S. 544 (1980).

⁷³ *Id.* at 554-55 (footnote omitted).

⁷⁴ Only Justice Rehnquist joined the Stewart opinion. Three concurring Justices, Justice Powell, Chief Justice Burger, and Justice Blackmun, desiring to avoid an issue not considered by the courts below, instead held that there were grounds for a *Terry* stop, and thus did not have occasion to decide either the correctness of Justice Stewart's seizure standard or its application in the instant case. As for the four *Mendenhall* dissenters, Justices White, Brennan, Marshall, and Stevens, they did not question the Stewart standard, but did point out that he overlooked "certain objective factors that would tend to support a 'seizure' finding," *id.* at 570, and that because the seizure issue was not raised below the record was inconclusive as to the factors mentioned by Justice Stewart.

⁷⁵ 103 S. Ct. 1319 (1983).

⁷⁶ The four-Justice plurality, consisting of Justices White, Marshall, Powell, and Stevens, endorsed that standard, as did Justice Blackmun in his dissent. No member of the Court expressly rejected it.

⁷⁷ If the suspect was guilty, this might bear upon what he would reasonably believe. Some courts have dealt with this by saying that the question is "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." *United States v. Wilie*, 569 F.2d 62, 68 (D.C. Cir. 1977) (quoting *Coates v. United States*, 413 F.2d 371, 373 (1969)).

their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them.⁷⁸

But what does it mean to say that a reasonable person "would have believed that he was not free to leave"? It has been noted that when a police officer puts a question to a pedestrian there "is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer."⁷⁹ This, it seems, is an accurate characterization of the great majority of situations in which an officer approaches a pedestrian and seeks an explanation for his activities or even his identification, which might be taken to mean that under the *Mendenhall-Royer* test virtually all police-citizen encounters amount to fourth amendment seizures.

However, this does not appear to be the meaning of the rule the Court has now adopted.⁸⁰ A close reading of the language quoted above, together with consideration of the views expressed in *Royer* on this point,⁸¹ all suggest otherwise. The Court appears to have accepted the proposition "that the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police."⁸² This means that under the Court's approach a street encounter would not amount to a fourth amendment seizure merely because of those pressures, that is, merely because one party to the encounter is known by the other to be a police officer. Rather, the confrontation would amount to a seizure only if the officer added to those inherent pressures by engaging in conduct

⁷⁸ *United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969).

⁷⁹ *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 899 (N.D. Ill. 1975).

⁸⁰ See Kamisar, *The Fourth Amendment*, in J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980*, 119, 132-43 (1981).

⁸¹ The plurality opinion asserts that

law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

103 S. Ct. at 1324. The four dissenters also appear to accept the conclusion that the initial encounter and questioning did not amount to a seizure. Justice Blackmun said only that a seizure occurred "at some point in this encounter," *id.* at 1333, while the other three dissenters, Justices Rehnquist and O'Connor and Chief Justice Burger, did not state when they believed the seizure commenced but did assert that "when the detectives first approached and questioned Royer, no seizure occurred." *Id.* at 1337 n.3. Only Justice Brennan (though apparently using the same test, he declared it was "wrong to suggest that a traveller feels free to walk away" in the circumstances described, *id.* at 1331) concluded that a seizure occurred "once an officer has identified himself and asked a traveller for identification and his airplane ticket." *Id.*

⁸² *MODEL CODE OF PRE-ARREST PROCEDURE* 258 (1975).

significantly beyond that accepted in social intercourse. So interpreted, the Court's rule not only matches the actual results in most lower court cases but also strikes a fair balance. Police remain free to seek cooperation from citizens on the street without being called upon to articulate a certain level of suspicion in justification if a particular encounter proves fruitful, yet the public is protected from any coercion other than that which is inherent in a police-citizen encounter.

II. PROBABLE CAUSE

The Warrant Clause of the fourth amendment declares that "no Warrants shall issue, but upon probable cause," which means that a valid arrest warrant or a valid search warrant may issue only upon a showing to the issuing authority that there is probable cause for the arrest or search. Though a literal reading of the fourth amendment does not compel such a conclusion, the prohibition upon "unreasonable" searches and seizures in the other clause is construed to mean that those searches and seizures which may be conducted without a warrant also require probable cause. As explained in *Wong Sun v. United States*,⁸³ "the requirements of reliability and particularity of the information on which an officer may act . . . surely cannot be less stringent [when an arrest is made without a warrant] than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed." The meaning of probable cause is thus another extremely important fourth amendment issue.

The Supreme Court has frequently addressed this question, most often in cases involving information offered by informants from the criminal milieu rather than by ordinary citizens. With respect to such situations, a "two pronged test" was developed in *Aguilar v. Texas*⁸⁴ and elaborated in *Spinelli v. United States*:⁸⁵ there had to be a showing in some way (not just a conclusory assertion) of both (i) the informant's veracity and (ii) the basis of his knowledge. Under this approach, the first prong could be established by showing the informant's past credibility (*i.e.*, that he had supplied reliable information on a past occasion),⁸⁶ or by showing the information was reliable on this occasion (*i.e.*, that the information given amounted to an admission against the informant's penal interest).⁸⁷ The second prong could be directly established by disclosure of exactly how the informant came by his

⁸³ 371 U.S. 471, 479-80 (1963).

⁸⁴ 378 U.S. 108 (1964).

⁸⁵ 393 U.S. 410 (1969).

⁸⁶ See *McCray v. Illinois*, 386 U.S. 300 (1967).

⁸⁷ See *United States v. Harris*, 403 U.S. 573, 583-84 (1971).

information,⁸⁸ or the basis could sometimes be inferred from the great detail provided.⁸⁹ In addition, the Court recognized that partial corroboration of the informant's tale was important, though the precise relevance of the corroboration to each of the prongs was a matter of some uncertainty.⁹⁰

A. ABANDONMENT OF THE "TWO PRONGED TEST"

The structure just described was at least partially dismantled by the Supreme Court in *Illinois v. Gates*.⁹¹ There, police in the Chicago suburb of Bloomingdale received on May 3 an anonymous letter stating that a named couple "make their living on selling drugs" and had over \$100,000 worth of drugs in their basement, "that most of their buys are done in Florida," that the modus operandi of the couple was for the wife to drive their car to Florida and leave it for loading and then fly back, after which the husband would fly down and drive the car back, and that such a procedure was about to be followed again, which would result in "over \$100,000 in drugs" being brought back in the trunk of the car.⁹² The police confirmed that the husband had a reservation to fly to West Palm Beach on May 5, and surveillance established that he made the flight, took a cab to a motel, entered a room registered in his wife's name, and the next morning departed in the family car with her, driving north on an interstate highway used by travelers to Chicago. A search warrant for their car and house was issued upon an affidavit reciting the above facts and was successfully executed, but the trial court, appellate court, and state supreme court all held that the affidavit was insufficient under the two-pronged test of *Aguilar-Spinelli*. Eschewing the question it had previously raised concerning the possible admissibility of the evidence if the warrant was issued without probable cause but in good faith,⁹³ the Supreme Court instead decided that the above allegations did add up to probable cause.

While some of the Justices worked out an answer to the probable cause issue one way or another under the existing *Aguilar-Spinelli* formula,⁹⁴ the majority took a more radical step by deciding

⁸⁸ See *Spinelli v. United States*, 393 U.S. 410, 423 (1969) (White, J., concurring).

⁸⁹ See *Spinelli v. United States*, 393 U.S. 410, 414 (1969).

⁹⁰ For discussion of the cases, consult 1 W. LAFAYE, *supra* note 57, at § 3.3(f).

⁹¹ 103 S. Ct. 2317 (1983).

⁹² *Id.* at 2325.

⁹³ See *infra* text accompanying note 147.

⁹⁴ While Justices Blackmun, O'Connor, Powell, and Chief Justice Burger joined the majority opinion of Justice Rehnquist, Justice White, concurring, after explaining in some detail why he would use *Gates* as a vehicle to recognize a "good faith" exception to the exclusionary rule, see *infra* note 148, concluded probable cause existed under the *Aguilar* formula, which he would retain. Justice Brennan, joined by Justice Marshall, dissenting, objected to "the

to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. . . . We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.⁹⁵

The rationale behind this abandonment of the approach that had been utilized by the Court for the preceding fourteen years is set out in Part III of the majority opinion and consists of the following propositions: (i) that the "totality of the circumstances approach is far more consistent with our prior treatment of probable cause" as a "'practical, nontechnical conception,'" "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules";⁹⁶ (ii) that the new approach is justified by the fact that affidavits "'are normally drafted by nonlawyers'" and warrants are issued "by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause'";⁹⁷ (iii) "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review";⁹⁸ (iv) that if affidavits are subjected to greater scrutiny "police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search";⁹⁹ (v) that the strictures of the two-pronged test "cannot avoid seriously impeding the task of law enforcement," as under that test anonymous tips would be of greatly diminished value in police work";¹⁰⁰ and (vi) that the two elements of the *Aguilar-Spinelli* test should not have "such independent status," so that "a deficiency in one may be compensated for, in

Court's unjustified and ill-advised rejection of the two-prong test for evaluating the validity of a warrant based on hearsay," 103 S. Ct. at 2351, under which they concluded the warrant in the instant case was invalid. Justice Stevens, joined by Justice Brennan, dissenting, concluded the warrant was invalid even under the Court's new "totality of the circumstances" test. *Id.* at 2360-62.

⁹⁵ *Id.* at 2332 (footnote omitted).

⁹⁶ *Id.* at 2328.

⁹⁷ *Id.* at 2330.

⁹⁸ *Id.* at 2331.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.”¹⁰¹

It does not take a misoneist to question the *Gates* holding, for these reasons neither individually nor collectively support the Court’s result. As for proposition (i), it is largely a red herring. No one could seriously contend that the *Aguilar-Spinelli* formula reduced probable cause to “a neat set of legal rules” or was likely to do so. Rather, the two-pronged test simply provided a structure for probable cause inquiries, and, if not rigidly applied,¹⁰² allowed sufficient room for assessment of the unique facts of the particular case. As Justice Brennan noted in his dissent,

[n]either the standards nor their effects are inconsistent with a “practical, nontechnical” conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause.¹⁰³

Proposition (ii) of the *Gates* majority, that the Court’s change in the probable cause standard is necessitated by the fact that affidavits are prepared by nonlawyer-policemen and warrants sometimes issued by “persons who are neither lawyers nor judges,” is totally unpersuasive. If anything, that fact cuts in exactly the opposite direction. As Justice White wisely pointed out in *Gates*, that laymen police and magistrates must often make the critical probable cause determination in the first instance is all the more reason for the Court “to provide more precise guidance” rather than “totally abdicating [its] responsibility in this area.”¹⁰⁴ The now abandoned *Aguilar* formula provided direction and thus afforded some assurance of rational decisionmaking. The *Aguilar-Spinelli* standards, as Justice Brennan put it in his dissent, “help to structure probable cause inquiries and, properly interpreted, may actually help a nonlawyer magistrate in making a probable cause determination.”¹⁰⁵ The Court’s prior cases, by stressing the independent importance of both the veracity and the basis of knowledge inquiries and by identifying various ways in which each requirement could be met, pro-

¹⁰¹ *Id.* at 2329.

¹⁰² In a footnote, the *Gates* majority made reference to the fact that three “lower court decisions, brought to our attention by the State, reflect a rigid application of such rules.” *Id.* at 2330 n.9. But Justice White quite correctly pointed out in his separate opinion: “The holdings in these cases could easily be disapproved without reliance on a ‘totality of the circumstances’ analysis.” *Id.* at 2350 n.26. Moreover, the fact that a few opinions can be found applying the *Aguilar-Spinelli* formula too strictly is hardly a reason for rejecting it in favor of a less demanding one, especially since there are also opinions applying the old standard too loosely. See 1 W. LAFAYE, *supra* note 57, at § 3.3.

¹⁰³ 103 S. Ct. at 2357-58 (Brennan, J., dissenting).

¹⁰⁴ *Id.* at 2351 (White, J., concurring).

