Hello everyone,

I hope you had a good summer break. I am looking forward to meeting with you, starting Wednesday, August 30th. Please note that class starts at 10:50am. I get thrown off kilter when people enter the room late. Please plan for this class and thereafter to arrive and be in your seat on time.

There is an assignment for the first class. Please look at the first page of the syllabus, the whole of which is live in the Syllabus tab of NYU Classes. It tells you what books you need as well as the material for the first class. In case you are unable to buy the casebook for the first class, I am also including those materials as well. You can find them under the Resources tab.

Best,

Barry Friedman
The casebook for the course will be Allen, Hoffmann, Livingston & Stuntz, Criminal Procedure: Investigation and Right to Counsel (3rd ed.). You also should buy the 2017 Supplement to their book Comprehensive Criminal Procedure. (Note: This is a supplement for a different casebook.) I have prepared some additional materials, which are available on NYU Classes.

Course assignments are tentative. I will adjust them on a class-by-class basis. In addition, you will see that there is a one class cushion to deal with the fact that we will inevitably fall behind.

I will discuss this more in class, but I wanted to include a trigger warning here. This class deals with very sensitive material. Every case is based on a crime (alleged or proven) — murder, rape, robbery, etc. — or police misconduct (alleged or proven). And we will be discussing the events of the last couple of years in policing — from Snowden through Ferguson and beyond. In addition, we will be watching some troubling videos. As anyone who has watched the news over the last year or two knows, some of this can be very tough to deal with. You should always feel free to discuss these events with me, including how you react to them. But I wanted you to know these sensitive subjects unavoidably will arise.

Note: We will not have class on 11/6. We will have a make up session on 10/13 from 10:50 AM – 12:40 PM in VH204. I will record class on religious holidays, but not otherwise. Please let me know if we should be recording.

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<td>OVERVIEW: Crime Control v. Constitutional Rights [682-86 (Tennessee v. Garner); 1098 (U.S. Const. Amendments IV &amp; V)]</td>
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at issue here? After all, doesn’t this regulatory scheme require motel owners to gather information on behalf of law enforcement (in effect, to act as law enforcement agents), to record and retain this information, and then to make it available for police review on demand? So why isn’t this case about the ordinary need for law enforcement—in roadblock terms, why isn’t it more like Edmond than Lidster? Why wouldn’t some measure of individualized justification (beyond participation in the regulated business) be required for this sort of intrusion? (Is Boyd, indeed, a dead letter?)

On the other hand, one could conclude (as did the original Ninth Circuit panel) that the motel owners had little at stake in Fourth Amendment terms. Perhaps there is an interest in curtailing the possibility of police harassment—an interest that the majority’s “opportunity for precompliance review” is presumably supposed to address. But the panel concluded that the motel owners failed to establish any reasonable expectation of privacy in the records they were required to collect and maintain (or that any trespass-based intrusion to review these records would be unreasonable) given, among other factors, that the records concerned their patrons, and not themselves. (The motel guests, the panel noted, also had no expectation of privacy in the records, given that they had shared the information with the motel owners.) Does this analysis again suggest that the Fourth Amendment’s application to information in the Information Age is, indeed, growing complicated? (Recall Professor Sklansky’s observation of “persistent and growing confusion about the meaning and continuing validity of the ‘reasonable expectations of privacy’ test” in the current era. See supra at page 354.)

3. Patel’s departure from recent administrative search doctrine (not to mention the modesty of its analysis) may stem in part from this growing uncertainty about the scope of Fourth Amendment constraints in the Information Age. Or perhaps the Patel majority is concerned more simply with reducing the risk of police harassment by extending the opportunity for precompliance review. Either way, the dissent sticks with the traditional doctrinal approach.

The dissent argues, accurately, that the “closely regulated business” category, before Patel, had not been limited to businesses posing a “clear and significant risk to the public welfare,” but had been extended to businesses of any character, so long as they were comprehensively regulated in a manner so as to suggest that those embarking on the business did so with their eyes wide open to the fact that they could expect vigilant governmental inspection. Such businesses were subject to inspection, so long as Burger’s three-factor test was satisfied. Patel cuts back on this line of cases, requiring precompliance review in most contexts. But why? If the concern is with the appropriate regulation of police discretion and the avoidance of police harassment, is this concern ameliorated by requiring police to serve a subpoena? Why or why not?

D. Reasonableness and Police Use of Force

TENNESSEE v. GARNER

Certiorari to the United States Court of Appeals for the Sixth Circuit
471 U.S. 1 (1985)

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that
such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I
At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a “prowler inside call.” Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that “they” or “someone” was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee respondent’s decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner’s face and hands. He saw no sign of a weapon, and, though not certain, was “reasonably sure” and “figured” that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5’ 5” or 5’ 7” tall.2 While Garner was crouched at the base of the fence, Hymon called out “police, halt” and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. . . .

Garner’s father . . . brought this action . . . seeking damages under 42 U.S.C. §1983 for asserted violations of Garner’s constitutional rights . . . . After a 3-day bench trial, the District Court entered judgment for all defendants. . . .

The Court of Appeals reversed and remanded. . . .

II
[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A police officer may arrest a person if he has probable cause to believe that person committed a crime. Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. . . . Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. . . .

. . . . [N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is

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2. In fact, Garner, an eighth-grader, was 15. He was 5’ 4” tall and weighed somewhere around 100 or 110 pounds.
unmatched. The suspect’s fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. “Being able to arrest such individuals is a condition precedent to the state’s entire system of law enforcement.” Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . [W]hile the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect’s interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .

. . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. . . .

III

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant. . . .

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be “reasonable.” It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. On the other hand, it “has not simply frozen into constitutional law those law enforcement practices that existed
D. Reasonableness and Police Use of Force

at the time of the Fourth Amendment's passage.” Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death. . . . Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons.

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. . . . Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. . . . [N]umerous misdemeanors involve conduct more dangerous than many felonies.

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries. . . .

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions. [Of the states in which the rule is relatively clear, 21 follow the fleeing felon rule, and 23 limit the right to use deadly force to apprehend a fleeing felon.] . . .

It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common-law rule. Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where “the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury.” . . . Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. . . .

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing “unreasonable” if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. . . .

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable
facts. We do not deny the practical difficulties of attempting to assess the suspect’s dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, e.g., Terry v. Ohio, 392 U.S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers’ split-second decisions.

IV

The District Court concluded that . . . Garner appeared to be unarmed, though Hymon could not be certain that was the case. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

. . . [T]he fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a “property” rather than a “violent” crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973-1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, Household Burglary 4 (1985).23

V

. . . We hold that the [Tennessee] statute is invalid insofar as it purported to give Hymon the authority to act as he did, . . .

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion. . . .

[The dissenting opinion of Justice O’Connor, joined by Chief Justice Burger and Justice Rehnquist, is omitted.]

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23. The dissent points out that three-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home assaults are committed by burglars. These figures mean only that if one knows that a suspect committed a rape in the home, there is a good chance that the suspect is also a burglar. That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, or might commit, a violent crime.

The dissent also points out that this 3.8% adds up to 2.8 million violent crimes over a 10-year period, as if to imply that today’s holding will let loose 2.8 million violent burglars. The relevant universe is, of course, far smaller. At issue is only that tiny fraction of cases where violence has taken place and an officer who has no other means of apprehending the suspect is unaware of its occurrence.
ARTICLE VI

. . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . .

AMENDMENT I

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 a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

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.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been
The Fourth Amendment plays two key roles in the American legal order. First, it is the law’s chief source of privacy protection. The Fourth Amendment’s domain extends to “all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life”—so the Supreme Court said in 1886: four years before Samuel Warren and Louis Brandeis penned the essay widely credited with making privacy a central concept in American law. See Boyd v. United States, 116 U.S. 616, 630 (1886); Samuel D. Warren & Louis D. Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890). For most of American history, that privacy protection was aspirational only; it had little practical relevance. Only federal officials were bound by Boyd to respect the sanctity of homes and “the privacies of life,” since the Fourth Amendment applied only to the federal government—and the federal government’s criminal law enforcement apparatus was quite small. Local police agencies were much more likely to invade individual privacy, and those agencies were subject to no serious legal regulation, constitutional or otherwise. That state of affairs changed in 1961, when the Supreme Court held that the Fourth Amendment’s exclusionary rule applied in state and federal cases alike. Mapp v. Ohio, 367 U.S. 643 (1961). Mapp gave Fourth Amendment law its teeth. Boyd ensured that the law Mapp enforced was grounded in privacy.

The second role Fourth Amendment law plays concerns not the interests being protected but rather the actors being regulated. The Fourth Amendment applies to all government actors, but it is almost always enforced against police officers. It is not too much to say that the Fourth Amendment functions as a kind of tort law for the police, the chief source of legal regulation of criminal law enforcement. Since there are more than 11 million arrests each year, and 750,000 police officers working for local, state, or federal governments, the task of regulating police is obviously important—indeed, some regulation of policing is essential to any free society.

And legal regulation of police searches and arrests consists mostly of Fourth Amendment regulation. There is a state law of search and seizure, but until the last generation it was very thin; the number of reported state cases discussing search and seizure claims before 1961 was trivially small. Today, most state-law search and seizure cases arise under state constitutional provisions that parallel the federal Fourth Amendment; the arguments and holdings in those cases tend to track arguments that appear in Fourth Amendment cases. And police training programs, which once (again, before 1961) ignored training in the law, now offer elaborate instruction in legal rules—mostly Fourth Amendment rules.

This is quite different from the state of affairs that prevails elsewhere in federal constitutional law. Most of constitutional law defines outer bounds within which the government may operate; the rules that define ordinary government operations are nonconstitutional. For the people who run public schools or government hospitals,
constitutional law has little to do with the day-to-day business of those institutions. For police, Fourth Amendment law is the primary source of legal restraint; it regulates ordinary, run-of-the-mill interactions between officers and suspects.

These two roles—protecting privacy and regulating the police—may be more important in the twenty-first century than ever before. Advances in information technology place privacy at greater risk than in an age when police used eyes and ears rather than electronics to monitor suspects. Yet, in an age of terrorism, police need to do a lot of monitoring: The costs of regulating the police badly may be measured in lost lives. As you study the materials in this chapter, one point will be evident: that these issues are not infrequently front and center in Fourth Amendment cases today, provoking courts to reexamine and sometimes revisit settled assumptions. Has Fourth Amendment law regulated wisely—adequately protecting privacy without disabling the police from guarding public safety—and is it adequate to the task in this still new century?

**Text and History**

One of the large stories of the past generation in constitutional law is the revival of attention to the constitutional text and the original intent of the men who wrote and ratified it. This revival has been less pronounced in Fourth Amendment law than in some other areas; even so, text-and-history arguments appear frequently in the materials that follow.

