PART ONE

Legal Foundations of Criminal Justice

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Introduction

A fundamental problem facing every society is how to achieve social control—protecting people’s lives and property and establishing socially desirable levels of order, harmony, safety, and decency. Societies have developed several informal means of achieving this control, including family structures, social norms, and religious precepts. In contrast, law is a formal means of social control. Law can be defined as a body of rules prescribed and enforced by government for the regulation and protection of society. Criminal law is that branch of the law prohibiting certain forms of conduct and imposing penalties on those who engage in prohibited behavior.

All modern societies have developed systems for administering criminal justice. What distinguishes democratic societies from authoritarian ones is a commitment to the rule of law. In democratic societies such as ours, a person cannot be convicted of a crime unless he or she has committed a specific offense against a law that provides for a penalty. This principle is expressed in the maxim *nulla crimen, nulla poena, sine lege*, a Latin phrase meaning, “there is no crime, there is no punishment, without law.” In the United States, formal law governs every aspect of criminal justice, from the enactment of criminal prohibitions to the imposition of punishment upon those who violate these prohibitions.

Our criminal law prescribes both substantive and procedural rules governing the everyday operation of the criminal justice system. Substantive criminal law prohibits certain forms of conduct by defining crimes and establishing the parameters of penalties. Procedural criminal law regulates the enforcement of the substantive law, the determination of guilt, and the punishment of those found guilty of crimes. For example, although substantive law makes the possession of heroin a crime, the procedural law regulates the police search and seizure that produce the incriminating evidence. The substantive law makes premeditated murder a crime; the procedural law determines the procedures to be observed at trial and, if a conviction ensues, at sentencing.

Figure 1.1 provides an overview of the system of criminal law and procedure that exists in this country. The figure suggests three fundamental principles at work:

- **Constitutional supremacy.** In keeping with the ideal of the rule of law, the entire system of criminal law and procedure is subordinate to the principles and provisions of the U.S. Constitution. The Constitution sets forth the powers of government, the limits of those powers, and the rights of individuals. The Constitution thus limits government’s power to make and enforce criminal sanctions in several important ways. These limitations are enforced by judicial review, which is the power of courts of law to invalidate substantive laws and procedures that are determined to be contrary to the Constitution.

- **Federalism.** There is a fundamental division of authority between the national government in Washington, D.C., and the fifty state governments. Although both levels of government have authority and responsibility in the realm of criminal justice, most of the day-to-day peacekeeping function is exercised by the states and their political subdivisions (primarily counties and cities). Each of the states has its own machinery of government as well as its own constitution that empowers and limits that government. Each state constitution imposes limits on the criminal justice system within that state. Of course, the provisions of the
state constitutions, as well as the statutes adopted by the state legislatures, are subordinate to the provisions of the U.S. Constitution and the laws adopted by Congress.

- **Separation of powers.** The national government and each of the fifty state governments are constructed on the principle that legislative, executive, and judicial powers must be separated into independent branches of government. Thus, the federal government and the states have their own legislative branches, their own executive branches, and their own systems of courts. The legislative branch is responsible for enacting laws that specify crimes and punishments. The executive branch is responsible for enforcing those prohibitions and for carrying out the punishments imposed by the judicial branch, but it is the judicial branch that interprets the laws and ensures that persons charged with crimes receive fair treatment by the criminal justice system.

**What Is a Crime?**

Every crime involves a wrongful act (*actus reus*) specifically prohibited by the criminal law. For example, in the crime of battery, the *actus reus* is the striking or offensive touching of another person. Even the failure to take action can be considered a wrongful act if the law imposes a duty to take action in a certain situation. For example, a person who fails to file a federal income tax return may be guilty of a federal offense.