¹⁰⁵ *Id.* at 2358 (Brennan, J., dissenting).

vided a most useful framework within which both police and magistrates could meaningfully operate. By comparison, the *Gates* approach, consisting largely of an exhortation to use common sense, does not afford guidance to police and magistrates. It thus enhances the risk that probable cause determinations will be grounded more upon the predilections of the decisionmaker and less upon established rules of law, as the Court appears to admit.¹⁰⁶

As for proposition (iii), "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review," this truism provides no support for the Court's abandonment of the two-pronged test. In both *Aguilar*¹⁰⁷ and *Spinelli*¹⁰⁸ the Supreme Court was careful to reaffirm the principle that a magistrate's determination of probable cause is entitled to considerable deference. Abandoning the structure provided by those cases and telling magistrates that under the new common-sense rule they "remain perfectly free to exact such assurances as they deem necessary"¹⁰⁹ discourages not only *de novo* review but any meaningful review whatsoever.

Proposition (iv) of the *Gates* majority, the *in terrorem* that closer scrutiny of affidavits than *Gates* requires might prompt police to "resort to warrantless searches," is equally unpersuasive. As the Court noted, it has long expressed a preference for the warrant process and in that connection has even said that on the matter of "when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."¹¹⁰ This being so, there is nothing to be gained by police acting without rather than with a warrant in any

¹⁰⁶ The Court stated at one point:

Nothing in our opinion in any way lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant; indeed, he is freer than under the regime of *Aguilar* and *Spinelli* to draw such inferences, or to refuse to draw them if he is so minded.

Id. at 2333.

¹⁰⁷ Where it was acknowledged that reviewing courts "will pay substantial deference to judicial determinations of probable cause." 378 U.S. at 111.

¹⁰⁸ Where it was also noted that magistrates' determinations of probable cause "should be paid great deference by reviewing courts." 393 U.S. at 419.

¹⁰⁹ 103 S. Ct. at 2333.

¹¹⁰ 103 S. Ct. at 2331 n.9 (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)). Just how broad this "doubtful or marginal" range is at the periphery of probable cause is hard to say. When a court rules that evidence obtained in a warrantless search must be suppressed because probable cause was lacking, it is most unlikely that the court's analysis will extend to the unnecessary additional step of declaring that the result would have been otherwise had the police gotten a warrant. Likewise, when a court holds that a certain warrant was issued on probable cause, there is no reason to expect that the court will go on to say that a different result would have been reached on the probable cause issue had the police foregone the warrant process. But especially if a court in the course of ruling on a probable cause issue makes some reference to the *Ventresca* principle, there may well exist considerable

case in which either alternative is permissible only upon probable cause and where the officer has some doubts about the sufficiency of the information at hand. In circumstances where the law permits the contemplated action only with a warrant, proceeding without one would make even less sense; it would, as Justice Brennan put it in his dissent, "be not only inadvisable, but also unavailing."¹¹¹ As for the implication in *Gates* that whenever the police might take either the consent search route or the search warrant route it is important to keep the barrier to the latter fairly low because the warrant alternative is the preferable of the two, suffice it to note that the Court's sense of priorities has previously been expressed somewhat differently.¹¹²

Then there is proposition (v), that the two-pronged test "cannot avoid seriously impeding the task of law enforcement," especially because anonymous tips "would be of greatly diminished value in police work." Even assuming the correctness of the *Gates* majority's assertion that such tips "frequently contribute to the solution of otherwise 'perfect

doubt as to whether the decision in that case has precedential value in a later case which is on all fours but for the presence or absence of a warrant.

The point is illustrated by *Gates*, where the Court abandoned the two-pronged test and then held that the warrant for the couple's home and car was issued on probable cause. Does this mean that if the police had instead immediately stopped the *Gates*' vehicle when it headed north and had subjected it to a warrantless search under the *Carroll-Chambers* "automobile exception" doctrine the outcome would have been the same? Given the prior use of the two-pronged test by courts in both with-warrant and without-warrant cases, must its abandonment in *Gates* be read as its rejection in both contexts? Even if the answer to that is yes, under the Court's new "common-sense decision" approach will this same limited corroboration suffice for a warrantless search?

The answers are not readily apparent from the *Gates* decision. The *Ventresca* principle is set out in a footnote, for whatever that is worth. Somewhat stronger ammunition for the contention that *Gates* should be limited to the with-warrant context is that some of the six reasons given for rejecting *Aguilar-Spinelli* (the need not to discourage police from seeking warrants, and the need not to subject affidavits to unduly severe after-the-fact review) are applicable only in warrant cases. But the other reasons discussed in the preceding and following text, assuming their validity, have equal force in the without-warrant setting as well. Because that is so and because of the general disinclination of courts to utilize the *Ventresca* principle on behalf of defendants in no-warrant situations, the chances are that *Gates* will receive unquestioned acceptance as a probable cause benchmark even when the police have acted without a warrant. If this is so, the concerns expressed herein about the "watering-down" of the probable cause test by *Gates* take on even greater significance.

¹¹¹ 103 S. Ct. at 2359 n.9 (Brennan, J., dissenting).

¹¹² In *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), the Court had high praise for consent searches, which were characterized as a "wholly legitimate aspect of effective police activity." *Id.* at 228. For one thing, said the Court, when the police lack probable cause for a warrant they "may be the only means of obtaining important and reliable evidence." *Id.* at 227. But of special significance here is the Court's additional comment that even when the police could have instead gotten a search warrant, a search by consent may be preferable because it "may result in considerably less inconvenience for the subject of the search." *Id.* at 228.

crimes,'"¹¹³ the Court is in error in declaring that the *Aguilar-Spinelli* standard "leaves virtually no place for anonymous citizen informants."¹¹⁴ It is not a matter of no place or a place, but rather of exactly what that place should be. Certainly, as Justice Brennan pointed out, there "is no basis for treating anonymous informants as presumptively reliable" nor "for assuming that the information provided by an anonymous informant has been obtained in a reliable way."¹¹⁵ But an anonymous tip can prompt a police investigation by which the necessary facts could be developed, as the *Gates* case itself illustrates. The letter confronted the police with the prospect of uncovering \$200,000 worth of drugs, and thus certainly justified some expenditure of police resources in checking it out. By abandoning the *Aguilar-Spinelli* formulation, the *Gates* majority found that the checking done was sufficient even though (as Justice Stevens noted in his dissent) what was found was "nothing except ordinary innocent activity." But if the police had heeded the letter writer's promise that "if you watch them carefully you will make a big catch," other facts would doubtless have come to light adding up to the pre-*Gates* quantum of probable cause.¹¹⁶ That is the proper place of anonymous informants in the probable cause equation.

But it is proposition (vi) which makes it apparent that *Gates* involves much more than an adiabatic change in terminology. That proposition, again, is that the "veracity" and "basis of knowledge" prongs of *Aguilar* should not have "independent status," so that a deficiency in one may be overcome by a strong showing of the other. Several examples are offered by the *Gates* majority in support of this proposition, the first being that if

a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip.¹¹⁷

But this simply is not so. The assertion is not supported by the case cited by the Court in support.¹¹⁸ Moreover, as Justice White stated in

¹¹³ 103 S. Ct. at 2332.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2356 (Brennan, J., dissenting).

¹¹⁶ See *infra* text accompanying note 145.

¹¹⁷ 103 S. Ct. at 2329.

¹¹⁸ That case is *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), which certainly does not justify any general assumption that an informant's "track record" tends to establish his basis of knowledge. For one thing, *Sellers* is a highly unusual case, for the affidavit said the information "was supplied by an informant who has given reliable information in more than one hundred instances in matters of investigation." *Id.* at 40 n.1. An informant, as that term is used herein, see *infra* note 127, is unlikely to have such credentials. (Indeed, though this fact was unknown by the issuing magistrate, the court of appeals in *Sellers* may have been influ-

his concurrence regarding that comment by the majority,

[i]f this is so, then it must follow *a fortiori* that "the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building" must be acceptable. . . . It would be "quixotic" if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. . . . But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement.¹¹⁹

The second example offered in support of proposition (vi) is that "if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."¹²⁰ In support, the Court cited *Adams v. Williams*.¹²¹ But *Adams*, apart from being woefully short on analysis,¹²² is not a case in which the Court was dealing with the meaning of probable cause to make a full arrest or search. Rather, at issue there was the question of whether the information received from an informant amounted to reasonable suspicion justifying a stop-and-frisk. Had the *Gates* majority instead examined the Court's prior decisions on probable cause, it would have discovered a principle under the two-pronged formula quite different from the example tendered: that an admission against penal interest is one way to establish veracity.¹²³

The last example given in connection with proposition (vi) is that "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case."¹²⁴ Quite understandably, no authority was cited to support this bizarre notion. In fact, a detailed description sheds no light on veracity. "If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as

enced by the hindsight knowledge that the so-called informant in that case turned out to be a Special Agent of the FBI.) For another, *Sellers* is most readily explainable as a case in which the basis of knowledge was supplied by self-verifying details. The court there held that because the affidavit contained "detailed statements relating to the organizational procedures of the gambling operation," this "provided a basis from which a detached judicial officer could reasonably infer that the informer must have had specific and direct knowledge of this particular bookmaking operation." *Id.* at 41.

¹¹⁹ 103 S. Ct. at 2350 (White, J., concurring) (citing *Whiteley v. Warden*, 401 U.S. 560 (1971), *Jones v. United States*, 362 U.S. 257 (1960), and *Nathanson v. United States*, 290 U.S. 41 (1933)).

¹²⁰ 103 S. Ct. at 2329.

¹²¹ 407 U.S. 143 (1972).

¹²² See 3 W. LAFAVE, SEARCH AND SEIZURE § 9.3(e) (1978).

¹²³ *United States v. Harris*, 403 U.S. 573, 583-84 (1971).

¹²⁴ 103 S. Ct. at 2329-30.

easily as with rough brush strokes.”¹²⁵ Likewise, a claim of first-hand observation is irrelevant to the question of veracity except as it may make the informant’s statement an admission against penal interest.¹²⁶

As is highlighted by these deficiencies in the Court’s examples, the *Gates* majority’s proposition (vi) contains a fatal flaw. A “common-sense decision” on probable cause, to take their language, necessitates attention to both veracity and basis of knowledge, and to treat a strong showing of one as curing a deficiency in the other makes a mockery of the fourth amendment’s probable cause requirement. The preferred method of satisfying the basis of knowledge requirement, a direct statement from the informant as to how he came by the information, is virtually worthless when it comes from an individual from the criminal milieu¹²⁷ about whom no veracity judgment is possible. And information tendered by a person of unquestioned credibility is worth very little when no judgment is possible as to the basis of his conclusions—whether or not, to use the Court’s oft-quoted phrase, he is merely reporting “an offhand remark heard at a neighborhood bar.”¹²⁸ This is why, as Justice White quite correctly declared in his separate opinion in *Gates*, the probable cause standard necessitates “some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way.”¹²⁹

It remains to be seen just what the impact of *Gates*’ abandonment of the *Aguilar-Spinelli* approach will be and, especially, whether it will result in a significant “watering-down” of the probable cause standard as it had developed under the two-pronged formula. As indicated in the preceding discussion, there is legitimate reason for concern. In speaking to “the limits beyond which a magistrate may not venture in issuing a warrant,” the Court put only the most extreme case: “the ‘bare bones’ affidavits presented in cases such as *Nathanson* and *Aguilar*,”¹³⁰ that is, affidavits which are totally conclusory on both the veracity and basis of knowledge factors. If trial courts take this to mean that in any situation short of that they are free to make a “common-sense decision” that probable cause exists, and appellate courts conclude that in such circumstances they may not substitute their own common sense for the

¹²⁵ *Stanley v. State*, 19 Md. App. 508, 533, 313 A.2d 847, 862 (1974).

¹²⁶ See 1 W. LAFAVE, *supra* note 57, at § 3.3(d).