The text of the Fourth Amendment is uncomplicated:

> 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.

Notice that the first clause of the Amendment defines the prohibition—no “unreasonable searches and seizures.” The second clause places some restrictions on the issuance of warrants, the most important being the requirement of probable cause. The relationship between the two clauses is, on the face of the text, unclear; it will be explored in detail in Section C, infra. For now, it is enough to say that one conventional reading of the text, the one adopted in nearly all Supreme Court opinions in the years after *Mapp*, treats probable cause and a warrant as defining the usual conditions for a “reasonable” search or seizure. Today, however, the Supreme Court more usually treats reasonableness as a freestanding concept, not necessarily anchored to warrants or probable cause. The results of that trend are also explored in Section C.

This relatively simple text has a relatively simple history. Although there are serious debates about some aspects of the story, most scholars agree on the basic outlines. The Fourth Amendment arose out of a trio of famous eighteenth-century cases, two from England and one from the colonies. The less famous of the two English cases was Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765), which is discussed at length in Boyd v. United States, page 274, supra. Entick was an English pamphleteer critical of the King’s ministers. As part of a seditious libel investigation, a warrant was issued authorizing Entick’s arrest and the seizure of all
his books and papers. The warrant was carried out; Entick sued for trespass, and he won a verdict of 300 pounds. The other English case was Wilkes v. Wood, 19 Howell’s State Trials 1153 (C.P. 1763). Wilkes was likewise a pamphleteer, and also a well-known Member of Parliament, perhaps the most popular man in England in his day. He too was a critic of the government, and he too was rewarded with arrest, search of his home, and the seizure of his books and papers (some 49 of Wilkes’s friends received the same treatment). All these searches and seizures were made pursuant to a warrant that neither named suspects nor specified places to be searched. Like Entick, Wilkes and a number of his friends sued for trespass and won; in Wilkes’s case, the verdict was 1,000 pounds, a considerable sum at the time. Both Entick and Wilkes won renown in the American colonies in the years leading up to the American Revolution; the judge who presided over both their trials, Lord Camden, was a colonial hero for whom a number of American cities and counties were named.

The third case arose in colonial Massachusetts, where customs inspectors were seeking to crack down on the smuggling that dominated Boston’s economy. To aid them in that task, inspectors used “writs of assistance,” which were issued by the King and which authorized the inspectors both to draft assistance (hence the name of the writs) and to search any place where smuggled goods might be concealed. In 1761 in The Writs of Assistance Case, James Otis argued, on behalf of some of the smugglers, that these writs conveyed no legal authority. Otis lost, but according to John Adams, his argument was the beginning of the Revolution—in Adams’s words, “Then and there was the child Independence born.”

Whatever else the Fourth Amendment was about, it was probably designed to enact the results in Entick and Wilkes and to overturn the result in The Writs of Assistance Case. Notice that none of the three cases involved a typical instance of criminal law enforcement: These were not investigations of murders, rapes, or robberies. Indeed, two of the three cases—Entick and Wilkes—arose out of investigations that could not happen today, because they would be clear violations of the First Amendment. Notice too that the officials who conducted the searches in these cases were not ordinary police officers—in Entick and Wilkes, they were “messengers,” special agents of the Crown; in The Writs of Assistance Case, they were customs inspectors. That is no accident; ordinary police officers did not exist, either in eighteenth-century England or in the colonies. The first police force was established in London in 1829; American police forces were born, one by one, between that date and about 1870. Thus, the Fourth Amendment—the prime source of legal restraint for the police—was written before the police existed, at least in anything like the form they take today. That fact should make us cautious when seeking to determine the “original understanding” of contemporary Fourth Amendment issues.

**Remedy and Right**

Today, Fourth Amendment litigation overwhelmingly involves challenges to searches and seizures conducted by the police in the course of investigating or enforcing ordinary criminal prohibitions—homicide, rape, theft, and, especially, drug violations. The large majority of those challenges occur in criminal cases, as defendants seek to suppress evidence they claim the police seized in violation of the Fourth Amendment.
There are other remedies for Fourth Amendment violations—they are explored in Section A.2, infra—but the dominant one, the one that is invoked most often by far, is the exclusionary rule. This may have a large effect on the substance of Fourth Amendment law, because it shapes the context in which judges are most often presented with Fourth Amendment claims. All exclusionary rule claims seek to suppress incriminating evidence; if no incriminating evidence is found, there is nothing for the defendant to exclude. Thus, judges see the cases where the police find cocaine in the car, not the cases where they find nothing. Perhaps that affects the way judges think about car searches. You should consider, as you read the cases that follow, how the presence of the exclusionary rule might have affected judicial perceptions about different kinds of searches, and how those perceptions might have affected the Fourth Amendment doctrines those cases discuss.

We begin the chapter with a brief consideration of the exclusionary rule and some of its possible alternatives, because the rule is so important to so many features of Fourth Amendment law. The chapter then turns to the substance of Fourth Amendment law—what the Fourth Amendment requires of the police or the other officials—and then returns, in Section E, to a more detailed consideration of the exclusionary rule and its scope.

A. Remedies

1. The Exclusionary Rule

MAPP v. OHIO

Appeal from the Supreme Court of Ohio
367 U.S. 643 (1961)

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of §2905.34 of Ohio’s Revised Code.2 . . . [T]he Supreme Court of Ohio found that her conviction was valid though “based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant’s home. . . .”