In most cases, the law requires that the wrongful act be accompanied by criminal intent (*mens rea*). Criminal intent does not refer to a person’s motive or reason for acting but merely to having formed a mental purpose to act. To convict a person of a crime, it is not necessary to know why a person committed the crime. It is only
necessary to show that the individual intentionally committed a prohibited act. An unintentional act is usually not a crime, although, as we will discover, there are exceptions to this principle. Moreover, in certain instances, one may be held criminally responsible irrespective of intent. Crimes of this latter nature are classified as strict liability offenses. A good example of a strict liability offense is selling liquor to a minor.

Felonies and Misdemeanors

Criminal law distinguishes between serious crimes, known as felonies, and less serious offenses, called misdemeanors. Generally speaking, felonies are offenses for which the offender can be imprisoned for more than one year; misdemeanors carry jail terms of less than one year. Common examples of felonies include murder, rape, robbery, burglary, aggravated assault, aggravated battery, and grand theft. Typical misdemeanors include petit theft, simple assault and battery, disorderly conduct, prostitution, and driving under the influence of alcohol.

Societal Interests Served by the Criminal Law

We can distinguish among types of crimes by the underlying societal interests that give rise to criminal prohibitions. Obviously, government has a duty to protect the lives and property of citizens—this is the essence of the social contract on which democratic government is based. But society also has an interest in protecting the public peace, order, and safety. Traditionally, the preservation of public morality has been regarded as an important function of the criminal law, although recently this notion has come under attack. Increasingly, protection of the public health and preservation of the natural environment are being recognized as societal interests that should be furthered by the criminal law. Finally, society has an interest in efficient and honest public administration and, in particular, the administration of justice.

Criminal Sanctions

As provided by law, courts have at their disposal a variety of sanctions to impose on persons convicted of crimes. During the colonial period of American history—and, indeed, well into the nineteenth century—the death penalty was often inflicted for a variety of felonies, including rape, arson, and horse theft. Today, the death penalty is reserved for only the most aggravated forms of murder and is infrequently carried out. Incarceration is the conventional mode of punishment prescribed for persons convicted of felonies, while monetary fines are by far the most common punishment for those convicted of misdemeanors. For first-time offenders, especially those convicted of nonviolent crimes, probation is a common alternative to incarceration, although probation usually entails a number of restrictions on the offender’s freedom.

As society becomes more cognizant of the rights of crime victims, courts are increasingly likely to require that persons convicted of crimes pay sums of money to their victims by way of restitution. Requiring offenders to make restitution and perform community service are common conditions of release on probation. Community service is often imposed as a condition as part of a pretrial diversion program in which first-time nonviolent offenders are offered the opportunity to avoid prosecution by completing a program of counseling or service. Increasingly, courts are requiring drug offenders to undergo treatment programs as conditions of probation.
Sources of Procedural Criminal Law

The procedural criminal law is promulgated by legislative bodies through enactment of statutes and by the courts through judicial decisions and the development of rules of court procedure. The U.S. Supreme Court prescribes rules of procedure and rules of evidence for the federal courts. State legislatures often adopt codes of evidence; however, the highest court of each state, usually called the state supreme court, is usually empowered to promulgate rules of procedure, including rules of evidence, for all the courts of that state. All criminal procedure rules are subject to the overriding requirements of the U.S. Constitution, as interpreted by the U.S. Supreme Court.

In addition to the common law, statutes, regulations, and ordinances, both federal and state constitutions contribute to the body of procedural law. For example, the U.S. Constitution defines the crime of treason in U.S. Const. Art. III, Sec. 3 and states, “No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

The Bill of Rights

Many of the most important constitutional provisions relative to criminal justice are found in the Bill of Rights (the first ten amendments to the Constitution adopted by Congress in 1789 and ratified by the states in 1791). The Bill of Rights has much to say about the enforcement of the criminal law and the rights of persons accused of crimes. Among the most important provisions of the Bill of Rights are:

- the Fourth Amendment, which prohibits unreasonable searches and seizures
- the Fifth Amendment, which, among other things, prohibits “double jeopardy” (being tried twice for the same offense) and protects people against compulsory self-incrimination
- the Sixth Amendment, which provides various rights to the accused, including the right to counsel and the right to trial by jury
- the Eighth Amendment, which prohibits excessive bail, excessive fines, and “cruel and unusual punishments”

Virtually all the provisions of the Bill of Rights have been held by the courts to apply with equal force to the states and to the national government. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Thus, the Bill of Rights limits the adoption of criminal laws, whether by Congress, the state legislatures, or the myriad city and county legislative bodies. The Bill of Rights also limits the actions of police, prosecutors, judges, and corrections officers at the local, state, and national levels.