¹²⁷ Which, absent any facts about the identity of the letter writer, he must be presumed to be. Of course, when the person providing the information is an ordinary citizen, then usually there is a presumption of reliability and the focus is upon the basis and completeness of knowledge. *Id.* at § 3.4.

¹²⁸ *Spinelli v. United States*, 393 U.S. 410, 417 (1969).

¹²⁹ 103 S. Ct. at 2350 (White, J., concurring).

¹³⁰ *Id.* at 2332-33.

presumed perspicacity of those on the firing line, then *Gates* will have produced a great mischief.

Certainly the potential for highly inconsistent and largely unreviewable probable cause determinations is there. When the majority in *Gates* says that from now on probable cause is to be ascertained by a "totality of the circumstances analysis," one cannot help but recall the pre-*Miranda* experience under the old "totality of the circumstances" voluntariness test for determining the admissibility of confessions. That confession standard proved to be a failure because it "left police without needed guidance" and "impaired the effectiveness and the legitimacy of judicial review."¹³¹ Should that experience now be replicated in the fourth amendment area as a result of *Gates*, then Justice Brennan will have proved fatidical in declaring that "today's decision threatens to 'obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'"¹³²

One hopes that will not come to pass. It need not if trial and appellate courts refuse to abdicate their responsibility to uphold the fourth amendment's probable cause requirement and do not read *Gates* as a total abandonment of standards and rules of law in favor of something called "common-sense." *Gates* does not mean that lower courts are writing on a completely clean slate when they now confront the question of when an informant's information amounts to probable cause. Even the *Gates* majority agreed "that an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report."¹³³ Because this is so, it is to be hoped that courts will continue to place considerable reliance upon the elaboration of these factors in earlier cases decided under the now-discarded *Aguilar* formula.

B. THE PARTIALLY CORROBORATED ANONYMOUS TIP

In concluding that the facts in the affidavit amounted to probable cause, the *Gates* majority reasoned as follows: (1) the facts obtained by independent investigation were alone quite suspicious, since "Florida is well-known as a source of narcotics and other illegal drugs," and *Gates*' observed conduct "is as suggestive of a pre-arranged drug run, as it is of an ordinary vacation trip";¹³⁴ (2) the anonymous letter was deserving of some weight because the "corroboration of the letter's predictions that the *Gates*' car would be in Florida, that Lance *Gates* would fly to Flor-

¹³¹ Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981).

¹³² 103 S. Ct. at 2359 (Brennan, J., dissenting) (quoting *Johnson v. United States*, 333 U.S. 10, 17 (1948)).

¹³³ 103 S. Ct. at 2327.

¹³⁴ *Id.* at 2334.

ida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true";¹³⁵ and (3) the details in the letter concerned "future actions of third parties ordinarily not easily predicted," thus suggesting the writer of the letter "also had access to reliable information of the Gates' alleged illegal activities."¹³⁶ Whether this reasoning is sound is a most difficult question, one which is not itself determined by the criticisms stated above. (This is apparent from the fact that Justice White's concurring opinion roundly condemned the majority's dismantling of the existing probable cause structure but nonetheless agreed that the search warrant in *Gates* had issued on probable cause.¹³⁷) But I find the reasoning of the *Gates* dissenters somewhat more persuasive.

In concluding that there was probable cause, the majority claimed that the corroboration showed that "the informant had access to accurate information" of the Gates' "not entirely ordinary travel plans."¹³⁸ Similarly, Justice White asserted that "the police corroborated" the letter's predictions "that Sue Gates would drive to Florida, that Lance Gates would fly there a few days after May 3, and that Lance would then drive the car back."¹³⁹ But to the extent that this suggests that the police had corroborated the rather unusual fast-paced sequence of events predicted in the letter, it is in error. As Justice Stevens pointed out in his dissent, the corroboration in *Gates* actually counts for very little. For one thing, the limited investigation did not establish when the wife had gone to Florida; "for all the officers knew she had been in Florida for a month."¹⁴⁰ For another, it did not establish whether the husband was making an immediate return to Bloomingdale. While the majority relied on police observation of the Gates' departure northbound on an interstate "frequently used by travelers to the Chicago area,"¹⁴¹ the Stevens dissent correctly noted that "the same highway is also commonly used by travelers to Disney World, Sea World, and

¹³⁵ *Id.* at 2335.

¹³⁶ *Id.*

¹³⁷ The five Justices who joined the majority opinion did not dispute Justice White's assertion that their result was possible under existing law, but only commented that their reasoning would not "satisfy some views," *id.*, of what the two-pronged test required. Justice Brennan, joined by Justice Marshall, dissenting, objected to "the Court's unjustified and ill-advised rejection of the two-pronged test for evaluating the validity of a warrant based on hearsay," *id.* at 2351, under which they concluded the warrant in the instant case was invalid. Justice Stevens, joined by Justice Brennan, dissenting, concluded the warrant was invalid even under the Court's new "totality of the circumstances" test. *Id.* at 2360-62.

¹³⁸ *Id.* at 2335.

¹³⁹ *Id.* at 2349 (White, J., concurring in judgment).

¹⁴⁰ *Id.* at 2360 n.1 (Stevens, J., dissenting).

¹⁴¹ *Id.* at 2326.

Ringling Brothers and Barnum and Bailey Circus World. It is also the road to Cocoa Beach, Cape Canaveral, and Washington, D.C.”¹⁴² Consequently, there was nothing inherently imputational in what had been observed unless all Florida travelers are suspicious because, as the majority says, “Florida is well-known as a source of narcotics and other illegal drugs.”¹⁴³

But surely that kind of suspicion should not suffice to bootstrap an anonymous letter up to probable cause, for (as Justice Brennan aptly noted in his dissent) an anonymous tipster’s allegations are more in need of some significant confirmation than “tips from informants known at least to the police.”¹⁴⁴ This is especially true in the *Gates* case. Not only had the police surveillance there corroborated precious little of the allegations in the anonymous letter, it also established the falsity of one claim. Both the husband and wife had been seen together in Florida, thus disproving the implication in the letter that they were never gone at the same time, a rather critical assertion because it squared with the further allegation that they already had “over \$100,000 worth of drugs in their basement.” Also, it can hardly be said of *Gates* that either this minimal corroboration must suffice or anonymous tips of the kind there received will, as the majority feared, “be of greatly diminished value in police work.”¹⁴⁵ Because the letter alleged an ongoing criminal scheme which was unlikely to terminate and which involved not only repeated travels by the two suspects but also recurrent visits to their house by drug dealers, the police were hardly confronted with a “now or never” kind of situation. Numerous avenues of investigation were open to them. Indeed, even a bit more patience in the surveillance which was undertaken would have sufficed. As Justice Stevens concluded in his dissent, had the probable cause determination included one additional fact which soon came to the attention of the police, “that Lance and Sue Gates made a 22-hour non-stop drive from West Palm Beach, Florida, to Bloomingdale, Illinois, only a few hours after Lance had flown to Florida,” then a probable cause finding would have been justified on this “persuasive evidence that they were engaged in illicit activity.”¹⁴⁶

¹⁴² *Id.* at 2360 n.3 (Stevens, J., dissenting).

¹⁴³ *Id.* at 2334.

¹⁴⁴ *Id.* at 2356 (Brennan, J., dissenting).

¹⁴⁵ *Id.* at 2331.

¹⁴⁶ *Id.* at 2360 (Stevens, J., dissenting). Because that additional and critical fact was known by the police before the car was actually searched, Justice Stevens would have remanded the case for a determination of whether that search could be upheld as a warrantless search on probable cause under the *Carroll-Chambers* rule.

C. PROBABLE CAUSE AND "GOOD FAITH"

After hearing argument in *Gates* on the question of whether a warrant had issued on probable cause, the Court requested reargument on an additional issue: "Whether the rule requiring exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment . . . should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."¹⁴⁷ Later, "with apologies to all," the Court declined to rule on that issue because it "was not presented to the Illinois courts."¹⁴⁸ But, as already discussed, the Court instead adopted a radical change in fourth amendment doctrine which, it seems, accomplished by indirection much of what the advocates of a "good faith" exception were seeking. Instead of saying that the officer or magistrate made a reasonable "near miss" on what suffices for probable cause under the pre-*Gates* standard and that consequently the illegally obtained evidence should be admissible under a "good faith" exception, the Court achieved essentially the same result by merely dropping the probable cause barrier down a few notches.

Several cases again raising the "good faith" issue will reach the Court next Term,¹⁴⁹ and thus it is appropriate to ask what bearing *Gates* ought to have upon it. By substituting a slogan for a standard, the

¹⁴⁷ *Illinois v. Gates*, 103 S. Ct. 436, 436 (1982) (order for reargument).

¹⁴⁸ 103 S. Ct. at 2321. Only Justice White, concurring in the judgment, confronted the issue, and he concluded that "when officers perform their tasks in the good-faith belief that their action comported with constitutional requirements, the deterrent function of the exclusionary rule is so minimal, if not non-existent, that the balance clearly favors the rule's modification." *Id.* at 2344. This is especially true, he added, when, as in the instant case, "law enforcement officers have reasonably relied on a judicially-issued search warrant." *Id.* As for the usual arguments against such an exception, he responded that: (i) it would not cause magistrates to flout the probable cause requirements, as magistrates generally would not "abdicate their responsibility to apply the law" and exclusion would still be appropriate "when it is plainly evident that a magistrate or judge had no business issuing a warrant," *id.* at 2345; (ii) it would not freeze development of fourth amendment law, as in a case presenting a "novel question" the Court could decide the violation issue "before turning to the good-faith question," *id.* at 2346 (emphasis in original); and (iii) it would not be difficult to apply in practice, as good faith would be determined by the existence of a warrant or in warrantless search cases "by objective standards . . . no more difficult to apply than the closely related good-faith test which governs civil suits under 42 U.S.C. § 1983." *Id.* at 2347.

¹⁴⁹ *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983) (holding that evidence seized under a warrant which, because of the issuing magistrate's good faith negligence, failed to describe items to be seized, must be suppressed); *Colorado v. Quintero*, 657 P.2d 948 (Colo.), *cert. granted*, 103 S. Ct. 3535 (1983) (fact that defendant a stranger in neighborhood, acting suspiciously and in possession of TV set he tried to conceal not probable cause; good faith of officer cannot validate the seizure), *cert. dismissed*, 52 U.S.L.W. 3460 (U.S. Dec. 13, 1983) (defendant died); *United States v. Leon*, *aff'd without opinion*, 701 F.2d 187 (9th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983) (district judge properly suppressed evidence seized pursuant to warrant because affidavit inadequate; court declines to adopt good faith exception).

Court in *Gates* has rendered the meaning of probable cause much more amphibolic than it had been, which in a perverse sense makes the argument for a "good faith" exception somewhat more compelling than it once was. The law is less clear now than it was before *Gates* and thus, the argument might proceed, greater is the need to excuse honest mistakes by police and magistrates as to what the law requires. But that is hardly a line of reasoning which any member of the *Gates* majority could in good conscience put forward, and in any event it is not compelling.

The salient characteristic of *Gates* is that it contemplates greater deference at the suppression hearing and appellate review stages to the judgment of the officer or magistrate who made the initial probable cause determination. That being so, there is no need to engage in "double counting" by first applying this less demanding conception of probable cause and then in addition excusing good faith deviations from it. If, as the *Gates* majority beguiles, probable cause is nothing more than a matter of "practical, common-sense" decisionmaking, then it would seem that a probable cause determination which is erroneous and thus lacking this sagaciousness is undeserving of either the appellation "good faith" or the sympathetic reception which a "good faith" qualification would allow.

III. THE BALANCING TEST

A fourth amendment issue of great practical and theoretical importance concerns when the traditional probable cause standard, whatever it is, may be "watered down" or even abandoned entirely in permitting certain types of seizures and searches. This has been accomplished by a so-called balancing test, typically where rather limited intrusions are outweighed by compelling public needs. As stated in *Terry v. Ohio*,¹⁵⁰ quoting *Camara v. Municipal Court*,¹⁵¹ this test involves "balancing the need to search [or seize] against the invasion which the search [or seizure] entails." One possible consequence of balancing, as in the *Terry* stop-and-frisk case, is that the conduct will be permitted under a less demanding reasonable suspicion standard. Another, as in the *Camara* housing inspection case, is that the conduct will be allowed without any individualized suspicion if undertaken pursuant to an established routine or plan.

