

1986

Obscenity and Police Purchases: A Purchase is a Purchase is a Seizure--First and Fourth Amendments: Maryland v. Macon, 105 S. Ct. 2778 (1985)

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Recommended Citation

Nicholas L. Giampietro, Obscenity and Police Purchases: A Purchase is a Purchase is a Seizure--First and Fourth Amendments: Maryland v. Macon, 105 S. Ct. 2778 (1985), 76 J. Crim. L. & Criminology 875 (1985)

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FIRST AND FOURTH AMENDMENTS— OBSCENITY AND POLICE PURCHASES: A PURCHASE IS A PURCHASE IS A SEIZURE?

Maryland v. Macon, 105 S. Ct. 2778 (1985).

I. INTRODUCTION

In *Maryland v. Macon*,¹ the United States Supreme Court held that an undercover police officer's entry into a bookstore and eventual purchase of two allegedly obscene magazines did not constitute a search or seizure under the fourth amendment.² The Court's view of the transaction as a simple purchase, instead of a seizure, appears to be supported by its precedents in the areas of first amendment obscenity³ and fourth amendment search and seizure.⁴ Moreover, the Court's decision is both practical and logical.⁵

The Court's decision treats the transaction as what it plainly appears to be—a simple purchase,⁶ it facilitates the police department's enforcement of the obscenity statute⁷ and it furthers the public interest.⁸ This casenote analyzes the transaction to determine if it is truly a purchase, and not a seizure, and concludes that the Court correctly characterized it as a purchase.

¹ 105 S. Ct. 2778 (1985).

² *Id.* at 2783.

³ The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

⁴ The fourth amendment states:

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

U.S. CONST. amend. IV.

⁵ See *infra* notes 105-84 and accompanying text.

⁶ See *infra* notes 105-70 and accompanying text.

⁷ See *infra* notes 171-74 and accompanying text.

⁸ See *infra* notes 175-84 and accompanying text.

II. FACTS

Respondent, Baxter Macon, was convicted in Prince George's County, Maryland, of distributing obscene materials in violation of article 27, section 418 of the Maryland Code.⁹ The Maryland Court of Special Appeals reversed the conviction on the ground that the magazines were improperly admitted into evidence.¹⁰ The Maryland Supreme Court denied certiorari.¹¹ The United States Supreme Court granted certiorari¹² to decide "whether a purchase of allegedly obscene matter by an undercover police officer constitutes a seizure under the Fourth Amendment."¹³

On May 6, 1981, three Prince George's County police detectives went to the Silver News, Inc., an adult bookstore, as part of a police investigation of adult bookstores in the area.¹⁴ One of the detectives, who was not in uniform, entered the store, browsed for several minutes and purchased two magazines from Baxter Macon, with a marked \$50 bill.¹⁵ The detective left the store and showed the magazines to his fellow officers.¹⁶ Together they concluded that the two magazines were obscene.¹⁷ The detectives then returned to the store, arrested Macon and retrieved the \$50 bill that had been used to purchase the magazines, but failed to return the change.¹⁸

Prior to trial, Macon moved to suppress the purchased magazines and the \$50 bill.¹⁹ The trial judge denied the motion.²⁰

⁹ The statute provides:

Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

Md. ANN. CODE art. 27, § 418 (1982). The legislative purpose of § 418 is to deter the dissemination of obscene materials by making designated acts a crime. See *Wheeler v. State*, 281 Md. 593, 380 A.2d 1052 (1977), *cert. denied*, 435 U.S. 997 (1978).

¹⁰ *Macon v. State*, 57 Md. App. 785, 471 A.2d 1090 (1984).

¹¹ *State v. Macon*, 300 Md. 795, 481 A.2d 240 (1984).

¹² *Maryland v. Macon*, 105 S. Ct. 900 (1985).

¹³ *Maryland v. Macon*, 105 S. Ct. 2778 at 2780.

¹⁴ *Id.*

¹⁵ *Id.* Both magazines that were purchased were enclosed in clear plastic wrappers. The total cost of the two magazines was \$12. *Macon*, 57 Md. App. at 708, 471 A.2d at 1091.

¹⁶ *Macon*, 105 S. Ct. at 2780.

¹⁷ *Id.* The officers reached this obscenity determination under the criteria previously used by them in warrant applications. *Id.*

¹⁸ *Id.* The detectives did not return the change received at the time of the purchase. *Id.* Macon escorted the remaining customers out and closed the bookstore before leaving with the detectives. *Id.*

¹⁹ *Id.*

²⁰ *Id.* The motion was denied on the grounds that the purchase was not a seizure

At trial, the magazines, but not the \$50 bill, were introduced into evidence.²¹ The jury found Macon guilty of distributing obscene materials.²²

Macon appealed, contending that a prior judicial determination of probable cause was required to sustain a seizure of the magazines and to arrest him on obscenity related charges.²³ The Maryland Court of Special Appeals determined that the purchase of the magazines was a constructive seizure in contravention of fourth amendment protections, and that the proper remedy was to exclude the magazines from evidence at trial.²⁴ The court also held, in the alternative, that the warrantless arrest of Macon required the exclusion of the publications from evidence.²⁵ Accordingly, the court reversed the conviction and ordered that the charges against Macon be dismissed, because without the magazines there was insufficient evidence to sustain the conviction.²⁶

The Maryland Court of Special Appeals began its analysis by stating: "The need to protect first amendment rights from government suppression necessitates more stringent application of fourth amendment safeguards in obscenity cases than in criminal cases."²⁷ The court recognized that the warrant requirement is primary among these safeguards because the protection of first amendment freedoms cannot be relegated to the whim of a law enforcement of-

within the meaning of the fourth amendment and that the warrantless arrest was lawful.
Id.

²¹ *Id.*

²² *Id.*

²³ *Id.* Macon did not challenge the jury's finding that the magazines were obscene.
Id. at 2780-81.

²⁴ *Macon*, 57 Md. App. at 717-19, 471 A.2d at 1096. The Supreme Court noted that by holding that the purchase constituted a seizure, the Maryland Court of Special Appeals rejected the view taken by a majority of states—that a purchase by an undercover police officer is not a seizure, regardless of whether the funds used to make the purchase are later retrieved as evidence. *Macon*, 105 S. Ct. at 2781. The Court cited the following cases: *Baird v. State*, 671 S.W.2d 191 (Ark. Ct. App. 1984) (en banc) (sale of obscene periodicals); *Wood v. State*, 144 Ga. App. 236, 240 S.E.2d 743 (1977), *cert. denied*, 439 U.S. 899 (1978) (sale of obscene magazines); *People v. Ridens*, 51 Ill. 2d 410, 282 N.E.2d 691 (1972) (sale of obscene books); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974) (sale of obscene magazines); *State v. Perry*, 567 S.W.2d 380 (Mo. App. 1978) (sale of obscene magazines); *State v. Dornblaser*, 26 Ohio Misc. 29, 267 N.E.2d 434 (1971) (sale of obscene films); and *Cherokee News and Arcade, Inc. v. State*, 533 P.2d 624 (Okla. Crim. App. 1974) (sale of obscene materials). *Macon*, 105 S. Ct. at 2781. The Court also cited a case which holds to the contrary: *State v. Furuyama*, 64 Haw. 109, 637 P.2d 1095 (1981) (sale of pornographic publications). *Macon*, 105 S. Ct. at 2781.