On May 23, 1957, three Cleveland police officers arrived at appellant’s residence in that city pursuant to information that “a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home.” Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit

2. The statute provides in pertinent part that

No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture . . . .

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both.
B. The Scope of the Fourth Amendment

1. The Meaning of “Searches”

   a. The Relationship Between Privacy and Property

   KATZ v. UNITED STATES
   
   Certiorari to the United States Court of Appeals for the Ninth Circuit
   389 U.S. 347 (1967)

   MR. JUSTICE STEWART delivered the opinion of the Court.

   The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner’s objection, to introduce evidence of the petitioner’s end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because “[t]here was no physical entrance into the area occupied by [the petitioner].” We granted certiorari in order to consider the constitutional questions thus presented.

   The petitioner has phrased those questions as follows:

   “A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

   “B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.”

   We decline to adopt this formulation of the issues. In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase “constitutionally protected area.” Secondly, the Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.4 Other provisions of the Constitution protect personal privacy from other

   4. “The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. . . . And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.” Griswold v. State of Connecticut, 381 U.S. 479, 509 (dissenting opinion of Mr. Justice Black).
forms of governmental invasion.\(^5\) But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not.\(^6\) But this effort to decide whether or not a given “area,” viewed in the abstract, is “constitutionally protected” deflects attention from the problem presented by this case.\(^9\) For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The Government stresses 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. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U.S. 438, 457, 464, 466; Goldman v. United States, 316 U.S. 129, 134-136, for that Amendment was thought to limit only searches and seizures of tangible property.\(^13\) But “[t]he premise that property interests control the right of the Government to search and seize has been discredited.” Warden v. Hayden, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead*

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5. The First Amendment, for example, imposes limitations upon governmental abridgment of “freedom to associate and privacy in one’s associations.” NAACP v. State of Alabama, 357 U.S. 449, 462. The Third Amendment’s prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too “reflects the Constitution’s concern for . . . the right of each individual “to a private enclave where he may lead a private life.”” Tehan v. Shott, 382 U.S. 406, 416. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution.

8. In support of their respective claims, the parties have compiled competing lists of “protected areas” for our consideration. It appears to be common ground that a private home is such an area but that an open field is not.

9. It is true that this Court has occasionally described its conclusions in terms of “constitutionally protected areas,” but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

13. We do not deal in this case with the law of detention or arrest under the Fourth Amendment.
that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any “technical trespass under . . . local property law.” Silverman v. United States, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government’s position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner’s activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner’s unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government’s actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.

14. Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner’s end of conversations concerning the placing of bets and the receipt of wagering information.

15. On the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them.
directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful “notwithstanding facts unquestionably showing probable cause,” Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police.” Wong Sun v. United States, 371 U.S. 471, 481-482. “Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,” United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case.

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.


And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations “only in the discretion of the police.” Id., at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored “the procedure of antecedent justification . . . that is central to the Fourth Amendment,” a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner’s conviction, the judgment must be reversed.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case. [The concurring opinions of Justice Douglas and Justice White are omitted.]

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as
well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.” My understanding of the rule that has emerged from prior decisions 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.

The critical fact in this case is that “[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume” that his conversation is not being intercepted. The point is not that the booth is “accessible to the public” at other times, but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.

In Silverman v. United States, 365 U.S. 505, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established that interception of conversations reasonably intended to be private could constitute a “search and seizure,” and that the examination or taking of physical property was not required. . . . In Silverman we found it unnecessary to re-examine Goldman v. United States, 316 U.S. 129, which had held that electronic surveillance accomplished without the physical penetration of petitioner’s premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree that it should now be overruled.* Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion. . . .

MR. JUSTICE BLACK, dissenting . . .

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today’s decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order “to bring it into harmony with the times” and thus reach a result that many people believe to be desirable.

* I also think that the course of development evinced by Silverman, supra, Wong Sun, supra, Berger, supra, and today’s decision must be recognized as overruling Olmstead v. United States, 277 U.S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment.
B. The Scope of the Fourth Amendment

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. . . . The first clause protects “persons, houses, papers, and effects, against unreasonable searches and seizures. . . .” These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers’ purpose to limit its protection to tangible things by providing that no warrants shall issue but those “particularly describing the place to be searched, and the persons or things to be seized.” A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court’s interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one “describe” a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says “particularly describing”? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was . . . “an ancient practice which at common law was condemned as a nuisance. 4 Blackstone, Commentaries 168. . . .” [Berger v. New York], 388 U.S., at 45. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges, . . .

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment’s applicability to eavesdropping through a wiretap was, of course, Olmstead, supra. In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

-The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or things to be seized. . . .

Justice Bradley in the Boyd case [116 U.S. 616 (1886)] and Justice Clark[e] in [Gouled v. United States, 255 U.S. 298 (1921)] said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses,
persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

[277 U.S., at 464-465.]

Goldman v. United States, 316 U.S. 129, is an even clearer example of this Court’s traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to Olmstead, found no Fourth Amendment violation. . . .

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual’s privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court’s language, designed to protect privacy, for the Constitution’s language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court’s broadest concept of privacy. . . .

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of “persons, houses, papers, and effects.” No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons I respectfully dissent.