A. AVAILABILITY OF THE BALANCING TEST

One difficult question which has troubled several members of the Court in recent years concerns the extent to which this balancing pro-

¹⁵⁰ 392 U.S. 1, 21 (1968).

¹⁵¹ 387 U.S. 523, 537 (1967).

cess should supplant the probable cause requirement. As Justice Blackmun put it in *United States v. Place*,¹⁵² there "appears . . . to be an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable." This may be attributable in part to the fact that in the seminal *Camara* case the Court was not sufficiently careful in elaborating the circumstances that make a non-probable cause search or seizure permissible via the balancing test.¹⁵³

Though this broader issue is too complex to be assayed here, it is worth noting that the objection by some Justices to utilization of the balancing test in two cases last Term seems unwarranted. One of them, *United States v. Place*,¹⁵⁴ involved the increasingly common practice of detaining luggage carried by a suspected drug courier at an airport. Though the majority in *Place* ultimately concluded that the ninety-minute detention was too long,¹⁵⁵ the Court's anterior holding was that the

¹⁵² 103 S. Ct. 2637, 2652 (1983).

¹⁵³ See LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1 (1968).

¹⁵⁴ 103 S. Ct. 2637 (1983).

¹⁵⁵ The Court noted that "although we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case." *Id.* at 2646.

In holding that the 90-minute detention of the suitcases was excessive under the fourth amendment, the Court responded thusly to the government's argument "that seizures of property are generally less intrusive than seizures of the person" and thus are not subject to precisely the same temporal limits:

While true in some circumstances, that premise is faulty on the facts we address in this case. The precise type of detention we confront here is seizure of personal luggage from the immediate possession of the suspect for the purpose of arranging exposure to a narcotics detection dog. Particularly in the case of detention of luggage within the traveler's immediate possession, the police conduct intrudes on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary. The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return. Therefore, when the police seize luggage from the suspect's custody, we think the limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause.

Id. at 2645 (footnote omitted).

A close reading of this language indicates that the Court was not merely saying that on the facts of the particular case the time limits must be the same, but rather that in *all* instances of dispossession from the suspect the limits are the same. (If there is any doubt at all on this point, it is because one of the sentences just quoted merely says that "such a seizure *can* effectively restrain the person" (emphasis added), and it is footnoted with this quotation:

"At least when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police."

Terry balancing test was applicable to such activity. On the government interest side of the scales, the Court put the consideration that "[b]ecause of the inherently transient nature of drug courier activity at airports, allowing police to make brief investigative stops of persons at airports on reasonable suspicion of drug-trafficking substantially enhances the likelihood that police will be able to prevent the flow of narcotics into distribution channels."¹⁵⁶ As for the nature-and-quality-of-intrusion pan of the scales, the Court noted that "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific and articulable facts that the property contains contraband or evidence of a crime."¹⁵⁷ The Court thus concluded:

[W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.¹⁵⁸

This approach was questioned by three concurring members of the Court. Justice Blackmun made the comment quoted above and went on to say that in *Terry* the Court utilized the balancing test because of the exceptional circumstances present, a need for " 'necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.' "¹⁵⁹ This characterization, however, is just as appropriate when

Id. at 2645 n.8. (quoting 3 W. LAFAVE, *supra* note 122, §9.6, at 61). This quite properly leaves intact the rule of *United States v. Van Leeuwen*, 397 U.S. 249 (1970), that a longer detention is permissible where neither privacy nor possession is disturbed.

In defense of the government's position, this hypothetical case might be put: Place is stopped at LaGuardia Airport on sufficient suspicion he is a drug courier that it would be reasonable to hold him with his luggage at the point of the stopping for a period of 15 minutes while a drug detection dog is brought to the scene. Unfortunately, the LaGuardia dog is home with a cold, so the agents, told by Place that his plans are to take a cab to the Plaza Hotel and later meet friends for dinner, advise him that they are taking his luggage to Kennedy Airport for sniffing by the dog there and that if the dog does not alert the agents will promptly deliver the luggage to Place's hotel room within an hour and a half. Certainly it is arguable that in such circumstances the proposed hour and a half dispossession is by no means comparable to the forbidden hour and a half detention of Place himself, but rather is equivalent to the permissible 15 minute detention of Place and therefore is a constitutional alternate procedure. Though this may be correct as an abstract matter, the Court in *Place* declined to embrace such reasoning, apparently because it would add another complication to the *Terry* balancing test. As earlier explained in *Dunaway v. New York*, 442 U.S. 200, 213 (1979), "the protections intended by the Framers could all too easily disappear" under such a more sophisticated multifactor balancing test requiring "the consideration and balancing of the multifarious circumstances presented by different cases."

¹⁵⁶ 103 S. Ct. at 2643.

¹⁵⁷ *Id.* at 2644.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 2652 n.1 (Blackmun, J., concurring) (quoting *Terry*, 392 U.S. at 20).

the officer's "beat" is an airport.

Justice Brennan (joined, as was Justice Blackmun, by Justice Marshall) objected that (i) "*Terry* and its progeny did not address seizures of property"¹⁶⁰ and (ii) that "there is a difference between incidental seizures of personal effects," which may happen when a person carrying luggage is himself detained, "and seizures of property independent of the seizure of the person," because the latter "significantly expand the scope of [the intrusion]."¹⁶¹ The first of these points, which underlies Justice Brennan's exprobation that *Place* constitutes "a radical departure from settled Fourth Amendment principles,"¹⁶² is far from compelling. To say that this issue was not anticipated and addressed in *Terry* indicates nothing about how it should now be resolved, and the outcome in *Place* is hardly any more radical than that in *Terry*, the first case to uphold seizure of a person on less than probable cause.

As for the second point, the assertion that the seizure of effects permitted by *Place* serves to "significantly expand the scope of [the intrusion]," this simply is not so. There is no extension in a temporal sense, for the Court in *Place* ruled that effects taken from a suspect's possession may be detained only so long as the suspect himself could be held.¹⁶³ Justice Brennan's assumption thus must be that there is an extension in the sense of a more serious kind of intrusion, referred to by him as "dispossession of his personal effects."¹⁶⁴ But what makes that more serious than the permissible alternative is never explained. Assuming a case where under *Terry* a suspected drug courier could be detained where stopped for fifteen minutes until a drug detection dog could be brought there to inhale his suitcase, it is difficult to see why it is more intrusive to dispossess the suspect of his luggage and take it to the dog with the understanding that if probable cause for seizure does not develop the bags will be returned in fifteen minutes.¹⁶⁵ That is, fifteen minutes of dispos-

¹⁶⁰ 103 S. Ct. at 2650 (Brennan, J., concurring).

¹⁶¹ *Id.* at 2649 (Brennan, J., concurring).

¹⁶² *Id.*

¹⁶³ Justice Brennan's concurrence proceeds as if the majority had not so held, and in discussing the instant case says that when the officers did not develop probable cause in their encounter with Place "they had to let him go" and that their seizure of his luggage at that point was "an independent dispossession of his personal effects" which makes the total intrusion "more severe." *Id.* at 2650 (Brennan, J., concurring). But if it is true that the circumstances were such that no further detention of Place would have been permissible, then under the majority's formulation no dispossession of the effects would have been permissible at that point either.

¹⁶⁴ 103 S. Ct. at 2650 (Brennan, J., concurring).

¹⁶⁵ Since the Court in *Place* required adherence to "the limitations applicable to investigative detentions of the person," *id.* at 2645; see *supra*, note 163, why did the Court go on to say that in the instant case

the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he

session is not more intrusive than fifteen minutes of detention.¹⁶⁶

More troublesome is *Michigan v. Long*,¹⁶⁷ where two officers, patrolling in a rural area after midnight, saw a car travelling erratically and at excessive speed swerve into a ditch, so they stopped to investigate. Long, the sole occupant of the vehicle, met the officers at the rear of his automobile but started back toward its open door when asked for his vehicle registration. The officers saw a hunting knife on the floor, and one officer then shined a light into the car to seek other weapons. Upon seeing something protruding from under the armrest, the officer reached in, lifted the armrest, and found an open pouch of marijuana. In upholding this police action, the Court ruled:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.¹⁶⁸

The Court emphasized that this "does not mean that the police may conduct automobile searches *whenever* they conduct an investigative stop," since "officers who conduct area searches during investigative detentions must do so only when they have the level of suspicion identified in *Terry*."¹⁶⁹

Two of the dissenters¹⁷⁰ in *Long* remonstrated that the "intrusion

might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion?

Id. at 2646. Does this mean that the result would have been different if the agents had advised Place what they intended to do with the luggage and, instead of merely giving him their phone number, had explained how long it would take and how they would get the suitcases back to him, as in the hypothetical put in *supra* note 163? Apparently not. Rather, this language taken with that quoted there suggests that police who do not sufficiently advise the suspect about the dimensions of the dispossession will thereby invalidate an otherwise lawful seizure of effects. For example, assume again that Place could have been held with his luggage where stopped for 15 minutes and that consequently under the Court's analysis the agents could also dispossess Place of the suitcases for 15 minutes. If the agents without sufficient explanation simply disappeared with the suitcases and then reappeared there 15 minutes later but could not terminate the dispossession because Place was gone, certainly the resulting continuation of the intrusion beyond that permissible should be charged to the police rather than to Place. This is because Place was not properly advised as to how he could minimize the interference with his travels and his possession of the luggage.

¹⁶⁶ Indeed, it might be argued that when the investigative technique to be used is a drug detection dog, then the dispossession is actually less intrusive because the technique may be utilized in circumstances not embarrassing to the suspect. See *supra* text following note 64.

¹⁶⁷ 103 S. Ct. 3469 (1983).

¹⁶⁸ *Id.* at 3480 (quoting *Terry*, 392 U.S. at 21).

¹⁶⁹ *Id.* at 3480 n.14 (emphasis in original).

¹⁷⁰ Justices Brennan and Marshall. Two other Justices, Justice Blackmun, concurring, and Justice Stevens, dissenting, disagreed with the majority's other ruling that if a state court decision appears to rest primarily on federal law or to be interwoven with federal law, then it

involved in this case is precisely 'the kind of intrusion associated with an arrest' " and that consequently there "is no justification . . . for 'balancing' the relevant interests."¹⁷¹ But, while it may be true that a search into a suspect's vehicle is a somewhat greater intrusion than the search of the person permitted under *Terry*,¹⁷² it is more limited¹⁷³ than the search which may be made incident to an arrest of an occupant of the car.¹⁷⁴ Also, it serves a compelling governmental interest—as it was put in *Terry*, "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."¹⁷⁵ As even the two dissenters acknowledged, "police should not be exposed to unnecessary danger in the performance of their duties."¹⁷⁶ As an abstract proposition, therefore, the extension of the *Terry* protective search concept to vehicles is unobjectionable.

B. "LESS INTRUSIVE MEANS" AND BALANCING TEST SEARCHES

The *Long* majority's nonsequacious application and elaboration of this rule is another matter, however. The Court unfortunately took a most expansive view of what constitutes danger in the context of a *Terry* stop of a person in an automobile. As a result, *Long* can easily be read by lower courts so inclined as conferring on police the power to make extensive vehicle searches without probable cause incident to virtually any lawful stopping of a vehicle. It is thus quite fair to say, as the dissenters warn, that "the implications of the Court's decision are frighten-

will be presumed that the state court decided the case the way it did because it believed federal law required it to do so, meaning that in such circumstances an independent state ground will exist only if the state court decision clearly and expressly indicates that it is alternatively based on bona fide separate, adequate, and independent state grounds.

¹⁷¹ 103 S. Ct. at 3487 (Brennan, J., dissenting).