²⁵ *Macon*, 57 Md. App. at 719, 471 A.2d at 1097.

²⁶ *Id.*

²⁷ *Id.* at 710, 471 A.2d at 1092 (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564-65 (1978); W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 6.7(e) (1978); 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity*, § 12 (1970)).

ficer.²⁸ The court concluded: "Thus, consideration of first amendment rights necessitates obtention of a judicial warrant as a precondition to seizure of allegedly obscene materials."²⁹ The Maryland Court of Special Appeals then stated that similar reasoning applied to the seizure of a person allegedly involved in the distribution of such materials.³⁰ As a result, the court explained that the prerequisite to a seizure of the person, as well as the allegedly obscene matter he distributes, is a prior judicial probable cause determination that the matter is obscene.³¹

The court then addressed the state's contention that the magazines were purchased, and not seized.³² The court stated that viewing the occurrence as a purchase would unjustifiedly circumvent first amendment protections.³³ It explained: "To permit the police,

²⁸ *Macon*, 57 Md. App. at 711, 471 A.2d at 1093 (citing *Roaden v. Kentucky*, 413 U.S. 496 (1973)). The Court also stated:

The complexity of the test for obscenity, and the need to ensure that constitutionally protected speech is not discouraged, require that the probable cause determination of obscenity be entrusted not to the police officer, who may lack legal expertise or impartiality, but to the judicial officer, whose knowledge of the law, coupled with his neutrality and detachment, qualify him to make such a decision.

Id. at 718, 471 A.2d at 1092-93.

²⁹ *Macon*, 57 Md. App. at 712, 471 A.2d at 1093. However, the court noted:

The Court established one exception to the warrant requirement, when police are faced with a "now or never" situation in which they must seize the allegedly obscene material or its distributor instantly or lose the opportunity There is nothing in the record to indicate that [*Macon*] or the magazines would not have been subject to seizure after the time required to have a neutral magistrate review the material and make a probable cause determination of obscenity.

The hearing to obtain a warrant need only be *ex parte*, not adversarial. . . . [The Supreme Court] did not perceive that an adversary hearing would protect first amendment rights significantly better than an *ex parte* proceeding. . . . For the same reasoning, an adversarial hearing is not a necessary precondition to issuance of a warrant to arrest the alleged purveyors of obscene material An *ex parte* hearing will suffice.

Id. at 712-13 n.2, 471 A.2d at 1093-94 n.2.

³⁰ *Id.* at 713, 471 A.2d at 1094.

³¹ *Id.* at 713-14, 471 A.2d at 1094. The Court quoted the holding in *State v. Furuyama*, 64 Haw. 109, 637 P.2d 1095 (1981): "[A] a police officer may not effect a warrantless arrest in a setting where first amendment freedoms are implicated." *Macon*, 57 Md. App. at 714, 471 A.2d at 1094 (quoting *Furuyama*, 64 Haw. at 117, 637 P.2d at 1100).

³² *Macon*, 57 Md. App. at 714-15, 471 A.2d at 1095.

³³ *Id.* The court explained:

A review of the record convinces us that every aspect of the missions in search of pornography and its purveyors was prearranged, including the repossession of the money given in 'payment' for the evidence. Yet, an element essential to the validity of the seizures, judicial concurrence regarding the obscene nature of the evidence, was missing. And the failure to seek the judge's opinion . . . could not have been inadvertent. Viewing the transactions in their entirety, we also believe they were 'preconceived seizures,' designed in part to evade that phase of the warrant procedure whose specific purpose is the protection of first amendment freedoms.

What is particularly objectionable here is that the alleged purchase . . . was immediately followed by a warrantless arrest and the seizure of the money. . . . Such

as a rule, to follow the practice used in this case would elevate form over substance, effectively sanctioning an 'end run' around these safeguards."³⁴

The Maryland Court of Special Appeals held that the proper remedy for the warrantless seizure was to exclude the magazines from trial.³⁵ The court recognized that warrantless arrests do not bar prosecution.³⁶ The court also stated that the general rule, which is almost unanimously followed in state and federal courts, is that an illegal arrest does not negate subsequent conviction.³⁷

The court explained, alternatively, that Macon's unconstitutional arrest furnished an additional basis for excluding the magazines.³⁸ It recognized that the first amendment prohibits the suppression of free expression even when published materials are not seized in violation of the fourth amendment.³⁹ Because the arrest forced Macon to close the bookstore, it was substantially more repressive than the simple seizure of the two magazines, for it barred public access as effectively as a seizure of all the store's publications.⁴⁰ Hence, the court held that where "law enforcement officers arrest a suspected distributor of obscene matter without a warrant authorizing seizure of either the distributor or the matter, the proper remedy is to exclude evidence of the allegedly obscene matter acquired in connection with the arrest."⁴¹

a transaction, in our opinion, could not have been a purchase; there was no intent to part with the money as in an ordinary sale. . . . [It] was tantamount to a warrantless seizure. . . . [F]irst amendment considerations militate against the approval of transactions expressly designed to evade specific warrant requirements governing the seizure of material arguably subject to constitutional protection. . . . An aspect of the warrant procedure tailored to protect first amendment freedoms could not have been meant for easy evasion with the modicum of ingenuity.

Id. at 715-16, 471 A.2d at 1095 (quoting *Furuyama*, 64 Haw. at 118-19, 637 P.2d at 1181-82).

³⁴ *Id.* at 716, 471 A.2d at 1096.

³⁵ *Id.*

³⁶ *Id.* at 717, 471 A.2d at 1096.

³⁷ *Id.* (citing *United States v. Crews*, 445 U.S. 463, 474 (1980)).

³⁸ *Id.*

³⁹ *Id.* "[A] retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before a seizure or 'constructive seizure' may take place." *Id.* at 718, 471 A.2d at 1096 (quoting *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1359 (5th Cir. 1980) (citing *Roaden v. Kentucky*, 413 U.S. 496 (1973))).

⁴⁰ *Id.*, 471 A.2d at 1097. The court explained that the arrest thus "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." *Id.* (quoting *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973)).

⁴¹ *Id.* the court stated in a caveat: "The holding in this case is limited to First Amendment rights and is not to be construed as a modification of traditional Fourth Amendment rulings." *Id.* at 719 n.3, 471 A.2d at 1097 n.3.