Due Process of Law

By far the broadest, and probably the most important, constitutional principle relating to criminal justice is found in the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. The same principle can be found in similar provisions of every state constitution. Reflecting a legacy that can be traced to the
Magna Carta (1215), such provisions forbid the government from taking a person’s life, liberty, or property, whether as punishment for a crime or any other reason, without **due process of law**. Due process refers to those procedural safeguards necessary to ensure the fundamental fairness of a legal proceeding. Most fundamentally, due process requires **fair notice** and a **fair hearing**. That is, persons accused of crimes must have ample opportunity to learn of the charges and evidence being brought against them as well as the opportunity to contest those charges and that evidence in open court.

One of the most basic tenets of due process in criminal cases is the **presumption of innocence**. Unless the defendant pleads guilty, the prosecution must establish the defendant’s guilt by evidence produced in court. In a **criminal trial**, the standard of proof is “beyond a reasonable doubt.” The **reasonable doubt standard** differs markedly from the “preponderance of evidence” standard that applies to civil cases. In a civil trial, the judge or jury must find only that the weight of the evidence favors the plaintiff or the defendant. In a criminal case, the fact finder must achieve the “moral certainty” that arises from eliminating “reasonable doubt” as to the defendant’s guilt. Of course, it is difficult to define with precision the term “reasonable.” Ultimately, this is a judgment call left to the individual judge or juror.

Over the years, the United States Supreme Court has rendered a legion of decisions interpreting “due process.” During the 1960s, while Earl Warren served as chief justice, the Court’s decisions significantly revised the interpretation of what constitutes due process in relation to the investigation, enforcement, and punishment of crime. That decade is sometimes referred to as the “Criminal Procedure Revolution of the 1960s.” Indeed, the so-called Warren Court in its interpretations of due process greatly expanded the rights of persons accused of criminal offenses. Many lay observers realized this when they recalled how in 1963 (**Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799**) the Court overruled old precedents and held that the Sixth Amendment to the U.S. Constitution (as applied to the states under the Fourteenth Amendment) required states to appoint counsel to represent indigent defendants in felony cases. And even casual observers of the criminal justice system were soon made aware of the Court’s controversial 1966 decision in **Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694**, that required police to warn criminal suspects in custody of certain constitutional rights prior to interrogation. As you read later chapters, notice how the Supreme Court interpretations of the Fourth, Fifth, Sixth, and Eighth Amendments starting in the 1960s reshaped the criminal processes by effectively “nationalizing” the criminal procedure. Note also how the Court began to take a more conservative approach toward Constitutional interpretations after President Richard Nixon appointed Warren Burger to be chief justice in 1969 and later when William H. Rehnquist, appointed in 1972, was elevated to chief justice by President Ronald Reagan in 1986. Today, the Supreme Court under President George W. Bush’s appointment of John G. Roberts, Jr., who took office as chief justice on September 29, 2005, is generally viewed as a more conservative court in relation to constitutional aspects of the criminal process.

**The Criminal Process**

Because the government prosecutes criminals on behalf of society, the victim of a crime is not a party to the criminal prosecution. By filing a complaint with a law en-
forcement agency, a victim initiates the process that leads to prosecution, but once the prosecution begins, the victim’s participation is primarily that of being a witness. Quite often, victims feel lost in the shuffle of the criminal process. They sometimes feel that the system is insensitive or even hostile to their interests in seeing justice done. In recent years some states have taken steps to address victims’ concerns. Despite some measures being proposed and others that have been adopted, crime victims remain secondary players in the criminal justice system. The principal parties in a criminal case are the prosecution (that is, the government) and the defendant (that is, the accused person). In some situations, however, the victim might have another remedy: a civil suit to recover damages for losses or injuries suffered.