¹⁷² A search into a vehicle is bound to be more intrusive in some respects, as the area of intrusion is greater and it is not feasible to limit the search by the two-step, pat-down-first procedure applicable to the person of the suspect. But that may be offset to some extent by the fact that a search of one's person carries a greater degree of offensiveness with it.

¹⁷³ Just how much more limited is, unfortunately, one of the ambiguities in *Long*. The *Long* holding says that the search must be (i) confined to "the passenger compartment of an automobile," and (ii) "limited to those areas in which a weapon may be placed or hidden." 103 S. Ct. at 3480. The second limitation does not also apply in search incident to arrest situations, *see infra* note 174, but its significance depends largely upon such questions as whether the term "weapon" in this context includes such possibilities as a razor blade and also whether a soft container must in any event be patted down first.

¹⁷⁴ Under *New York v. Belton*, 453 U.S. 454, 460 (1981), "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile," inclusive of "the contents of any containers found within the passenger compartment."

¹⁷⁵ 392 U.S. at 23.

¹⁷⁶ 103 S. Ct. at 3488 (Brennan, J., dissenting).

ing.”¹⁷⁷ In particular, the *Long* majority’s analysis is flawed in three significant respects: (i) as to whether the officer is obligated to take any steps to minimize the danger that might otherwise exist; (ii) as to when a sufficient likelihood of danger exists in terms of the suspect’s possible access to the vehicle; and (iii) as to when, assuming access, a suspect is sufficiently likely to be armed and dangerous.

Unquestionably the most perverse aspect of *Long* is the Court’s assertion that because a *Terry* investigation “‘at close range’” requires the officer to make a “‘quick decision as to how to protect himself and others from possible danger,’” there is no requirement whatsoever “that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.”¹⁷⁸ In other words, if an officer could avoid any risk of the suspect getting at any possible weapon in the car by having him exit and move away from the vehicle,¹⁷⁹ he may ignore that alternative and thereby create a continuing danger that justifies a search inside the automobile for which the officer lacks probable cause. No authority is cited to support this bootstrapping principle because there is none. Indeed, *Terry* and its progeny point in the opposite direction. In *Terry*, the Court stressed that a search for weapons must “be strictly circumscribed by the exigencies” and “limited to that which is necessary,”¹⁸⁰ which is hardly consistent with this new notion that the police are free to fashion their own exigencies and necessities. In *Adams v. Williams*,¹⁸¹ the Court upheld police action more intrusive than previously authorized in *Terry*, but did so only after emphasizing that the officer tried to avoid the necessity for such action by first requesting the suspect “to step out of the car so that his movements could more easily be seen.” And in *Pennsylvania v. Mimms*, the Court’s recognition that police must have carte blanche to order any lawfully stopped driver out of his vehicle was grounded in the conclusion that such action “reduces the likelihood that the officer will be the victim of an assault.”¹⁸² Because it most certainly does with respect to the likelihood of assault with any weapons in the car, it is particularly unfortunate that the Court in *Long* permitted (indeed, emboldened) officers to forego that alternative and similar protective measures and thereby gain the prerogative to make searches without probable cause. Had the Court in *Long* instead indicated that alternative protective measures should be utilized

¹⁷⁷ *Id.* at 3487 (Brennan, J., dissenting).

¹⁷⁸ *Id.* at 3482.

¹⁷⁹ The Court previously had held that such a precautionary measure is a lawful course of action incident to any lawful stopping. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

¹⁸⁰ 392 U.S. at 26.

¹⁸¹ 407 U.S. 143, 148 (1972).

¹⁸² 434 U.S. at 110.

whenever feasible, the decision would have permitted protective searches of vehicles in a relatively small (and tolerable) number of cases.

A second iniquitous feature of *Long* is the breadth with which the Court describes the likelihood of a suspect's access to his car which will suffice (if the *Terry* "may be armed and presently dangerous" test is otherwise met) to justify search into the vehicle. The Court's holding indicates that such a search is permissible only if, *inter alia*, the officer reasonably believes "the suspect may gain immediate control of weapons."¹⁸³ This would seem to encompass a reasonable judgment about the suspect's ability in the particular circumstances to get back into the car. Yet, the Court rather summarily dismissed the lower court's ruling that there was no need for a vehicle search in the instant case because Long was then in the control of the officers.¹⁸⁴ Though the lower court's conclusion seems especially justified in *Long*, where the apparently dazed suspect was alone and in the custody of two armed officers at the rear of a vehicle which had swerved into a ditch, the Supreme Court countered that "a *Terry* suspect in Long's position [might] break away from police control and retrieve a weapon from his automobile."¹⁸⁵ Whether the Court would have made the same pronouncement on other facts—*e.g.*, if Long had taken a seat in the police car—is unclear. But this language is certainly susceptible to the interpretation that a "break away" ability is to be assumed without regard to the facts of the particular case. If that is what the Court intends, then *Long*, in this respect, creates a "bright line" just as pernicious as the one in *New York v. Belton*.¹⁸⁶

On this matter of access to weapons, the Court in *Long* offered another possibility: "[T]he suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons."¹⁸⁷ Indeed, that was the situation in *Long*, for the suspect, at the officers' request, was about to get into his car to obtain the vehicle registration. But, unless one accepts the Court's notion that the police need take no alternative measures to ensure their safety, there is no reason why a suspect thought to be dangerous should be allowed to reenter his car for that purpose. As the dissenters noted, the police could have continued to detain respondent outside the car and asked him to tell them where his registration was and "then could have retrieved the re-

¹⁸³ 103 S. Ct. at 3480.

¹⁸⁴ *Michigan v. Long*, 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'd*, 103 S. Ct. 3469 (1983).

¹⁸⁵ 103 S. Ct. at 3481.

¹⁸⁶ 453 U.S. 454 (1981), criticized in this respect in LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 324-33 (1982); see *supra* note 174.

¹⁸⁷ 103 S. Ct. at 3482.

gistration themselves," which "would have resulted in an intrusion substantially less severe than the one at issue here."¹⁸⁸

The third type of access identified by the *Long* majority is that which often occurs at the conclusion of a *Terry* stop: "[I]f the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside."¹⁸⁹ There is no denying that such propinquity will occur with some frequency, but it is not likely to create any danger to the officer. To justify a protective search, *Terry* instructs, there must be a reasonable belief that the suspect is "armed and presently dangerous." Except perhaps in extraordinary circumstances, no such belief will exist as to post-detention access, for it is most unlikely that a suspect would want to attack the officer who had just told him he was free to go. In *Long*, for example, it seems fanciful to suggest that if the police had concluded that he was not intoxicated and had permitted him to go his way, perhaps after issuing a ticket for speeding, there was any appreciable risk that Long would have returned to his car, obtained a weapon, and tried to attack the officers before they left the scene.

In support of its conclusion that the danger to officers in the context of vehicle stops is such as to justify the broad search power conferred, the Court in *Long* relied upon an empirical study of police shootings published in this Journal¹⁹⁰ and relied upon by the Court in the past.¹⁹¹ But a closer examination of that research discloses that it does not give credence to the *Long* analysis. The study reported that of police officers shot in connection with vehicle stops, about half were shot by persons seated in or concealed in a car, about a third by persons standing outside the car talking to the police, and the rest by persons then exiting the car or fleeing the scene. Quite clearly, a power to search the car is neither adequate nor necessary to protect the police in any of those situations. No mention is made in the study of any instance in which a person outside the car returned to the vehicle and then shot the officer. Thus, it is quite understandable why the author does not propose that police be allowed to search cars, but rather that they maintain better "vehicle occupant control while issuing traffic tickets, interrogating, or [performing] other routine police business."¹⁹²

Next, the Court in *Long* seems to imply that rather generous pre-

¹⁸⁸ *Id.* at 3488 n.7 (Brennan, J., dissenting).

¹⁸⁹ *Id.* at 3481.

¹⁹⁰ Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 93 (1963).

¹⁹¹ *E.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973); *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972).

¹⁹² Bristow, *supra* note 190, at 95.

sumptions may be entertained as to what types of suspects might be armed and dangerous, that is, might have a weapon in the vehicle and be motivated to use it against the officer or others in the event of access to the vehicle. Where, as in *Terry*, the observed activity appeared "to be preface to a 'stick-up,'" then surely (as the Court there concluded) the officer was "warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior."¹⁹³ But in *Long* the suspected offense was driving while intoxicated; as the dissenters noted, "A drunk driver is indeed dangerous while driving, but not while stopped on the roadside by the police."¹⁹⁴ And while the officers had seen an apparently lawful hunting knife in the car, not a particularly remarkable discovery in rural Michigan, that sheds little if any light on the questions of whether there is another weapon in the car (which the Court said the officer was properly searching for when the marijuana was discovered) or whether Long was at all likely to make use of any weapon. The same may be said of the other factors relied upon by the Court, such as that the stopping occurred late at night and in a rural area. Lower courts have understandably usually required more than this to justify a *Terry* search.¹⁹⁵

Likewise objectionable for its failure to heed the *Terry* proviso that searches under the balancing test must be "limited to that which is necessary" is *Illinois v. Lafayette*.¹⁹⁶ The Court there held "that it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."¹⁹⁷ As for the lower court's conclusion that the inventory of all of the arrestee's effects was unnecessary because "the defendant's shoulder bag could easily have been secured by sealing it within a plastic bag or box and placing it in a secured locker,"¹⁹⁸ the Supreme Court responded:

We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding

¹⁹³ *Terry*, 392 U.S. at 28.

¹⁹⁴ 103 S. Ct. at 3487 (Brennan, J., dissenting).

¹⁹⁵ See cases discussed in 3 W. LAFAVE, *supra* note 122, at § 9.4(a).

¹⁹⁶ 103 S. Ct. 2605 (1983).

¹⁹⁷ *Id.* at 2611.

¹⁹⁸ 99 Ill. App. 3d 830, 835, 425 N.E.2d 1383, 1386 (1981).

which containers or items may be searched and which must be sealed as a unit.¹⁹⁹

This repudiation of the lower court's "less intrusive means" approach is troublesome at best. The Court correctly noted that it had previously rejected that reasoning in *South Dakota v. Opperman*²⁰⁰ and *Cady v. Dombrowski*,²⁰¹ but the alternative understandably dismissed in those cases was the expensive procedure of posting a guard with a vehicle for some substantial period of time. Police departments presumably have secure areas where small effects can be stored, and thus the alternative urged in *Lafayette* seems much less impracticable. Indeed, the Court had stressed on an earlier occasion that the difficulties it had described in *Opperman* and *Cady* did not carry over to situations involving containers.²⁰² Perhaps *Lafayette* is not of great practical importance in its particular application because of the tendency of courts to view containers in an arrestee's immediate possession as "fair game" under the *Robinson-Belton* search-incident-to-arrest rule.²⁰³ But it is nonetheless worrisome when viewed as precedent for the casuistic proposition that the existence of less intrusive alternatives is generally irrelevant in fourth amendment adjudication.

C. "LEAST INTRUSIVE MEANS" AND BALANCING TEST SEIZURES

In *Florida v. Royer*,²⁰⁴ a suspected drug courier was lawfully questioned in an airport concourse and then required to accompany the police about forty feet to a small police office, where the suspect consented to a search of his suitcases after they were obtained from the airline and brought to the room. Although the total elapsed time was fifteen minutes, the four-Justice plurality in *Royer* concluded that the consent was the fruit of an illegal arrest. In the course of reaching that conclusion, the *Royer* plurality placed great emphasis upon two points: (i) that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";²⁰⁵ and (ii) that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."²⁰⁶

The first of these two principles (at least if unadorned by the second) is certainly unobjectionable and fully consistent with the previ-

¹⁹⁹ 103 S. Ct. at 2610.

²⁰⁰ 428 U.S. 364 (1976).

²⁰¹ 413 U.S. 433 (1973).

²⁰² *United States v. Chadwick*, 433 U.S. 1 (1977).

²⁰³ See 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5(a) (1978).

²⁰⁴ 103 S. Ct. 1319 (1983).

²⁰⁵ *Id.* at 1325.