The Maryland Court of Special Appeals concluded that the magazines taken from the bookstore should have been excluded from trial. Without the magazines there was insufficient evidence to convict Macon and thus, his conviction was reversed and the charges dismissed.⁴²

III. THE SUPREME COURT'S OPINION

A. THE MAJORITY OPINION

In a seven to two decision, the Supreme Court reversed the decision of the Maryland Court of Special Appeals.⁴³ With Justice O'Connor writing for the majority,⁴⁴ the Court held that the Maryland Court of Special Appeals erred in viewing the purchase of the two allegedly obscene magazines as a "constructive seizure" and in deciding that the magazines should not have been admitted into evidence at trial.⁴⁵ The Court held that because the officers did not obtain possession of the magazines by means of an unreasonable search or seizure, and because the magazines were not the fruit of an arrest, lawful or otherwise, the magazines were properly admitted into evidence at trial.⁴⁶

The issue the majority addressed was whether a purchase of allegedly obscene matter by an undercover police officer constitutes a seizure under the fourth amendment.⁴⁷

The Court then set forth a test to analyze this case. Justice O'Connor stated that "[if] the publications were obtained by means of an unreasonable search or seizure, or were fruits of an unlawful arrest, the Fourth Amendment requires their exclusion from evidence. If, however, the evidence is not traceable to any Fourth

⁴² *Id.* at 719, 471 A.2d at 1097.

⁴³ *Maryland v. Macon*, 105 S. Ct. 2783 (1985).

⁴⁴ *Id.* at 2780. (Justice O'Connor was joined by Chief Justice Burger, and Justices White, Blackmun, Powell, Rehnquist, and Stevens).

⁴⁵ *Macon*, 105 S. Ct. at 2781.

⁴⁶ *Id.* at 2783. The Court noted: "We do not decide whether a warrant is required to arrest a suspect on obscenity-related charges, because the magazines at issue were not the product of a warrantless arrest." *Id.* at 2781. "We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Id.* at 2783.

⁴⁷ *Id.* at 2788. The Court's reformulation of the issue to the instant case is as follows: "[W]hether allegedly obscene magazines purchased by undercover police officers shortly before the warrantless arrest of a sales clerk must be excluded from evidence at the clerk's subsequent trial for distribution of obscene materials." *Id.* Note the narrowness of the Court's inquiry: "Because we hold the magazines were properly admitted in evidence at trial, we also do not address respondent's contention that the Double Jeopardy Clause bars retrial." *Id.* at 2781. See *supra* note 47.

Amendment violation, exclusion is unwarranted.”⁴⁸

The Court analyzed the first prong of its test by determining whether the purchase constituted a search or seizure. First, the Court explained that a search occurs when “ ‘an expectation of privacy that society is prepared to consider reasonable is infringed.’ ”⁴⁹ The Court relied on *Katz v. United States*,⁵⁰ in which it held that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.”⁵¹ The Court recognized that Macon did not have any reasonable expectation of privacy in the bookstore because the general public was invited to enter and to transact business therein.⁵² The majority concluded: “The officer’s action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search”⁵³

Second, the Court explained that a seizure occurs when “ ‘there is some meaningful interference with an individual’s possessory interests’ in the property seized.”⁵⁴ The Court noted that Macon voluntarily transferred any possessory interest he may have had in the magazines to the police officer upon the receipt of the purchase money.⁵⁵ The Court concluded that at the time of the sale, the police officer did not interfere with any interest of the seller; he merely took that which was intended as a requisite part of the transaction.⁵⁶

⁴⁸ *Macon*, 105 S. Ct. at 2781 (citing *United States v. Crews*, 445 U.S. 463, 472 (1980)). The majority initially established that “[a]bsent some action taken by government agents that can properly be classified as a ‘search’ or ‘seizure,’ the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply.” *Id.* at 2782.

⁴⁹ *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 189, 113 (1984)).

⁵⁰ 389 U.S. 347 (1967).

⁵¹ *Id.* at 351. The Court in *Macon* furthered explained: “The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable.” *Macon*, 105 S. Ct. at 2782.

⁵² *Macon*, 105 S. Ct. at 2782.

⁵³ *Id.*

⁵⁴ *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 189, 113 (1984)).

⁵⁵ *Id.* The Court further noted that whatever possessory interests Macon had was not in the magazines, but in the purchase money. *Id.*

⁵⁶ *Id.* The Court also dismissed any assertion that the use of undercover officers is a *per se* violation of the first or fourth amendments. *Id.* at 2782-83. First, the Fourth Amendment is not violated when an undercover officer merely accepts an offer to do business which is freely made to the public. *See id.* at 2782. The Court said: “ ‘A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.’ ” *Id.* at 2782-83 (quoting *Lewis v. United States*, 385 U.S. 206, 211 (1966)). Second, the purchase by an undercover officer of a small number of magazines does not

The Court then addressed the respondent's contention that the bona fide nature of the purchase was invalidated due to the officer's subsequent seizure of the marked \$50 bill and failure to return the change.⁵⁷ The Court answered that from an objective perspective, the transaction was a sale.⁵⁸ It stated: "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions' . . . and not on the officer's actual state of mind at the time the challenged action was taken."⁵⁹

The Court in *Macon* therefore held that the actions of the police officer leading up to the transaction, and the actual transaction itself, were not a search or seizure.⁶⁰ As a result, the magazines did not have to be excluded from evidence at trial on the basis of an unreasonable search or seizure violation.

The Court then analyzed the second prong of its test to determine whether the magazines were the fruit of an unlawful arrest.⁶¹ Relying on the exclusionary rule, the Court held that the "'rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.'" ⁶² The Court concluded that the magazines were already in police possession before the arrest, and thus were not fruits of the arrest and not subject to

render the purchase invalid under the fourth amendment. *See id.* at 2783. Such a purchase is not a wholesale search or seizure. The risk of prior restraint is not implicated, and the purchase is "analogous to purchases of other unlawful substances previously found not to violate the Fourth Amendment." *Id.* (citing *Lewis v. United States*, 385 U.S. 206, 210 (1966) (purchase of narcotics)).

⁵⁷ *Id.* at 2783. The respondent argued that the purchase is "tantamount to a warrantless seizure" where the officer subjectively intends to seize the money while retaining the magazines. *Id.*

⁵⁸ *Id.* The Court explained: "The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.*

⁵⁹ *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). The Court, in dicta, further explained: "Assuming, *arguendo*, that the retrieval of the money incident to the arrest was wrongful, the proper remedy is restitution or suppression of the \$50 bill as evidence of the purchase, not exclusion from evidence of the previously purchased magazines." *Id.*

⁶⁰ *Id.* The Court stated its conclusion as follows: "[W]e conclude that the officer's entry into the bookstore and later examination of materials offered for sale there was not a search and that the purchase of two magazines did not effect a seizure." *Id.* at 2781.