NOTES AND QUESTIONS

1. Katz is a leading case on the question what constitutes a “search” for Fourth Amendment purposes. Notice that the immediate effect of Katz was to expand the Fourth Amendment by rejecting the notions: (1) that the Amendment is concerned only with the search or seizure of tangible property; and (2) that the Amendment only applies to surveillance techniques involving the physical penetration of protected
spaces. Broadly, *Katz* continued the deconstruction of Boyd v. United States, 116 U.S. 616 (1886), detailed in the last chapter. But while the *Katz* Court “specifically rejected the view that physical trespass [is] necessary to establish a search” (and the “trespass test” thereafter became “a doctrine many had left for dead”), you should be aware that the Supreme Court has recently made clear, starting with United States v. Jones, 132 S. Ct. 945 (2012), discussed at page 390, infra, that property interests remain important to defining the Fourth Amendment’s scope. Priscilla J. Smith, *Much Ado About Mosaics: How Original Principles Apply to Evolving Technology in United States v. Jones*, 14 N.C. J. L. & Tech. 557, 566 (2013). In the last chapter, we examined the birth, death, and possible resurrection of *Boyd*. The recent reaffirmation of *Boyd*’s suggestion that the Fourth Amendment is concerned in part with the protection of private property may further evidence *Boyd*’s continued vitality. But the persistence of property-based ideas to defining the scope of Fourth Amendment coverage should not be a surprise. For all of *Katz*’s emphasis on protecting people rather than places, obviously people are protected in places.

2. For now, though, let’s explore *Katz*’s expansion of the concept of search beyond property intrusions. Notice that even as *Katz* reworked the very scope of the Fourth Amendment, it offered no comprehensive test of Fourth Amendment coverage, nor any general theory by which questions of coverage might be resolved. As one scholar famously put it at the time: “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.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 385 (1974). Justice Harlan’s two-prong formula soon became the Court’s test for determining whether a “search” had taken place:

My understanding of the rule that has emerged from prior decisions 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.”

Is this a meaningful test? If a search takes place when the government intrudes on an individual’s reasonable expectation of privacy, isn’t *some* animating theory of privacy necessary—if only to ground questions about the Fourth Amendment’s scope? Does *Katz* have one?

3. Maybe not. But perhaps the lack of an overarching privacy theory counts as a virtue, not a vice. Consider the argument in Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory; Local Versus General Theoretical Knowledge*, 72 St. John’s L. Rev. 1149 (1998). Allen and Rosenberg draw on the distinction, made famous by Friederich Hayek, between “made” and “grown” orders. “Made” orders are created by some plan or design. “Grown” orders, by contrast, arise spontaneously without central coordination. Allen and Rosenberg argue that Fourth Amendment law, a “grown” order, is ill-suited to overarching theory but that it more properly evolves incrementally, in a process not unlike the evolution of the common law:

Made orders usually possess a limited number of variables, and thus those variables may be manipulated in order to produce predictable outcomes. If the woodlot suffers a drought, watering will promote growth. If the soil becomes too acidic, it can be treated. . . . Spontaneous orders are extremely complex; introducing reforms into spontaneous systems leads to much more unpredictable consequences. Introducing
a new vine as ground cover around the periphery of the forest may result in the forest’s destruction as the vine, freed from its natural enemies, grows out of control and chokes out all other plant forms. Unintended, unanticipated consequences are much more likely to result from the introduction of change into a spontaneous order.

In essence, the Fourth Amendment is . . . a grown, spontaneous system. . . . It has too many variables to yield its essence to logical analysis designed to generate decision algorithms. Its subject matter encompasses virtually every human action and interaction imaginable, . . . from public statements to private thoughts recorded in a secret diary, from the affairs of the homeless to those of Dow Chemical, from participating in illegal [drug] markets . . . to illegal restraints of trade. . . . The beliefs of the [academic] commentators, in short, that . . . the Fourth Amendment or privacy will reduce to simple variables, a simple theory, is unjustified. Some things are just more complicated than that.

Are we, then, simply at the mercy of an uncontrollable monster? No. . . . Cautious, incremental change, with a sensitive awareness of the need for close monitoring and adjustment can be done with a reasonable prospect of favorable outcomes—as the common law demonstrates so well. Adjustments can come from other sources besides the courts, of course. Whatever the sources, we suggest this is the path to take.

If Allen and Rosenberg are right, questions of the Fourth Amendment’s coverage might best be approached without the aid of any overly articulated theory as to what constitutes the “privacy” subject to Fourth Amendment protection. Perhaps incrementalism ensures that the Court’s conception of privacy can adapt to changes in culture and technology—the sorts of change evident in Katz, and also present today.

4. On the other hand, even the most devout incrementalists are now giving attention to “persistent and growing confusion about the meaning and continuing validity of the ‘reasonable expectations of privacy’ test.” David Alan Sklansky, Too Much Information: How Not to Think About Privacy and the Fourth Amendment, 102 Cal. L. Rev. 1069, 1071 (2014). Katz itself expanded the scope of the Fourth Amendment’s concerns, but some scholars contend that its methodology, coupled with the lack of any underlying theory of privacy, has led the Court in subsequent cases to restrict the definition of searches, “steadily erod[ing] privacy in specific cases, and conceptually promis[ing] to eliminate it altogether.” Sherry F. Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 121 (2002). In addition, consider whether the assumptions about privacy that prevailed when Katz was decided are even operative today:

Lurking below [the doctrinal disarray] are more fundamental uncertainties about the mission of the Fourth Amendment and the nature of privacy—uncertainties that reflect a larger unraveling of the late twentieth-century consensus about the constitutional regulation of searches and seizures. That consensus rested in part on assumptions that seemed so obvious and so basic they often went unarticulated: that there was such a thing as privacy, that it was important for democracy, that it was threatened in particularly important ways by widespread strategies of law enforcement, that the dangers those tactics posed to privacy were among their greatest costs, and that courts and the law were critical tools in containing those dangers. None of these assumptions seems obvious today. . . . Academics, along with popular writers, have questioned whether there is any real content to the concept of privacy, whether there is any hope of preserving privacy in the modern world, and whether the loss of privacy
B. The Scope of the Fourth Amendment

is truly worth mourning. To the extent that privacy exists, is important, and is threatened, the threats today seem to come more from the private sector—from Internet search engines, social networking sites, credit reporting agencies, and private surveillance systems—than from government investigators. Recent revelations about government monitoring of electronic communications have drawn some of the attention . . . back to the government. But the concerns have centered on intelligence gathering by national security officials . . . not on the day-to-day operations of the criminal justice system. The threats that law enforcement poses to privacy seem dwarfed not just by commercial threats to privacy but also by other threats posed by law enforcement: racial profiling, police violence, and mass incarceration. As a result, privacy scholars by and large remain less interested in the police than in Google, Facebook, and Equifax, and criminal justice scholars are less interested in privacy than in fairness, proportionality, and legitimacy.

Sklansky, Too Much Information: How Not to Think about Privacy and the Fourth Amendment, 102 Cal. L. Rev., at 1073 (critiquing conception of privacy that focuses narrowly on control over personal information and advocating a conception of “privacy as refuge”).

5. Finally, whatever the parameters (or continued relevance) of its privacy focus, Katz determined conclusively that a physical trespass is not necessary to invoke Fourth Amendment protections. But as it turns out, neither is a trespass automatically sufficient to ensure that a given police activity constitutes a search. Long before Katz, the Court established an “open fields” doctrine, which held that police entry and search of open fields involves no Fourth Amendment intrusion even if officers intrude on privately owned land. Hester v. United States, 265 U.S. 57 (1924). This doctrine was reaffirmed post-Katz in Oliver v. United States, 466 U.S. 170 (1984). Oliver and Thornton were charged with cultivating marijuana. Oliver was growing marijuana on his farm, in a field located more than a mile from his house; Thornton’s marijuana was growing in two patches in the woods behind his house. Both locations were highly secluded, and both were posted with “No Trespassing” signs. In each case, police officers discovered the marijuana as the result of a warrantless entry onto and inspection of the property. Justice Powell wrote the opinion for the Court, concluding that the officers’ trespass did not constitute a search:

The rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: “[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.” . . .

This interpretation of the Fourth Amendment’s language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v. United States, 389 U.S. 347 (1967), the touchstone of Amendment analysis has been the question whether a person has a “constitutionally protected reasonable expectation of privacy.” Id., at 360 (Harlan, J., concurring). . . .

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers . . . , the uses to which the individual has put a location, and our societal
important role in shaping the Court’s post-*Katz* decisionmaking, and in a direction that many view as placing too much police investigative activity *outside* Fourth Amendment constraints. The Court’s critics may be right or wrong. But in an era in which both courts and scholars are acknowledging growing uncertainty about the concept of “reasonable expectations of privacy,” it is important to grapple with this idea of “knowing exposure,” which has proved so central to application of *Katz*.

We begin with the sensitive subject of undercover agents and informants. Prior to *Katz*, the Court decided several cases involving the Fourth Amendment’s application to the use of undercover agents and informants who engaged in communications with suspects, some of which were either secretly recorded or transmitted to back-up law enforcement personnel. In *Hoffa v. United States*, 385 U.S. 293, 302 (1966), the Court held that the successful efforts of an informant to obtain the confidence of a suspect and to elicit statements from him involved only “a wrongdoer’s misplaced belief that a person to whom he voluntarily confide[d] his wrongdoing [would] not reveal it”—and so “no interest legitimately protected by the Fourth Amendment.” Accord, *Lewis v. United States*, 385 U.S. 206 (1966). The Court had earlier held that neither the recording of statements elicited by an undercover agent, see *Lopez v. United States*, 373 U.S. 427 (1963), nor the transmission of a suspect’s statements to a nearby police officer via a secret microphone hidden on an informant’s person, see *On Lee v. United States*, 343 U.S. 747 (1952), violated the Fourth Amendment. In the next case, the Court addressed the question whether its decision in *Katz*—with its newfound focus on reasonable expectations of privacy—affected these results.

**UNITED STATES v. WHITE**

Certiorari to the United States Court of Appeals for the Seventh Circuit

401 U.S. 745 (1971)

*Justice White* announced the judgment of the Court and an opinion in which *Chief Justice Burger, Justice Stewart*, and *Justice Blackmun* joined.

In 1966, respondent James A. White was tried and convicted under two consolidated indictments charging various illegal transactions in narcotics. . . . The issue before us is whether the Fourth Amendment bars from evidence the testimony of governmental agents who related certain conversations which had occurred between defendant White and a government informant, Harvey Jackson, and which the agents overheard by monitoring the frequency of a radio transmitter carried by Jackson and concealed on his person. On four occasions the conversations took place in Jackson’s home; each of these conversations was overheard by an agent concealed in a kitchen closet with Jackson’s consent and by a second agent outside the house using a radio receiver. Four other conversations—one in respondent’s home, one in a restaurant, and two in Jackson’s car—were overheard by the use of radio equipment. The prosecution was unable to locate and produce Jackson at the trial and the trial court overruled objections to the testimony of the agents who conducted the electronic surveillance. The jury returned a guilty verdict and defendant appealed. . . .