²⁰⁶ *Id.*

ously discussed notion that intrusions under the balancing test should be kept to the necessary minimum. But the second appears to impose a more onerous burden than is reflected in prior cases. As the *Royer* plurality explained,

the State has not touched on the question whether it would have been feasible to investigate the contents of Royer's bags in a more expeditious way. The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage. There is no indication here that this means was not feasible and available. If it had been used, Royer and his luggage could have been momentarily detained while this investigative procedure was carried out. Indeed, it may be that no detention at all would have been necessary. A negative result would have freed Royer in short order; a positive result would have resulted in his justifiable arrest on probable cause.²⁰⁷

In other words, the *Royer* plurality opinion appears to mean²⁰⁸ that a *Terry* stop can become an arrest (and consequently an illegal one if probable cause is then lacking) if it appears that the police could have utilized some other means of investigation which it is believed would have been less intrusive.

Although only four Justices joined in that language, it is most noteworthy that Justice Brennan, concurring, while unwilling to concede "that the use of trained narcotics dogs constitutes a less intrusive means

²⁰⁷ *Id.* at 1328-29 (footnote omitted).

²⁰⁸ To the extent that there is some uncertainty as to exactly what the plurality's position is, it is because this "least intrusive means" point is connected to concern about movement of the suspect to another location, which is itself expressed none too clearly. At one point it is asserted that it is consistent with the conclusion that Royer was under arrest that he would not have been free to leave the room. But this is misleading, as inability to leave (or, more precisely, that a reasonable man would believe he is not free to leave, *see supra* text accompanying note 72, only establishes that there was some kind of seizure, not whether it is of the arrest or *Terry* variety. Equally perplexing for the same reason is the assertion that "the officers' conduct was more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases." *Id.* at 1328. Moreover, the plurality appears not to have recognized the point made by Justice Blackmun in his dissent, that the suspect, even if he had already been seized, could nonetheless have consented to have the detention continue in the room rather than in the concourse. *Id.* at 1334-35 (Blackmun, J., dissenting).

Yet another possible interpretation of the plurality's concern over the movement of the suspect is that they believe that under *Dunaway v. New York*, 442 U.S. 200 (1979), any transportation of the suspect to the coercive surroundings of a police facility, no matter how near, transforms the situation into an arrest. This is suggested by these comments concerning Royer:

He found himself in a small room—a large closet—equipped with a desk and two chairs. He was alone with two police officers who again told him that they thought he was carrying narcotics. He also found that the officers, without his consent, had retrieved his checked luggage from the airlines. What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions.

103 S. Ct. at 1327.

of conducting a lawful *Terry* stop,"²⁰⁹ expressed a view which—if anything—was even more demanding: "[A] lawful stop must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop."²¹⁰ Consequently, one might well conclude that this "least intrusive means" concept has the support of a majority of the Court. (If there is doubt about this, it may be because later the same Term, as discussed earlier, the Court rejected a "least intrusive means" theory in circumstances where it was much more compelling than in *Royer*.)

The other four members of the Court took serious exception to this new "least intrusive means" principle. Justice Rehnquist declared:

All this to my mind adds up to little more than saying that if my aunt were a man, she would be my uncle. The officers might have taken different steps than they did to investigate *Royer*, but the same may be said of virtually every investigative encounter that has more than one step to it. The question we must decide is what was *unreasonable* about the steps which *these officers* took with respect to *this* suspect in the Miami Airport on this particular day.²¹¹

The dissenters' concern is justified. This is not to suggest that a "least intrusive means" inquiry has no place in the *Terry* balancing process; for the reasons already stated, the Court would have been well advised to pursue that approach in *Long* and *Lafayette*. But in the present case, where unlike *Long* the question is not whether there will or will not be a certain fourth amendment intrusion (there a vehicle search, here a seizure of the person), but rather how extensive it may be, and where in addition the consideration of alternatives is likely to involve numerous imponderables, a "least intrusive means" inquiry has a great potential for mischief. It is likely to result in unrealistic second-guessing of the police.

This is especially true if a court were to go about it in the fashion suggested by the *Royer* plurality opinion. Under the approach taken there, apparently any possible alternative investigative technique is to be presumed more expeditious than the one chosen by the police until the prosecution proves otherwise. Because of an absence of such proof, the plurality seems to assume that the use of a detection dog would be "more expeditious."²¹² It said that the officers should have detained

²⁰⁹ *Id.* at 1331 (Brennan, J., concurring). This occurred before the Court later that Term held that use of a drug detection dog against unaccompanied luggage in a public place was no search. *United States v. Place*, 103 S. Ct. 2637 (1983). Use of a dog in certain other circumstances, however, may be fourth amendment activity. *See supra* text accompanying note 61.

²¹⁰ 103 S. Ct. at 1331 n.* (Brennan, J., concurring).

²¹¹ *Id.* at 1340 (Rehnquist, J., dissenting)(emphasis in original).

²¹² *Id.* at 1328.

Royer "for the brief period during which Florida authorities at busy airports seem able to carry out the dog-sniffing procedure,"²¹³ though (as the Court was to learn later the same Term²¹⁴) these dogs are not always that readily available. The plurality implied that seeking consent is not as expeditious, but (again, as the Court was to learn later that Term²¹⁵) consent might be very promptly obtained. If not, or if there is not time for a search before the suspect's flight departs, the suspect might be allowed to go his way and the investigation continued at his destination. The plurality also intimated that the procedure followed was unduly intrusive because of the move to the room some 40 feet away. As the dissenters quite properly asked, however:

Would it have been more "reasonable" to interrogate Royer about the contents of his suitcases, and to seek his permission to open the suitcases when they were retrieved, in the busy main concourse of the Miami Airport, rather than to find a room off the concourse where the confrontation would surely be less embarrassing to Royer?²¹⁶

D. SEIZURE ABSENT REASONABLE SUSPICION OR
ESTABLISHED ROUTINE

Finally, *United States v. Villamonte-Marquez*²¹⁷ must be noted. This case is especially significant because it pushed the balancing test well beyond its applications in *Camara* and *Terry*. As noted earlier, under the balancing test the Court has heretofore allowed certain police actions upon a reasonable suspicion (as in *Terry*) or pursuant to an established routine ensuring against arbitrariness (as in *Camara*).²¹⁸ But in *Villamonte-Marquez*, the Court upheld the statutory authority of customs officers to "'at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers.'"²¹⁹ Thus, the Court for the first time upheld fourth amendment activity not grounded in either a reasonable suspicion or an established routine such as a checkpoint operation. The Court offered these reasons for doing so:

²¹³ *Id.* at 1328 n.10.

²¹⁴ In *United States v. Place*, 103 S. Ct. 2637 (1983), the suspect's luggage was held for 90 minutes so that it could be taken from LaGuardia Airport to Kennedy Airport in New York City, where there was such a dog available.

²¹⁵ In *United States v. Place*, 103 S. Ct. 2637 (1983), the suspect promptly consented to a search of his bags in Miami but he was allowed to depart instead because his flight was about to leave; the investigation was continued when he arrived in New York.

²¹⁶ 103 S. Ct. at 1340 (Rehnquist, J., dissenting).

²¹⁷ 103 S. Ct. 2573 (1983).

²¹⁸ See *supra* text accompanying notes 150 and 151.

²¹⁹ 103 S. Ct. at 2575 (quoting 19 U.S.C. § 1581(a) (1976)). Though the statute read literally appears to confer greater authority upon customs officers, the Court considered only their power to board for document inspections.

In a lineal ancestor to the statute at issue here the First Congress clearly authorized the suspicionless boarding of vessels, reflecting its view that such boardings are not contrary to the Fourth Amendment; this gives the statute before us an impressive historical pedigree. Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment, . . . but stops at fixed checkpoints or at roadblocks are. . . . The nature of waterborne commerce in waters providing ready access to the open sea is sufficiently different from the nature of vehicular traffic on highways as to make possible alternatives to the sort of "stop" made in this case less likely to accomplish the obviously essential governmental purposes involved. The system of prescribed outward warnings used by States for vehicle registration is also significantly different than the system of external markings on vessels, and the extent and type of documentation required by federal law is a good deal more variable and more complex than are the state vehicle registration laws. The nature of the governmental interests in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, are substantial; the type of intrusion made in this case, while not minimal, is limited.²²⁰

One hopes that *Villamonte-Marquez* does not serve as a precedent for any other such generous conferral of law enforcement authority, as the majority's reasoning has little to commend it. For one thing, the asserted "impressive historical pedigree" is nonexistent.²²¹ For another, the *Villamonte-Marquez* case is another instance in which, unfortunately, the availability of less intrusive means doesn't count. In response to the majority's assertion that Congress need not choose a registration system comparable to that used by the states for autos,²²² the dissenters cogently commented: "It is unseemly at best for the Government to refrain from implementing a simple, effective, and unintrusive law enforcement device, and then to argue to this Court that the absence of such a device justifies an unprecedented invasion of constitutionally guaranteed liberties."²²³ Moreover, what the majority calls "only a modest intrusion" is much more serious than the stopping at issue in *Prouse*, since it involves an actual boarding of what serves for many as a temporary dwelling. For these reasons, there is much to be said for the dissenters' position that "if random stops by roving patrols are necessary, they [should] be subjected to some sort of neutral selection system

²²⁰ 103 S. Ct. at 2582.

²²¹ Justice Brennan, joined by Justice Marshall, dissenting, objected that the statute passed by the First Congress was a border-search statute, applicable only to vessels entering the country, while the present statute, enacted in 1922, "purported to authorize suspicionless boardings of vessels without regard to whether there had been any border crossing." *Id.* at 2586 n.7.

²²² In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court concluded that because of the state's vehicle registration system, there was no need to permit the random stopping of vehicles to ascertain compliance with registration requirements.

²²³ 103 S. Ct. at 2590 (Brennan, J., dissenting).

that would decrease the opportunity for arbitrariness or harassment."²²⁴

IV. THE WARRANT REQUIREMENT

Because the fourth amendment says nothing about when a warrant is required, a recurring and difficult issue concerns the circumstances in which a seizure or a search may be made without a warrant. The Supreme Court's traditional teaching is that the prior judgment of a judicial officer is ordinarily to be preferred. The warrant process, the Court has said, "interposes an orderly procedure"²²⁵ involving "judicial impartiality"²²⁶ whereby "a neutral and detached magistrate"²²⁷ can make "informed and deliberate determinations"²²⁸ on the issue of probable cause. To leave such decisions to the police is to allow "hurried action"²²⁹ by those "engaged in the often competitive enterprise of ferreting out crime."²³⁰ Yet, the Court has often recognized exceptions to the warrant requirement.

It is clear that some fourth amendment interests are considered more important than others when it comes to determining whether an intrusion upon them ordinarily should be allowed only with the prior approval of a magistrate. Paramount is the privacy in one's dwelling, as is reflected by the fact that the Court has declined to permit a warrantless search of premises even upon a fairly convincing showing of exigent circumstances.²³¹ By comparison, the seizure of a person which does not involve entry of private premises²³² is permissible without a warrant even absent any showing of exigent circumstances.²³³ As for automobiles, they are generally subject to search without a warrant. At one time this was explained by an unconvincing claim of exigent circumstances,²³⁴ but the rationale now is that vehicles have a "diminished expectation of privacy."²³⁵ As for other containers, under *United States v.*

²²⁴ *Id.* at 2590 n.10.

²²⁵ *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

²²⁶ *Id.*

²²⁷ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

²²⁸ *Aguilar v. Texas*, 378 U.S. 108, 110 (1964).

²²⁹ *Aguilar*, 378 U.S. at 110 (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

²³⁰ *Johnson*, 333 U.S. at 14.

²³¹ *Vale v. Louisiana*, 399 U.S. 30 (1970).

²³² In the event of such entry a warrant is required absent true exigent circumstances. *Steagald v. United States*, 451 U.S. 204 (1981) (search warrant required for entry of third-party premises); *Payton v. New York*, 445 U.S. 573 (1980) (arrest warrant needed for defendant's own premises).

²³³ *United States v. Watson*, 423 U.S. 411 (1976). But "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

²³⁴ *Chambers v. Maroney*, 399 U.S. 42 (1970).