⁶¹ *See id.* at 2783. The Court stated the question as follows: "[W]hether respondent's warrantless arrest after the purchase of the magazines requires their exclusion at trial." *Id.*

⁶² *Id.* (quoting *United States v. Crews*, 445 U.S. 463, 475 (1980)). The Court, in dicta, further explained: "[A]ssuming, *arguendo*, that the warrantless arrest was an unreasonable seizure in violation of the Fourth Amendment—a question we do not decide—it yielded nothing of evidentiary value that was not already in the possession of the police." *Id.*

the exclusionary rule.⁶³ In addition, the Court stated that the \$50 bill, which was used to buy the obscene magazines, was the only fruit of the arrest.⁶⁴ Exercise of the exclusionary rule was not necessary because the \$50 bill was not introduced into evidence.⁶⁵

The *Macon* Court stated that it was reversing the judgment of the Maryland Court of Special Appeals "[b]ecause the undercover agents did not obtain possession of the allegedly obscene magazines by means of an unreasonable search or seizure and [because] the magazines were not the fruit of an arrest, lawful or otherwise"⁶⁶ The Court concluded, therefore, that the magazines were properly admitted in evidence.⁶⁷

B. THE DISSENT

In his dissenting opinion,⁶⁸ Justice Brennan took issue with the majority opinion in two respects. First, Justice Brennan viewed the statute⁶⁹ under which the respondent was convicted as "unconstitutionally overbroad and therefore facially invalid in its entirety."⁷⁰ Second, Justice Brennan contended that even if he thought otherwise regarding the constitutionality of the statute, he would not join the majority opinion because he disagreed with the Court's analysis of whether the respondent's warrantless arrest should result in a reversal of his conviction.⁷¹

Justice Brennan initiated his analysis by recognizing the impor-

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ *Id.* (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's dissent. *Id.*

⁶⁹ MD. ANN. CODE art. 27, § 418 (1982).

⁷⁰ *Macon*, 105 S. Ct. at 2784 (Brennan, J., dissenting). Justice Brennan referred to his dissent in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) to support his contention. *Id.* (Brennan, J., dissenting). In *Paris Adult Theatre*, Justice Brennan noted the "severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery" posed by the obscenity issue. *Paris Adult Theatre I*, 413 U.S. at 93. He thus concluded:

In short, while I cannot say that the interests of the State . . . are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. . . . I would hold, therefore, . . . the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what might be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

Id. at 112-13.

⁷¹ See *Macon*, 105 S. Ct. at 2784 (Brennan, J., dissenting).

tance of the first amendment and liberty of expression. He stated that "in enforcing the Fourth Amendment's command, courts must exercise a 'scrupulous exactitude' to ensure that official use of the power to search and seize poses no threat to liberty of expression."⁷² He continued by explaining that a seizure of presumptively protected books is not reasonable within the meaning of the fourth amendment without first obtaining a judicially issued warrant.⁷³

Justice Brennan then contended that it logically follows that the seizure of a person for allegedly distributing allegedly obscene books and magazines must also meet the judicially issued warrant requirement.⁷⁴ He argued that if the investigative practice followed in this case were permitted, it would "threaten to restrain the liberty of expression in the same way that seizure of presumptively protected material does."⁷⁵ Justice Brennan noted "the disruptive potential of an effectively unbound power to arrest,"⁷⁶ and stated that *Roaden v. Kentucky* makes clear that government officials may not seize persons or books and magazines without some prior judicial determination of probable cause.⁷⁷ Justice Brennan concluded that the warrantless arrest in this case was "clearly illegal."⁷⁸

Justice Brennan also argued that the Court left the respondent "without an effective remedy for his illegal arrest."⁷⁹ He noted that the Court followed precedents which hold that "the illegality of an arrest in itself will not suffice to prevent the introduction of evidence lawfully obtained prior to arrest,⁸⁰ . . . or to invalidate a con-

⁷² *Id.* (Brennan, J., dissenting) (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

⁷³ *See id.* (Brennan, J., dissenting). Justice Brennan stated:

An official seizure of presumptively protected books [and] magazines . . . is not 'reasonable' within the meaning of the Fourth Amendment unless a neutral and detached magistrate has issued a warrant particularly describing the things to be seized, and the probable-cause determination supporting the warrant is based on a proceeding in which the magistrate has the opportunity to 'focus searchingly on the question of obscenity.'

Id. (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)) (citation omitted).

⁷⁴ *See id.* at 2785 (Brennan, J., dissenting). Justice Brennan maintained: "A warrantless arrest involves the same risks as does a warrantless seizure of books [or] magazines." *Id.*

⁷⁵ *Id.* (Brennan, J., dissenting).

⁷⁶ *Id.* (Brennan, J., dissenting). Justice Brennan illustrated this disruptive potential by stating that in the instant case, the police officer's conduct "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition." *Id.* (quoting *Roaden v. Kentucky*, 413 U.S. 496, 504 (1972)).

⁷⁷ *See id.* (Brennan, J., dissenting) (citing *Roaden v. Kentucky*, 413 U.S. 496 (1972)).

⁷⁸ *Id.* (Brennan, J., dissenting).

⁷⁹ *Id.* (Brennan, J., dissenting).

⁸⁰ *Id.* (Brennan, J., dissenting) (citing *United States v. Crews*, 445 U.S. 463, 472-73 (1980)).

viction.”⁸¹ Justice Brennan contended that when first amendment values are at stake, it is inappropriate to apply these precedents mechanically.⁸² Instead, one must balance “the state’s interest in law enforcement” against “the citizen’s interest in protection from unreasonable official overreaching.”⁸³ Justice Brennan stated this balancing method:

In most cases the incremental deterrent of invalidating a conviction as a result of an illegal arrest might not justify the added ‘interference with the public interest in having the guilty brought to book.’ *United States v. Blue*, 384 U.S. 251, 255 (1966). In cases like the present one, however, an additional and countervailing public interest in ensuring the broad exercise of First Amendment freedoms must enter the calculus.⁸⁴

Justice Brennan concluded that the deterrent to protected expression which would result from such a system demands an effective remedy.⁸⁵ The remedy posited by Justice Brennan was the invalidation of obscenity convictions which are founded upon arrests unsupported by any prior judicial determination of probable cause.⁸⁶

IV. FOURTH AMENDMENT PRINCIPLES AND DOCTRINE

The importance of the fourth amendment cannot be underestimated.⁸⁷ It is primarily through the fourth amendment that we as a society can govern our police, instead of our police governing us.⁸⁸

⁸¹ *Id.* (Brennan, J., dissenting) (citing *United States v. Crews*, 445 U.S. 463, 474 (1980)).

⁸² *See id.* at 2786 (Brennan, J., dissenting).

⁸³ *Id.* (Brennan, J., dissenting).

⁸⁴ *Id.* (Brennan, J., dissenting). Justice Brennan explained in detail:

[T]he consequences of illegal use of the power of arrest fall not only upon the specific victims of abuse of that power but also upon all those who, for fear of being subjected to official harrassment, steer far wider of the forbidden zone than they otherwise would. Such a result would infringe not only the rights of those who would otherwise engage in such expression but also the rights of those who would otherwise receive such expression.