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither
know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally “justifiable”—what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by *Hoffa* and *Lewis*. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State’s case.

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant’s utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of “reasonableness.”

Nor should we be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable. An electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent. It may also be that with the recording in existence it is less likely that the informant will change his mind, less chance that threat or injury will suppress unfavorable evidence and less chance that cross-examination will confound the testimony. Considerations like these obviously do not favor the defendant, but we are not prepared to hold that a defendant who has no constitutional right to exclude the informer’s unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.

It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a “reasonable” investigative effort and

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4. Justice White described *Hoffa* and *Lewis* earlier in the opinion as follows:

*Hoffa* . . . which was left undisturbed by *Katz*, held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. . . . No warrant to “search and seize” is required in such circumstances, nor is it when the Government sends to defendant’s home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, *Lewis*. . . . —Eds.
lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an “unreasonable” and unconstitutional search and seizure. Our opinion is currently shared by Congress and the Executive Branch, Title III, Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U.S.C. §§2510 et seq. (1964 ed., Supp. V), and the American Bar Association. Project on Standards for Criminal Justice, Electronic Surveillance §4.1 (Approved Draft 1971). It is also the result reached by prior cases in this Court. . . .

The judgment of the Court of Appeals is reversed.5

JUSTICE BLACK concurs in the judgment of the Court for the reasons set forth in his dissent in Katz v. United States.

[The concurring opinion of Justice Brennan is omitted.]

JUSTICE DOUGLAS, dissenting.

The issue in this case is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as “eavesdropping,” we now call “electronic surveillance”; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held “reasonable” within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of “commerce” would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on. . . .

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth. . . .

JUSTICE HARLAN, dissenting. . . .

The plurality opinion . . . [adopts] the following reasoning: if A can relay verbally what is revealed to him by B (as in Lewis and Hoffa), or record and later divulge it (as in Lopez), what difference does it make if A conspires with another to betray B

5. The Court had earlier held in Desist v. United States, 394 U.S. 244 (1969), that Katz would not be applied retroactively to electronic surveillance predating the Katz decision. Since the activity in White occurred prior to that decision, Justice White’s plurality opinion relied on Desist as an independent basis for affirming the conviction. Justice Brennan believed that Katz required overruling both On Lee and Lopez but concurred with the four-justice plurality on the retroactivity issue.—Eds.
by contemporaneously transmitting to the other all that is said? The contention is, in essence, an argument that the distinction between third-party monitoring and other undercover techniques is one of form and not substance. The force of the contention depends on the evaluation of two separable but intertwined assumptions: first, that there is no greater invasion of privacy in the third-party situation, and, second, that uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, given the values and goals of our political system.

The first of these assumptions takes as a point of departure the so-called “risk analysis” approach of Lewis, and Lopez, and to a lesser extent On Lee, or the expectations approach of Katz. While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the substitution of words for analysis. The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary.

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of “informer” investigation upheld in Lewis and Hoffa. The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener’s inability to reformulate a conversation without having to contend with a
B. The Scope of the Fourth Amendment

documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant. . . .

Finally, it is too easy to forget—and, hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its “risk analysis” solely in terms of the expectations and risks that “wrongdoers” or “one contemplating illegal activities” ought to bear, the plurality opinion, I think, misses the mark entirely. On Lee does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk. The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that produces the results the plurality opinion ascribes to the On Lee rule. Abolition of On Lee would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. . . .

[The dissenting opinion of Justice Marshall is omitted.]

NOTES AND QUESTIONS

1. According to the plurality opinion in White, it makes no sense to recognize a Fourth Amendment privilege against the use at trial of an accurate version of one’s conversation—a version secretly tape-recorded or transmitted by an informant—when there is no Fourth Amendment privilege barring the informant from testifying to his recollection of the conversation. But this argument begs the question whether the Court took a wrong turn in Hoffa and Lewis. The basis for the holdings in these “unbugged agent” cases was that persons assume the risk that their trusted colleagues may be or may become government agents. But should we have to assume this risk? At least when the government places a covert agent in our midst to cajole us into talking, isn’t it “constitutionally justifiable” to impose the requirement of a warrant based on probable cause?

In part, the answer may depend on which metaphor one chooses. Current doctrine tends to emphasize the comparison between the undercover agent and a