²³⁵ *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

*Chadwick*²³⁶ and *Arkansas v. Sanders*²³⁷ they carry a greater privacy expectation than cars and, accordingly, are not covered by a general warrantless search rule. The *Chadwick-Sanders* rule was recently reaffirmed in *United States v. Ross*,²³⁸ thus renewing interest in the question of what special circumstances permit the warrantless opening of a container. Two cases last Term touched upon that issue.

A. CONTENTS "INFERRED FROM THEIR OUTWARD APPEARANCE"

In footnote 13 of the *Sanders* case, quoted with apparent approval in *Ross*,²³⁹ the Court said:

Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.²⁴⁰

Except in the easy case where there is unquestionably a plain view in the sense of a direct observation of the contents because the container is partially open or transparent,²⁴¹ it is unclear what situations footnote 13 is intended to cover. One possibility is plain view once removed, as where, to use the language of the plurality in *Robbins v. California*,²⁴² "the distinctive configuration of a container proclaims its contents." The *Sanders* illustration of "a gun case" is such a situation. But the other illustration given by the *Sanders* Court, "a kit of burglar tools," though accepted by the *Robbins* plurality as among "the very model of exceptions which prove the rule,"²⁴³ cannot be explained on the same basis. There is no "distinctive configuration" which, standing alone, identifies the contents of a container enclosing burglar tools. Thus, there is an inherent ambiguity in the footnote 13 exception: was the burglar tools hypothetical merely an ill-considered example, or was it intended to suggest that there are still other situations in which no warrant is required?

The *Robbins* case illustrates the significance of this question. Each of the packages searched without a warrant in that case "resembles an

²³⁶ 433 U.S. 1 (1977).

²³⁷ 442 U.S. 753 (1979).

²³⁸ 456 U.S. 798 (1982).

²³⁹ *Id.* at 814 n.19 (quoting *Sanders*, 442 U.S. at 764 n.13).

²⁴⁰ 442 U.S. at 764 n.13.

²⁴¹ *Tillman v. State*, 275 Ark. 275, 630 S.W.2d 5 (1982) (garment bag partially open, revealing stolen goods), *cert. denied*, 103 S. Ct. 1185 (1983); *State v. Schrier*, 283 N.W.2d 338 (Iowa 1979) (clear plastic bag of marijuana protruding from knapsack).

²⁴² 453 U.S. 420, 427 (1981).

²⁴³ *Id.*

oversized, extra-long cigar box with slightly rounded corners and edges," "wrapped or boxed in an opaque material covered by an outer wrapping of transparent, cellophane-type plastic" and "sealed on the outside with at least one strip of opaque tape."²⁴⁴ The California court of appeals concluded that these packages fell within the footnote 13 exception of *Sanders*, since "[a]ny experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana."²⁴⁵ But the *Robbins* plurality disagreed; noting that the searching officer testified he "had heard" that marijuana was so packaged but "had never seen" such a package before, they said:

This vague testimony certainly did not establish that marijuana is ordinarily "packaged in this way." Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer. If indeed a green plastic wrapping reliably indicates that a package could only contain marijuana, that fact was not shown by the evidence of record in this case.²⁴⁶

This strongly suggests that those four Justices declined to accept Justice Rehnquist's conclusion that the officer "was aware that contraband was often wrapped in this fashion,"²⁴⁷ for they believed that this was not (as Rehnquist put it) "a fact of which all those who watch the evening news are surely aware,"²⁴⁸ but rather a fact which could be established only by a stronger showing of the officer's relevant experience and expertise. The "or otherwise" in the *Robbins* plurality opinion thus seems to mean at least this: even if the contents of the container are not seen, felt, smelled, or revealed by the shape of the container, the container still does not deserve the full protections of the fourth amendment if the character of the container alone suffices to "clearly announce" its contents.²⁴⁹ So stated, the rule appears to require (i) a high degree of certainty about the contents of the container (ii) ascertained from the nature of the container itself.

It must be asked whether the first of these possible requirements calls for a higher degree of probability than is necessary under the probable cause test and, if so, how much higher. This question logically

²⁴⁴ *Id.* at 422 n.1.

²⁴⁵ 103 Cal. App. 3d 34, 40, 162 Cal. Rptr. 780, 783 (1980).

²⁴⁶ *Robbins*, 453 U.S. at 428.

²⁴⁷ *Id.* at 442 (Rehnquist, J., dissenting).

²⁴⁸ *Id.*

²⁴⁹ For example, if a brick-shaped object with rounded edges in a plastic container clearly announces that it contains marijuana and if a small glassine or tinfoil package or a tied-up balloon clearly announces that it contains illegal drugs, then these containers may be searched without a warrant.

leads to the recent case of *Texas v. Brown*,²⁵⁰ where, after a car was stopped at a routine driver's license checkpoint, an officer saw the driver drop a knotted opaque party balloon onto the seat and then observed several small plastic vials, quantities of loose white powder and an open bag of party balloons in the glove compartment. The officer then seized the balloon, which a police chemist later determined contained heroin. The defendant challenged the warrantless seizure of the balloon, and the court below decided in his favor, ruling that the state could not avail itself of the "plain view" doctrine because the officer did not know that incriminating evidence was before him.²⁵¹ The four-Justice plurality opinion, addressing this "plain view" theory, concluded that it required not the "near certainty" assumed by the court below but only probable cause. They then determined "that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance."²⁵²

If plain view excuses a warrant and is established by a showing of probable cause, then it appears that *Chadwick-Sanders* has been reduced to the nonsense proposition that no warrant is needed to search any observable container for which a warrant could lawfully issue. But this is not what *Brown* means, which would have been more apparent had the plurality eschewed its infelicitous plain view analysis. It is noteworthy that at no point does the plurality refer to *Sanders* or in any way suggest that it is interpreting the footnote 13 exception. More importantly, the question of when a warrant is needed to search a container was not even before the Court. The defendant inexplicably raised only the question of the warrantless seizure of the balloon, and only that issue was addressed by the Supreme Court. As the three concurring Justices pointed out, that is a relatively easy issue and one which, under the Court's prior decisions, can be best resolved without becoming entangled in the troublesome concept of "plain view." The seizure of a container requires only probable cause, but it does not follow from this that a warrantless search of the container would also be permissible.²⁵³ Rather, absent probable cause to search the entire car,²⁵⁴ a warrant is necessary unless the case

²⁵⁰ 103 S. Ct. 1535 (1983).

²⁵¹ 617 S.W.2d 196 (Tex. 1981).

²⁵² 103 S. Ct. at 1543.

²⁵³ They correctly noted, after citing *Ross*, *Chadwick*, and *Sanders*: "All of these cases . . . demonstrate that the constitutionality of a container search is not automatically determined by the constitutionality of the prior seizure." *Id.* at 1546-47 (Stevens, J., concurring).

²⁵⁴ Actually, in *Brown* it appears that there was probable cause to search the entire car, so that under *Ross* (not yet decided when the Texas court ruled in the instant case) that would be the easiest basis upon which to uphold the search of the container. As the three concurring Justices noted, "it is entirely possible that what the officer saw in the car's glove compartment, coupled with his observation of respondent and the contents of his pockets, provided

may be brought within footnote 13 of *Sanders*. What is required, as these three Justices noted, is "a degree of certainty that is equivalent to the plain view of the heroin itself," that is, a "virtual certainty that the balloon contained a controlled substance."²⁵⁵ Whether this "virtual certainty" test will evolve as the standard under footnote 13 of *Sanders* remains to be seen; shortly after *Brown* in a somewhat analogous situation the Court utilized a less demanding (and, it seems, more ambiguous) test.²⁵⁶

Under a "virtual certainty" or similar test, the other question alluded to earlier remains: whether that determination must be based exclusively on the "very nature" of the container, as it is put in footnote 13 of *Sanders*. If it does, this will undoubtedly be the cause of considerable difficulty, for it is rather awkward, to say the least, to separate out the nature of the container from the circumstances of its possession or transportation in making any kind of judgment about what it contains. *Robbins* provides an excellent illustration of this point. If one were to ask whether there was a "virtual certainty" that the two packages contained marijuana, certainly one would consider not only the shape and size and wrapping of the packages, but also (as Justice Rehnquist emphasized) that they were found in the luggage compartment after the officers "had already discovered marijuana in the passenger compartment of the car" and that the defendant then "stated: 'What you are looking for is in the back.'"²⁵⁷ Likewise, in *Brown* one would consider not only the knotted balloon but also the fact that it was seen in a car in which several small plastic vials and quantities of loose white powder were also observed.²⁵⁸ In these and similar situations,²⁵⁹ it seems unrealistic to expect that the "virtual certainty" or similar determination should (or can) be made in total disregard of the circumstances in which the container is seen.²⁶⁰

probable cause to believe that contraband was located somewhere in the car—and not merely in the one balloon at issue." *Id.* at 1547 (Stevens, J., concurring).

²⁵⁵ *Id.* at 1547-48 (Stevens, J., concurring). As Justice Stevens observed,

[s]ometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in the particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, 'virtual certainty' is a more meaningful indicator than visibility.

Id. at 1548 n.5.

²⁵⁶ See *infra* text accompanying note 265.

²⁵⁷ *Robbins*, 453 U.S. at 442 (Rehnquist, J., dissenting).

²⁵⁸ Those additional facts are stressed by the plurality in *Brown*, though for them the question was only one of probable cause.

²⁵⁹ Another situation is when a container of a certain special type is found with other containers of exactly the same type which are open, revealing their contents. See *Blair v. United States*, 665 F.2d 500 (4th Cir. 1981).

²⁶⁰ The three concurring Justices in *Brown* did not address this point in specific terms, but they intimated agreement with it when they stated "a balloon of this kind might be used only

Of course, if this reasoning is pursued far enough, then the resulting rule is this: upon a "virtual certainty" that seizable objects are inside a container, it may be searched without a warrant, regardless of the nature or source of the information upon which that determination is made. In other words, even where the container itself is innocuous and unrevealing no warrant is needed if there is an exceptionally strong showing of probable cause based upon other information.²⁶¹ It is doubtful, however, whether footnote 13 of *Sanders* will or should evolve into such a rule. For one thing, such an open-ended search warrant exception, that is, one not limited to the first-hand perceptions of the police regarding the nature of the container and the circumstances of its use, would increase significantly the risk of erroneous police decisions on whether there is sufficient certainty to permit a warrantless search. For another, such an extension of the *Sanders* footnote 13 concept would out-run its rationale, namely, that a person cannot claim any reasonable expectation of privacy in a container when its "outward appearance" in the circumstances in which it is used makes it close to certain what it contains. Certainly, revealing the contents to a confidant, even one who happens to be especially credible, is another matter.

What then of incriminating admissions by the defendant? Assume this variation on *Robbins*: instead of merely saying "What you are looking for is in the back," the defendant says that there is marijuana in the luggage compartment, but the only container found therein (such as the tote bag also found in *Robbins*) itself indicates nothing about its contents. Is this a case in which a warrantless search is permissible? Justice Rehnquist would say yes, for he contended that the defendant in *Robbins* "could have no reasonable expectation of privacy in the contents of the garbage bags"²⁶² in light of his admissions to the police. In other words, the act of stating to police the contents of the container is much like revealing the contents by using a transparent container;²⁶³ in neither instance, to use the footnote 13 language, does the container "deserve the full protection of the Fourth Amendment." Authority in support of this conclusion can be found,²⁶⁴ and it certainly may be argued with

to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin." 103 S. Ct. at 1547; see also *supra* note 253.

²⁶¹ An example of this "other information" is an informant with extraordinary credentials, who fully reveals his solid basis of knowledge.

²⁶² 453 U.S. at 442 (Rehnquist, J., dissenting).

²⁶³ This analogy is most compelling when the statement is as to the entire contents of the container. If a person tells the police he has a stolen diamond ring in his suitcase, it might be argued that this is not a surrender of his privacy expectation regarding the contents of the suitcase generally.