Id.

⁸⁵ *See id.* (Brennan, J., dissenting).

⁸⁶ *See id.* (Brennan, J., dissenting). Justice Brennan declared: “Opting for the contrary course, the Court today sanctions an end around constitutional requirements carefully crafted to guard our liberty of expression.” *Id.*

⁸⁷ As Anthony G. Amsterdam, Professor of Law at New York University School of Law, states: “I can think of few constitutional issues more important than defining the reach of the fourth amendment—the extent to which it controls the array of activities of the police . . . [and] the amount of power that [society] permits its police to use without effective control by law.” Amsterdam, *Perspective on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974).

⁸⁸ *See id.* at 380. Professor Amsterdam stated:

[W]e must count upon the Constitution, and primarily upon the fourth amendment,

As such, it is a "profoundly antigovernment document."⁸⁹ "A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures."⁹⁰

The framers of the Bill of Rights drafted the fourth amendment primarily to secure people from searches and seizures by officers acting with the unrestricted authority of a general warrant.⁹¹ These general warrants placed "the liberty of every man in the hands of every petty officer."⁹²

While the fourth amendment was most directly the product of contemporary hatred against a system of writs of assistance, its roots go much deeper.⁹³ While occasionally specific, the warrants which were utilized more often than not gave the most general discretionary authority.⁹⁴ As a result, general warrants were ultimately judicially condemned in England.⁹⁵ This history is a component of the intellectual matrix within which the Bill of Rights' fabric was shaped.⁹⁶

to identify the areas of concern, keep the concerns alive, set at least the minimum standards for each area, and provoke, inform and monitor the processes of enforcement in each area where we want to govern our police instead of being governed by them.

Id.

⁸⁹ *Id.* at 353. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The Supreme Court declared: "The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority" *Id.*

⁹⁰ *Amsterdam*, *supra* note 87, at 417. See *Stanford v. Texas*, 379 U.S. 476, 480-81 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 732-33 (1961).

⁹¹ See *Stanford*, 379 U.S. at 480-85. The Court described the attitude of that era as follows:

Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty. . . ."

Id. at 481.

⁹² *Id.*

⁹³ See *id.* at 482. These roots were based upon the "use of general warrants as instruments of oppression from the time of the Tudors, through the Star Chamber, the Long Parliament, the Restoration, and beyond." *Id.*

⁹⁴ See *Marcus*, 367 U.S. at 726.

⁹⁵ See *id.* at 728. *Entich v. Carrington*, 95 Eng. Rep. 807 (1765), which led to this condemnation of general warrants, has been called "one of the landmarks of English liberty." *Marcus*, 367 U.S. at 728 (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)).

⁹⁶ See *Marcus*, 367 U.S. at 729. The Court emphasized:

The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.

Current fourth amendment doctrines are based on the principle that searches and seizures are forbidden by the fourth amendment only if they are unreasonable.⁹⁷ In 1950, the Supreme Court took a broad view of the phrase unreasonable searches and seizures; however, during the past twenty years, the Court has uniformly condemned searches and seizures made without a search warrant, subject only to a few narrow exceptions.⁹⁸ Search warrants may be issued only by judicial officers, upon a showing of probable cause; that is, "reasonable grounds to believe—that criminally related objects are in the place which the warrant authorizes to be searched and the items or matters to be seized."⁹⁹ An officer may not seize anything that is not described in the search warrant except contraband and perhaps other obvious criminal objects which he inadvertently encounters in plain view.¹⁰⁰ Exceptions to the warrant requirement include 1) consent searches, 2) a very limited class of routine searches, and 3) certain searches conducted under circumstances of haste which make it impracticable to obtain a search warrant.¹⁰¹ When first amendment rights are implicated, the constitutional requirement "that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude."¹⁰² The Court in *Marcus v. Search Warrant*¹⁰³ elaborated:

Id.

With respect to the importance of the fourth amendment's historical background, Professor Amsterdam stated:

The pre-constitutional history . . . is concerned with the abuses of search warrants, not warrantless searches—a contrast that has led Telford Taylor to observe that "[f]rom a historical standpoint, [the Justices] . . . have stood the fourth amendment on its head." Whether Professor Taylor's observation is an indictment or an accolade depends largely upon the answer to the . . . question . . . what [is] the extent to which the fourth amendment *should* be restricted to its historical origins.

Amsterdam, *supra* note 87, at 367. Professor Amsterdam continued by commenting on Justice Frankfurter's perspective of the fourth amendment. He stated: "Mr. Justice Frankfurter, who more than any other of the Justices sought the fourth amendment's meaning in its history, found there no limitation of its sweeping terms searches and seizures." *Id.* at 397. Professor Amsterdam concluded:

Indisputably the "searches and seizures" on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what "the framers" thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy.

Id. at 398.

⁹⁷ See Amsterdam, *supra* note 87, at 358.

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² *Stanford*, 379 U.S. at 485.

¹⁰³ 367 U.S. 717 (1960). See also 50 AM. JUR. 2D *Lewdness, Indecency and Obscenity* § 12 (1970). "Within the precinct of the First Amendment, the requirement that a search

[T]he line between speech unconditionally guaranteed and speech which may be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to possible consequences for constitutionally protected speech.¹⁰⁴

However, notwithstanding these well-established fourth amendment principles and precedents, if police activities are not searches or seizures, the fourth amendment proscriptions do not apply.¹⁰⁵

V. DISCUSSION AND ANALYSIS

In holding that a purchase of allegedly obscene magazines by an undercover police officer does not constitute a seizure under the fourth amendment, the Supreme Court in *Macon* reached a decision which is supported by precedents in the areas of both first amendment obscenity and fourth amendment search and seizure. Indeed, the Court's view of the purchase as simply that—a purchase—is reasonable and logical.¹⁰⁶ It avoided the impracticable result of requiring a police officer to obtain a warrant before he can make a simple purchase.

Initially, it is important to note the narrowness of the Court's inquiry. The Court focused on the police officer's actions in the bookstore leading up to the purchase of the two magazines and the actual purchase of the magazines.¹⁰⁷ It did not consider whether the fourth amendment prohibited the subsequent warrantless arrest, leaving that question open, because the magazines at issue were not the product of the warrantless arrest.¹⁰⁸

With respect to the scope of the term "search," courts have rec-

warrant be obtained prior to any search or seizure assures a free society that the sensitive determination of obscenity will be made judicially and not ad hoc by police officers in the field." *Id.*

¹⁰⁴ *Marcus*, 367 U.S. at 736.

¹⁰⁵ See *United States v. Dionisio*, 418 U.S. 1, 15 (1973). Professor Amsterdam described this fourth amendment applicability-nonapplicability framework as follows:

The fourth amendment, then, is ordinarily treated as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose those restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.

Amsterdam, *supra* note 87, at 388.

¹⁰⁶ See *supra* notes 107-84 and accompanying text.