24. From the same standpoint it may also be thought that electronic recording by an informant of a face-to-face conversation with a criminal suspect, as in Lopez, should be differentiated from third-party monitoring, as in On Lee and the case before us, in that the latter assures revelation to the Government by obviating the possibility that the informer may be tempted to renege in his undertaking to pass on to the Government all that he has learned. While the continuing vitality of Lopez is not drawn directly into question by this case, candor compels me to acknowledge that the views expressed in this opinion may impinge upon that part of the reasoning in Lopez which suggested that a suspect has no right to anticipate unreliable testimony. I am now persuaded that such an approach misconceives the basic issue, focusing, as it does, on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment’s protection of privacy. Distinctions do, however, exist between Lopez, where a known Government agent uses a recording device, and this case which involves third-party overhearing. However unlikely that the participant recorder will not play his tapes, the fact of the matter is that in a third-party situation the intrusion is instantaneous. Moreover, differences in the prior relationship between the investigator and the suspect may provide a focus for future distinctions.
gossipy friend, the idea being that, just as we all bear the risk that our friends will repeat things they’ve heard us say, so suspects bear the risk that people they trust (including successful undercover agents) will betray that trust. An alternative comparison is between the undercover agent and a spy. Like spies (and unlike gossipy friends), undercover agents are not who they pretend to be—they are not friends who talk too much but rather are more like enemies who pretend to be friends. Do we really bear the risk of spies in our ordinary lives? If not, should we bear the risk of police spies? Cf. Jacqueline E. Ross, Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint, 4 Ann. Rev. L. & Soc. Sci. 239, 265 (2008) (noting that “[i]n most modern European democracies,” where undercover policing “suffer[s] from myriad associations with totalitarianism,” such tactics “did not gain ground as an accepted investigative tactic until recently” and “it was only in the 1990s that Germany, France, and Italy enacted legislation designed to legalize a tactic that occupied an ambiguous role at the margins of accepted investigative activity”).

2. Perhaps the results in cases like 

_Hoffa_, __Lewis__, and __White__ stem from the recognition that certain crimes cannot be investigated effectively without using covert agents and that the warrant and probable cause requirements would unduly frustrate their use. Professor Philip Heymann has argued that undercover operations are most important to the investigation of crimes that cannot be readily observed and reported by witnesses and that will not be reported by participants or victims. See Philip Heymann, Understanding Criminal Investigations, 22 Harv. J. Legis. 315, 325-327, 331-334 (1985). Narcotics trafficking and the bribery of public officials, for instance, involve willing participants and infrequently produce victims who notice they have been harmed. Similarly, the intimidation of witnesses makes it difficult to investigate crimes like loan sharking or extortion. Requiring an overly rigorous form of factual justification prior to use of a covert agent “could altogether eliminate the use of undercover operations in even the most pressing situations.” Id., at 332.

Assume for the moment that Heymann is right. (He probably is.) How much weight should courts give this kind of government need? If the investigation of some but not all crimes requires covert methods, should Fourth Amendment law differ according to the kinds of crime police investigate? Whatever the best answer in theory, historically Fourth Amendment law does seem to have responded to law enforcement needs, and law enforcement needs are, in part, a function of what crimes the police investigate. For now, note three points: First, some crimes by their nature require much more in the way of privacy intrusion to investigate than others. Second, as Heymann’s article emphasizes, those crimes often (though not always) involve consensual transactions. Third and finally, our society devotes a great deal of energy and resources to attacking drug crime, which primarily consists of consensual transactions. Given those three points, perhaps the outcome in __White__ is unsurprising.

3. The plurality opinion in __White__ cites Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which is treated in more detail in Chapter 6. In the wake of __Katz__ and __Berger v. New York__, 388 U.S. 41 (1967), which held New York’s wiretap statute to be unconstitutional, Congress enacted Title III to establish procedures
for the use of electronic eavesdropping by law enforcement that would be consistent with the Court’s holdings. After its enactment, most states passed their own statutes patterned on Title III’s provisions. Today, Title III and similar state statutes, along with subsequently enacted laws, such as the Stored Communications Act, 18 U.S.C. §§2701-2711, regulate not only the use of traditional wiretaps and the electronic surveillance of oral communications, but also the interception of electronic communications such as e-mail. Most of these statutes, however, do not apply to the recording or third-party surveillance of a communication when one of the parties to the communication consents—hence, they play only a small role in regulating police use of undercovers and informants.

4. Finally, notice that by the time White was decided, Justice Harlan, the author of the “reasonable expectations” approach, was already expressing reservations about any analytic framework for Fourth Amendment coverage questions—including his own—that might lead to the “substitution of words for analysis.” Whatever you think about the result in White, doesn’t it suggest that Justice Harlan’s caution may be well taken? Does White’s methodology amount to a conclusion that the “knowing exposure” of one’s words to another forfeits the protections of the Fourth Amendment if that other elects to betray us? Is this approach to defining the Fourth Amendment’s scope consistent with any robust account of the privacy interests that the Amendment should protect? Ponder the Katz Court’s statement that “[w]hat a person knowingly exposes to the public” cannot be the subject of Fourth Amendment protection as you read the following case. Is the next case an example of how a legal formula can take on a life of its own?

CALIFORNIA v. GREENWOOD

Certiorari to the Court of Appeal of California, Fourth Appellate District
486 U.S. 35 (1988)

JUSTICE WHITE delivered the opinion of the Court. . . .

In early 1984, Investigator Jenny Stracner of the Laguna Beach Police Department received information indicating that respondent Greenwood might be engaged in narcotics trafficking. . . . On April 6, 1984, Stracner asked the neighborhood’s regular trash collector to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses. The trash collector cleaned his truck bin of other refuse, collected the garbage bags from the street in front of Greenwood’s house, and turned the bags over to Stracner. The officer searched through the rubbish and found items indicative of narcotics use. She recited the information that she had gleaned from the trash search in an affidavit in support of a warrant to search Greenwood’s home.

Police officers encountered both respondents at the house later that day when they arrived to execute the warrant. The police discovered quantities of cocaine and hashish during their search of the house. Respondents were arrested on felony narcotics charges. They subsequently posted bail.

The police continued to receive reports of many late-night visitors to the Greenwood house. On May 4, Investigator Robert Rahaeuser obtained Greenwood’s