²⁶⁴ *State v. Ludtke*, 306 N.W.2d 111, 114 (Minn. 1981) (when passenger in car said satchel contained hashish and unregistered guns, search without warrant proper, as "here the officer did not have to infer—he knew—what the contents of the satchel were. More importantly, he

some force that allowing a warrantless search in such circumstances makes at least as much sense as allowing it in some of the other situations already discussed. An unequivocal incriminating admission regarding the contents of the container leaves virtually no doubt as to what those contents are; by contrast, whether the officer's expertise and experience permit the conclusion that certain types of containers are very likely used only to hold illegal drugs might be thought to be precisely the kind of question as to which the judgment of a "neutral and detached" magistrate would be beneficial.

B. THE CONTROLLED DELIVERY

In another case last Term, *Illinois v. Andreas*,²⁶⁵ the Court for the first time dealt with the frequent law enforcement tactic commonly referred to as a controlled delivery. In its purest form, a controlled delivery involves a situation in which the police first make a lawful observation of the contraband contents of a certain container and then keep the receptacle under continual surveillance while it is delivered to the defendant, at which time the defendant is arrested and the container seized and opened. In *Andreas* the Court held that no warrant is needed in such circumstances because

once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening of the container is not a "search" within the intendment of the Fourth Amendment.²⁶⁶

As the dissenters pointed out, this characterization of the reopening of the package as no fourth amendment search at all is open to serious question.²⁶⁷ But the conclusion that no warrant is necessary in such circumstances is itself "a sensible rule which reasonably accommodates the

knew that defendant, by volunteering what the contents were, had implicitly signaled that he no longer had any expectation of privacy in the satchel"). But see *People v. Rinaldo*, 80 Ill. App. 3d 433, 435, 399 N.E.2d 1027, 1029 (1980) (a box in defendant's car could not be searched without a warrant merely because it was certainly the same box which police helped another person load into his car and which that person said contained a stolen microwave he was selling to defendant, as the police "had no first-hand knowledge of its contents"). *Rinaldo* is distinguishable from *Ludtke*, for there was no surrender of a privacy expectation by the defendant himself in *Rinaldo*; it is more like the informer hypothetical discussed in the preceding paragraph.

²⁶⁵ 103 S. Ct. 3319 (1983).

²⁶⁶ *Id.* at 3324.

²⁶⁷ Justice Brennan, joined by Justice Marshall, stressed that the fourth amendment protects not only secrecy but also security in effects, that the Court had never before "held that the physical opening and examination of a container in the possession of an individual was anything other than a 'search,'" *id.* at 3325, and that if the reopening was truly no search then it would not (contrary to the majority's assumption) even require probable cause. Justice Stevens, in a separate dissent, did not question this branch of the majority opinion.

values protected by the fourth amendment and the interests of effective law enforcement.”²⁶⁸ Even if the taking of the container from the arrestee is a new seizure, that alone is hardly objectionable. Such dispossession occurs anyway as an incident of the arrest, and, as the Court held in *Sanders*, the police have “acted properly—indeed commendably—”²⁶⁹ in seizing a container that they have probable cause to believe contains contraband. And even if the opening of the container really is a new search, the fact that it is made without a warrant is not objectionable either. This is because the earlier viewing of the contents makes the probable cause so certain as to be beyond question, thus obviating the need for a presearch judicial assessment of whether the police are entitled to open the container.

But there was a complicating factor in *Andreas*: the container, a large metal box holding a table filled with marijuana, was in defendant’s apartment beyond police surveillance for about forty-five minutes. The Court concluded that this makes no difference, as “there was no substantial likelihood here that the contents of the shipping container were changed during the brief period that it was out of sight of the surveilling officer.”²⁷⁰

The Court’s analysis is unconvincing. Whether one views the matter in terms of when a reasonable expectation of privacy reattaches, as the Court does in *Andreas*, or in terms of when the warrant process again becomes meaningful, as would seem more appropriate, certainly a more demanding test is needed. Justice Stevens proposed the “virtual certainty” standard he advocated in *Brown*. That would be a most appropriate standard for use in this setting: it is objective, it is more readily understood by police than (to take Justice Brennan’s apt characterization) the “vague intermediate standard”²⁷¹ adopted by the *Andreas* majority, and it excepts only a very special case in which added fourth amendment restraints are clearly unnecessary.²⁷²

V. SOME FINAL THOUGHTS

In seven of the nine search and seizure cases decided by the Supreme Court during the October 1982 Term, the Court overturned lower court rulings which had gone in the defendants’ favor. In the other two—*Royer* and *Place*—the Court affirmed lower court rulings

²⁶⁸ *McConnell v. State*, 595 P.2d 147, 154 (Alaska 1979).

²⁶⁹ *Sanders*, 442 U.S. at 761.

²⁷⁰ 103 S. Ct. at 3325.

²⁷¹ *Id.* at 3329 (Brennan, J., dissenting).

²⁷² The facts of *Andreas* stressed by the majority, the “unusual size of the container, its specialized purpose, and the relatively short break in surveillance,” *id.* at 3325, are such that the outcome would probably have been the same under a “virtual certainty” test.

against the state and federal governments, respectively, but in each instance created new fourth amendment law which will be useful to police and prosecutors in future cases. For some, such a "box score" of the Court's work in the fourth amendment area last Term undoubtedly suffices to show that something is amiss.

Though it is not simply a matter of won-lost statistics, the thesis of this Article is that something is amiss—that the Court this past Term has in several respects been unduly generous in its definition of the powers which the police may exercise consistent with the protections of the fourth amendment. This is especially so as to the important questions of what amounts to a protected expectation of privacy, what constitutes probable cause, how to strike a balance under *Camara-Terry*, and when containers are deserving of the protections of the warrant process. But it is not only a matter of the result, in the narrow sense, even in the cases dealing with those issues. Perhaps even more significant is the tenor and style of the decisions; it is almost as if a majority of the Court was hell-bent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials.

Lest this seem unduly threnodic, consider the following. In *Gates* the Court abandoned the well-established two-pronged probable cause test though (as Justice White made clear) that step was not necessary to the outcome. In *Place* the Court held that the use of a sniffing dog is no search and that luggage may be detained on reasonable suspicion, though a decision on neither point was necessary to the judgment. In *Royer* the plurality endorsed the legality of the initial stop though such a determination was wholly unnecessary in light of the subsequent police action amounting to an arrest without probable cause. In *Knotts* the Court, in holding that the use of a beeper was not a search, set out unnecessarily broad dicta on the "open fields" doctrine and the constitutional irrelevance of sense-augmenting devices generally. In *Andreas* the Court used a less demanding and more ambiguous standard when a "virtual certainty" test would have, in all likelihood, produced the same result. In *Lafayette* the Court declined to require police to establish more careful procedures even as to at-the-station inventory, a process which particularly lends itself to rulemaking at the police level. In *Brown* the plurality utilized the "plain view" doctrine in circumstances where it was not relevant and in the process made it appear indistinguishable from probable cause. In *Long* the Court upheld a search of a suspect's vehicle without probable cause to arrest or search, though the lower court's decision to the contrary rested upon what theretofore would have amounted to an independent state ground. In *Villamonte-Marquez* the Court countenanced use of roving patrols to board vessels at random

instead of holding the case moot because of the voluntary dismissal of the prosecution by the government.

Just how one explains this headlong rush into the conferral of broader police power is hard to say. Perhaps, as Justice Harlan once commented in another context, "the Court's actions here can only be put down to the vagaries of the times."²⁷³ But it just may be that this trend is attributable in part to a perception by the Court that more law enforcement tools are essential to combat the drug traffic. All nine search and seizure cases decided by the Court involved drugs, and a recurring theme is the need for effective enforcement of the drug laws. *Gates* makes reference to "the horrors of drug trafficking,"²⁷⁴ *Place* stresses the "'compelling interest in detecting those who would traffic in deadly drugs for personal profit,'"²⁷⁵ the *Royer* plurality similarly emphasizes "the public interest involved in the suppression of illegal transactions in drugs,"²⁷⁶ *Andreas* takes note of "the rigors and contingencies inescapable in an investigation into illicit drug traffic,"²⁷⁷ and *Villamonte-Marquez* is grounded largely upon "the need to deter or apprehend smugglers" of "controlled substances" and the like.²⁷⁸

It may well be that the complexities and difficulties of the law enforcement tasks with which we burden our police are not totally irrelevant in fourth amendment adjudication. A static view of the fourth amendment may be inappropriate *both* because our forefathers did not know of the kind of sophisticated surveillance techniques that would ultimately be available to well-organized police agencies²⁷⁹ and because they did not know of "the inability of eighteenth century investigative procedures to deal with crime, especially organized crime, in an urbanized and heterogeneous society."²⁸⁰ After all, as the Court said some years ago in *Brinegar v. United States*,²⁸¹ the amendment is intended not only "to safeguard citizens from rash and unreasonable interferences with privacy" but also "to give fair leeway for enforcing the law in the community's protection."

But even conceding this, any diminution of fourth amendment protections on the supposition that drug enforcement cannot otherwise be maintained at tolerable levels surely must be undertaken with greater

²⁷³ *Bloom v. Illinois*, 391 U.S. 194, 215 (1968) (dissenting opinion).

²⁷⁴ 103 S. Ct. at 2333.

²⁷⁵ 103 S. Ct. at 2642 (quoting *United States v. Mendenhall*, 446 U.S. 544, 561 (1980)).

²⁷⁶ 103 S. Ct. at 1324.

²⁷⁷ 103 S. Ct. at 3324.

²⁷⁸ 103 S. Ct. at 2581.

²⁷⁹ See *Amsterdam*, *supra* note 20, at 401.

²⁸⁰ Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 947 (1965).

²⁸¹ 338 U.S. 160, 176 (1949).

circumspection and providence than is reflected in last Term's decisions. (This is especially so in light of the fact that there is reason to believe that some supposedly "scientific" studies of the fourth amendment's costs overstate them substantially.²⁸²) In the final analysis, all fourth amendment adjudication should be governed by these acuminous words from *Almeida-Sanchez v. United States*:²⁸³

It is not enough to argue, as does the Government, that the problem of [enforcing certain laws] is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Only if this admonition is heeded can it be assured that the maleficent trafficking in drugs, which has already wrought such tragedy, does not produce the ultimate injury: atrophy of the fourth amendment and consequently "the irretrievable impairment of substantial liberties."²⁸⁴

²⁸² In his concurring opinion in *Illinois v. Gates*, 103 S. Ct. 2317, 2342 n.13 (1983), Justice White had this to say about the costs of the fourth amendment:

The effects of the exclusionary rule are often felt before a case reaches trial. A recent study by the National Institute of Justice of felony arrests in California during the years 1976-1979 "found a major impact of the exclusionary rule on state prosecutions." NATIONAL INSTITUTE OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* 2 (1982). The study found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems. The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems.

However, the NIJ study of the experience in California may shed little light upon the situation nationwide if, as may well be the case, "California police are generally more aggressive in their attempts to detect crime than are other police, and if they work in an environment characterized by a relatively high frequency of drug offenses." Fyle, *Enforcement Workshop: The NIJ Study of the Exclusionary Rule*, 19 CRIM. L. BULL. 253, 255 (1983). In addition, the statistics in the study appear to be presented in such a way as to make the "costs" appear much more substantial than they actually are. Illustrative are the statistics on prosecution screening, which actually support the conclusion that the cases rejected by prosecutors primarily for search and seizure reasons amount to less than 8/10ths of one per cent of the total number of felony complaints referred to California prosecutors during the period in question. It has also been questioned whether some of the statistics—including the 30% figure in drug cases—are even fairly representative of the situation in California generally. See remarks of Professor Yale Kamisar and Judge Shirley M. Hufstедler at Panel Discussion, Criminal Justice Section, ABA Annual Meeting, July 31, 1983, summarized in 33 CRIM. L. RPTR. 2411 (Aug. 17, 1983).

²⁸³ 413 U.S. 266, 273 (1973).

²⁸⁴ *Glasser v. United States*, 315 U.S. 60, 86 (1942).