¹⁰⁷ See *supra* notes 47-48.

¹⁰⁸ See *supra* notes 47-48.

ognized that not all quests for evidence are searches within the meaning of the fourth amendment.¹⁰⁹ Instead, as the Court in *Katz v. United States*¹¹⁰ explained, the formula of fourth amendment coverage is that whenever an individual may have a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion.¹¹¹ The term "expectation of privacy" was defined by Justice Harlan in his concurrence in *Katz*. He stated that "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"¹¹²

¹⁰⁹ See *Katz v. United States*, 389 U.S. 347, 358 n.5 (1967). See also *State v. Furuyama*, 64 Haw. 109, 118, 637 P.2d 1095, 1101 (1981). The Supreme Court of Hawaii stated: "We further realize 'implications of a search are inherent in any quest for evidence by the police, [but] no one has ever suggested that every instance of such seeking is a 'search'.'" *Id.* (quoting W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.1 at 223 (1978)).

¹¹⁰ 389 U.S. 347 (1967).

¹¹¹ See *id.* at 351-52. Professor Amsterdam pointed out that "'Searches' are not particular methods by which government invades constitutionally protected interests: they are a description of the conclusion that such interests have been invaded." Amsterdam, *supra* note 87, at 385. Professor Amsterdam also noted: "In the end, the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection." *Id.*

¹¹² *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan's elaboration of what he understood the majority's opinion to mean is set forth:

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. . . . My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. Professor Amsterdam took issue with the subjective aspect of the test. He urged:

An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *supra* note 87, at 384. Justice Harlan ultimately agreed with the view posited by Amsterdam. In his dissenting opinion in *United States v. White*, 407 U.S. 745 (1971), he counseled that analysis under *Katz* "must . . . transcend the search for subjective expectations," for "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." *Id.* at 786 (Harlan, J., dissenting). In addressing the question of what expectations of privacy are constitutionally justifiable, Professor Amsterdam emphasized:

The ultimate question . . . is a value judgment. It is whether, if the particular form

In applying the *Katz* "reasonable expectation of privacy" test¹¹³ to business and commercial premises, many police investigative activities may not constitute fourth amendment searches due to diminished expectations of privacy.¹¹⁴ As the Court in *Katz* declared: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹¹⁵ As a result, law enforcement officials may freely accept a general public invitation to enter commercial premises;¹¹⁶ and the reasons for accepting this invitation need not be related to the trade conducted there.¹¹⁷

Once a police officer has entered the commercial premises in the same manner as would any other member of the public, the officer's actions do not constitute a search if he conducts himself as might be expected of any other person entering the premises.¹¹⁸ He may examine merchandise as would a prospective customer,¹¹⁹ and "take note of objects in plain view."¹²⁰ However, if the officer goes beyond the limits of what a potential customer could be expected to do, his conduct may constitute a search.¹²¹ As the Court in *Lewis v. United States*¹²² cautioned: "[T]his does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a

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.

Amsterdam, *supra* note 87, at 403.

¹¹³ See *supra* notes 109-10 and accompanying text.

¹¹⁴ W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.4, at 338. Professor LaFave explained:

"It is a fair generalization, however, that business and commercial premises are not as private as residential premises, and that consequently there are various police investigative procedures which may be directed at such premises without the police conduct constituting a Fourth Amendment search." *Id.*

¹¹⁵ *Katz*, 389 U.S. at 351.

¹¹⁶ See W. LAFAVE, *supra* note 114, § 2.4, at 338 (citing *United States v. Berrett*, 513 F.2d 154 (1st Cir. 1975)).

¹¹⁷ See *Id.* Courts have consistently held that police officers, even though motivated by an investigative purpose, did not conduct a search merely by entering various commercial premises. See *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984) (motel); *Northside Realty Associates Inc. v. United States*, 605 F.2d 1348 (5th Cir. 1979) (real estate office); *People v. Johnson*, 21 Ill. App. 3d 769, 315 N.E.2d 579 (1974) (pool hall); *State v. Russo*, 470 S.W.2d 164 (Mo. App. 1971) (restaurant); *Commonwealth v. Adams*, 234 Pa. Super. 475, 341 A.2d 206 (1975) (bus terminal); *State v. Doukales*, 111 R.I. 443, 383 A.2d 769 (1973) (variety store).

¹¹⁸ See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1978); *Lewis v. United States*, 385 U.S. 206, 211 (1966). See also LAFAVE, *supra* note 114, § 2.4, at 339.

¹¹⁹ See LAFAVE, *supra* note 114, § 2.4, at 339.

¹²⁰ *Id.* (quoting *United States v. Berrett*, 513 F.2d 154, 156 (1st Cir. 1975)).

¹²¹ See *supra* note 117.

¹²² 385 U.S. 206 (1966).

general search for incriminating materials.”¹²³ Consequently, warrantless wholesale searches and seizures generally do not comport with fourth amendment guarantees.¹²⁴

When the police officer in *Macon* entered the bookstore, browsed a few minutes, and finally purchased the two magazines, he conducted himself as any reasonable customer would.¹²⁵ He was not conducting a wholesale search,¹²⁶ or any type of search whatsoever.¹²⁷ In sum, the police officer was not infringing on any legitimate, reasonable expectation of privacy, and was therefore not subject to any fourth amendment prohibitions.

It is important to note the distinction between a seizure and a sale. The Court in *United States v. Jacobsen*¹²⁸ said that a seizure occurs “when there is some meaningful interference with an individual’s possessory interests” in the property seized.¹²⁹ On the other hand, when a bonafide sale occurs,¹³⁰ the exchange results in a voluntary transfer to the purchaser of any possessory interest the seller may have had.¹³¹ The officer thus takes only that which is contem-

¹²³ *Id.* at 211.

¹²⁴ See *Lo-Ji Sales, Inc.*, 442 U.S. at 329. In *Lo-Ji Sales, Inc.*, police officers and a Town Justice searched an adult bookstore during business hours. The Justice examined magazines after the officers removed the cellophane wrappers within which they were enclosed. *Id.* at 322-23. The Justice also looked at films on coin-operated projectors after the sales clerk adjusted the projector so that no coins were required. *Id.* The Court concluded that the search could not be upheld under the search warrant held by the officers. *Id.* at 325-26. In addressing the state’s contention that no warrant was needed because the salesclerk had “no legitimate expectation of privacy against governmental intrusion,” the Court said:

[T]here is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. . . . The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books . . . he was not seeing them as a customer would ordinarily seem them.

Id. at 329.

¹²⁵ See *supra* notes 117-23 and accompanying text.

¹²⁶ See *supra* notes 121-23 and accompanying text.

¹²⁷ See *supra* notes 117-23 and accompanying text.

¹²⁸ 466 U.S. 109 (1984).

¹²⁹ *Id.* at 113.

¹³⁰ See *State v. Flynn*, 519 S.W.2d 10 (Mo. 1975). The Supreme Court of Missouri has set out a general rule for a bona fide sale. The court stated that a sale is established where “[t]he evidence shows that the police officer asked for a publication of a certain type, that it was produced by [the seller], that the officer paid the purchase price, and that the book was delivered to him.” *Id.* at 13. In applying the general rule to the facts of its case, the court concluded that the purchasing officer paid for and owned the magazines, and thus that there was no seizure. *Id.* See *State v. Perry*, 567 S.W.2d 380, 382 (Mo. App. 1978).

¹³¹ See *United States v. Lewis*, 385 U.S. 206, 210 (1966). See also *supra* notes 55-56; *supra* notes 133-41.

plated, and in fact intended, by the seller as a necessary part of the transaction.¹³² Hence, the Court in *Macon* rightly held that the purchase of two magazines by an undercover officer was not a seizure.

However, the respondent asserted that the entire transaction was a preconceived seizure.¹³³ The preconceived seizure theory maintains that police officers do not actually intend to part with the purchase money,¹³⁴ and that therefore the transaction is not a bona fide purchase, but a "preconceived seizure" designed to evade the procedural safeguard of obtaining a warrant.¹³⁵

The difficulty with the "preconceived seizure" theory is that it delves into the subjective.¹³⁶ In contrast, an objective standard is the test which has been selected and continuously utilized by the Court to determine if there has been a fourth amendment violation.¹³⁷ As the Court in *Scott v. United States*¹³⁸ pronounced: "[I]n evaluating alleged violations of the Fourth Amendment the Court has . . . undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him."¹³⁹ Justices White, Harlan, and Stewart strongly took issue with the subjective

¹³² See *Lewis*, 385 U.S. at 210.

¹³³ See *supra* notes 58-67 and accompanying text.

¹³⁴ See *Furuyama*, 64 Haw. at 117-19, 637 P.2d at 1101. The theory recognizes the fact that most of these purchases are followed by a warrantless arrest and a recovery of the purchase money. See *id.*

¹³⁵ See *Id.* In advancing this theory, the Supreme Court of Hawaii added a caveat: "Our holding here is a narrow one which is not meant to affect the validity of purchases by undercover agents in settings where there is no deliberate effort to evade warrant requirements governing the seizure of arguably protected expressive material." *Id.* at 119 n.6.

¹³⁶ See *Scott v. United States*, 436 U.S. 128 (1977); *Terry v. Ohio*, 392 U.S. 1 (1968). See also *Amsterdam*, *supra* note 87, at 373. Professor Amsterdam elaborated:

For the most part . . . the constitutional rules governing searches and seizures allow, withhold or limit the search power upon the basis of entirely objective criteria. When objective circumstances authorizing an exercise of that power exist, a policeman may exercise it within objectively defined limits; and courts will not ordinarily inquire whether it exercise was actuated by the right or wrong motives.

Id.

¹³⁷ See *supra* note 136 and accompanying text.

¹³⁸ 436 U.S. 128 (1977).

¹³⁹ *Id.* at 137. In *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), the Supreme Court first noted that the fourth amendment prohibits only "unreasonable" searches and seizures, and then emphasized the objective nature of the term "reasonable."

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard.

Id. at 21.

view, cautioning that to send "state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."¹⁴⁰ In sum, as the Court in *Scott* maintained, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."¹⁴¹ Viewed objectively, the purchase of a magazine by an undercover officer is simply that—a purchase—regardless of any subjective intent the officer may have entertained.¹⁴² As a result, the transaction is not a seizure, and thus not subject to fourth amendment proscriptions.¹⁴³

Furthermore, the simple browsing and eventual purchase of a few magazines in a bookstore cannot be characterized as a wholesale search or seizure so as to subject these actions to fourth amendment scrutiny. Permitting this conduct does not result in a risk of prior restraint.¹⁴⁴ More specifically, the purchase of a few magazines does not harm the seller,¹⁴⁵ nor does it harm potential buyers or the general public.¹⁴⁶ The seller is not deprived of the ability to effectuate a sale,¹⁴⁷ and potential buyers and the general public are not deprived

¹⁴⁰ *Massachusetts v. Painten*, 389 U.S. 568, 565 (1968) (White, J., dissenting from the dismissal of certiorari as improvidently granted).

¹⁴¹ *Scott*, 436 U.S. at 138.

¹⁴² See *supra* notes 136-41 and accompanying text.

¹⁴³ See *supra* note 104 and accompanying text.

¹⁴⁴ See *Lo-Ji Sales, Inc.*, 442 U.S. at 327-28. The Court in *Lo-Ji Sales, Inc.*, noted that the underlying premise for the special fourth amendment protections accorded searches for and seizures of first amendment materials is the risk of prior restraint. *Id.* See also *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

¹⁴⁵ See *Lewis*, 385 U.S. at 210 (where the Court made note of the fact that an undercover agent did not "see, hear, or take anything that was not contemplated, and in fact intended, by [the seller] as a necessary part of his illegal business."). In addressing the purchase of allegedly obscene films, the Court in *State v. Dornblaser*, 26 Ohio Misc. 29, 267 N.E.2d 434 (1971), explained:

The *Marcus* and *Quantity of Books* cases deal with seizure of books, including both obscene and not obscene. In our judgment the Court was rightly concerned with denial of circulation of books that were not obscene and that the seizure of such books deprived the owner of due process. If it were found that the books were not obscene, the ability to effectuate a sale was gone In the instant case, we have films purchased, not seized To seize books before they are declared obscene and remove them from sale by the dealer could work irreparable property loss to him, if the court held them not obscene upon a later hearing. The dealer has lost the sale of his books or magazines, and there may be no sale for them after their return. *Where, as here, the prosecuting officers procured the magazines by purchase, the dealer could suffer no injury, if the books are later held not to be obscene.*

Id. at 33-34, 267 N.E.2d at 436-37 (quoting *Peachtree News Co. v. Slaton*, 226 Ga. 471, 473-74, 175 S.E.2d 539, 548 (1978)).

¹⁴⁶ See *Marcus*, 367 U.S. at 736; *Lo-Ji Sales, Inc.*, 442 U.S. at 327.

¹⁴⁷ See *supra* note 145.

of the opportunity to purchase additional copies of the same magazines.¹⁴⁸ Hence, the purchase neither creates a risk of prior restraint, nor can it be termed a wholesale search and seizure; as a result, it is not subject to fourth amendment proscriptions.

The purchase by the undercover agent in the instant case is indistinguishable from the purchase of other illegal substances previously found not to violate the fourth amendment.¹⁴⁹ As the Court in *Lewis* noted, if such undercover activities were illegal per se, this proscription would "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest."¹⁵⁰ In addition, as Justice Brennan explained in his concurring opinion in *Lewis*, such activity invades no right to privacy of the seller.¹⁵¹ Consequently, the activity is not a search or seizure.

The most prominent examples of these "secret" crimes include the illegal sales of liquors, narcotics, firearms, bribery, and prostitution.¹⁵² These enumerated criminal categories are established under regulatory statutes which condemn behavior directed against public order, and not particular individuals.¹⁵³ Violation is deemed a wrong against society and not against a specific individual.¹⁵⁴ These offenses are carried out in "secret," and it is rare for any member of the public to be willing to assist in the enforcement of the law.¹⁵⁵ It is necessary therefore that the government rely upon

¹⁴⁸ See *supra* note 146.

¹⁴⁹ See *Lewis*, 385 U.S. at 210 (purchase of narcotics in the home of the seller-dealer by an undercover agent).

¹⁵⁰ *Id.* On the use of undercover agents, the Court stated:

Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity.

Id. at 210-11 n.6 (quoting MODEL PENAL CODE § 2.10, comment, at 16 (Tentative Draft No. 9, 1959)).

¹⁵¹ *Id.* at 213 (Brennan, J., concurring). Justice Brennan explained:

[T]he seller cannot, then, complain that his privacy has been invaded so long as the agent does no more than buy his wares. . . .

. . . [T]he agent, in the same manner as any private person, entered the premises for the very purposes contemplated by the occupant and took nothing away except what would be taken away by any willing purchaser. There was therefore no intrusion upon the "sanctity" of [the seller's] . . . "privacies of life."

Id. See also *supra* notes 108-23; *supra* notes 128-32 and accompanying text.

¹⁵² See Note, *Entrapment*, 73 HARV. L. REV. 1333, 1338 (1960). See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091, 1093-94 (1951).

¹⁵³ Donnelly, *supra* note 152, at 1094.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

the diligence of its own officials.¹⁵⁶ This requires that the police must be present at the time the offenses are committed in an undercover capacity or through spies.¹⁵⁷

The Court in *Sorrells v. United States*¹⁵⁸ recognized that standard police procedures may not be adequate in these situations. The Court stated:

Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, *the prohibited publication*, the fraudulent use of the mails, the illegal conspiracy, or other offenses
. . . .¹⁵⁹

In *State v. Jarvis*,¹⁶⁰ the defendant was found guilty of selling intoxicating liquor. The conviction was based upon the purchase of one pint of liquor with two \$1 bills by two police officers.¹⁶¹ Similarly, in *People v. Rucker*,¹⁶² an undercover police officer purchased ten dollars worth of morphine.¹⁶³ This evidence was admissible at trial to support the defendant's conviction.¹⁶⁴ Likewise, in *People v. Fiche*,¹⁶⁵ an agent working for the state's attorneys' office purchased four bombs with six \$50 bills and a \$240 check.¹⁶⁶ Subsequent to the defendant's arrest, the marked bills were retrieved by the state's attorney office.¹⁶⁷ In all of these cases, the transactions were treated as simple purchases and not as seizures.

Moreover, to require a police officer to obtain a warrant in order to make a purchase is simply ludicrous.¹⁶⁸ Such a requirement would erect yet another procedural barrier for officers in their al-

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 287 U.S. 435 (1932).

¹⁵⁹ *Id.* at 441-42 (emphasis added).

¹⁶⁰ 105 W. Va. 499, 143 S.E. 235 (1928).

¹⁶¹ *Id.* at 500-01, 143 S.E. at 236. For similar liquor purchase cases, see *United States v. Reisenweber*, 288 F. 528 (2d Cir. 1923); *Dennis v. Dennis*, 68 Conn. 186, 36 A. 34 (1896); *State v. Ragan*, 157 Wash. 130, 288 P. 218 (1930).

¹⁶² 121 Cal. App. 361, 8 P.2d 938 (1932).

¹⁶³ *Id.* at 364, 8 P.2d at 939.

¹⁶⁴ *Id.* For a similar narcotics purchase case, see *United States v. Sherman*, 200 F.2d 888 (2d Cir. 1952).

¹⁶⁵ 343 Ill. 367, 175 N.E. 543 (1931).

¹⁶⁶ *Id.* at 372, 175 N.E. at 545.

¹⁶⁷ *Id.* For a similar weapons purchase case, see *People v. Makovsky*, 3 Cal. 2d 366, 44 P.2d 536 (1935).

¹⁶⁸ See *State v. Dornblaser*, 26 Ohio Misc. 29, 33-34, 267 N.E.2d 434, 437 (1971). The court noted: "To require a prior determination of obscenity *vel non* under the present facts would result in the absurdity of requiring the police undercover agents to have an adversary hearing before even making a purchase of suspected obscene material." *Id.* (quoting *United States v. Gower*, 316 F. Supp. 1390, 1393 (D.C. 1978)).

ready difficult duty to curb illicit conduct.¹⁶⁹ A warrant should not be required of a police officer when he makes a simple purchase, when it is not required of any other customer.¹⁷⁰ This procedural barrier would emasculate the plain meaning of the term "purchase" as used in the decisions of courts for years.¹⁷¹

Moreover, the public interest is furthered by treating the transaction as a purchase.¹⁷² The permissibility of police inducement has a significant deterrent effect.¹⁷³ A liquor dealer, for example, is less likely to sell below a state determined minimum price if he is aware that the individual requesting a "bargain" may be a law enforcement official.¹⁷⁴

Furthermore, since the businesses under discussion are subject to special public interest, as is manifested by the fact that licenses are required to conduct them in many states, a stricter code of conduct and the utilization of more stringent enforcement methods, known to and accepted by businessmen, may be justified.¹⁷⁵

Despite the fact that there is little risk of the evidence being destroyed by the seller in the instant case, police officers should still not be required to obtain a warrant prior to making a simple purchase.¹⁷⁶ The nature of the illegal activity,¹⁷⁷ the effectiveness of stratagems,¹⁷⁸ the deterrent effect of "spot checks,"¹⁷⁹ and the special public interest involved¹⁸⁰ all counsel in favor of treating the transaction as a simple purchase rather than a seizure.

V. CONCLUSION

The Court's view in *Maryland v. Macon* that the purchase of allegedly obscene material by an undercover officer is simply that—a purchase—and not a seizure, is supported by its precedents both in the areas of obscenity as well as search and seizure. Furthermore, the Court's holding is both reasonable and practical. It avoids requiring the acquisition of a warrant before a police officer can make

¹⁶⁹ See *Id.* at 35-36, 267 N.E.2d at 438.

¹⁷⁰ *Id.*

¹⁷¹ Cf. *United States v. Gower*, 316 F. Supp. 1390, 1393 (D.C. 1978).

¹⁷² *Donnelly*, *supra* note 152, at 1093.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1094.

¹⁷⁶ See *supra* notes 106-75 and accompanying text.

¹⁷⁷ See *supra* notes 149-67 and accompanying text.

¹⁷⁸ See *supra* notes 152-71 and accompanying text.

¹⁷⁹ See *supra* notes 172-74 and accompanying text.

¹⁸⁰ See *supra* note 175 and accompanying text.

a simple purchase; it enhances police enforcement techniques; and it furthers the public interest.

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