Certain basic procedural steps are common to all criminal prosecutions, although specific procedures vary greatly among jurisdictions. In every jurisdiction, law enforcement agencies make arrests, interrogate persons in custody, and conduct searches and seizures. All of these functions are regulated by the law. In every jurisdiction, there are procedures through which persons accused of crimes are formally notified of the charges against them and given an opportunity to answer these charges in court. Today elaborate pretrial processes enable defendants to explore the strengths and weaknesses of the prosecution’s case, often resulting in “plea bargaining” between the prosecution and defense. We mention these processes later and discuss them in detail in Chapter 5. Yet the criminal trial, a highly formal process for determining guilt or innocence, remains the crown jewel of criminal procedure. All court procedures, from the initial appearance of an accused before a magistrate to the decision of an appellate court reviewing a criminal conviction, are governed by an elaborate framework of laws, rules, and judicial decisions. These procedures are based on the common-law concept that the adversary process is the best mechanism for “truth finding” and in determining guilt or innocence. This process characterizes the American system of criminal justice. (Figure 1.2 illustrates the major components of the criminal process and indicates the chapters in which they are discussed.)

As cases move through the criminal justice system from arrest through adjudication and, in many instances, toward the imposition of punishment, there is considerable attrition. Of any one hundred felony arrests, perhaps as few as twenty-five will result in convictions. This “sieve effect” occurs for many reasons, including insufficient evidence, police misconduct, procedural errors, and the transfer of young offenders to juvenile courts.

Searches and Seizure

Searches are directed at locating evidence of crime; seizures occur when searches are fruitful. Like all activities of law enforcement, search and seizure are subject to constitutional limitations. The Fourth Amendment to the U.S. Constitution, enforceable against the states through the Due Process Clause of the Fourteenth Amendment, explicitly protects citizens from unreasonable searches and seizures. The Supreme Court has interpreted this protection as requiring law enforcement officers to have specific grounds for conducting searches: either probable cause or, in some instances, the less stringent standard of reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Furthermore, the Court has held that officers must obtain a search warrant unless exigent circumstances make it impracticable to obtain a warrant and also preserve evidence of crime. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). There are several well-
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FIGURE 1.2 The Criminal Process

- Investigation
- Search and Seizure (Ch. 3)
- Arrest (Ch. 4)
- Arraignment (Ch. 5)
- Guilty Plea
- Not Guilty Plea
- Conviction
- Acquittal
- Trial (Ch. 6)
- Sentencing (Ch. 7)
- Appeals Process (Ch. 8)
- Punishment (Ch. 7)

Out of system

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defined types of searches, each subject to a distinct set of constitutional rules. The limited investigatory detention, the stop-and-frisk, the border search, the search incident to a lawful arrest, and electronic eavesdropping are some types of searches that have been addressed by the courts.

To enforce the protections of the Fourth Amendment, the Supreme Court has fashioned a broad exclusionary rule that bars the fruits of illegal searches and seizures from being used as evidence in criminal trials. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Recent decisions by the Court have somewhat narrowed the scope of this exclusionary rule. See, for example, United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Nevertheless, because it excludes from many cases evidence that is both reliable and probative, the exclusionary rule remains controversial. (Search and seizure are discussed thoroughly in Chapter 3.)

Arrest and Interrogation

Arrest consists of taking into custody a person whom the police have probable cause to believe has committed a crime. An arrest can be made on the basis of an arrest warrant issued by a judge or magistrate. An arrest warrant may also be issued pursuant to a grand jury indictment or a prosecutor's sworn charging document known as an information. More commonly, arrests are made by police who observe commission of a crime, or have probable cause to believe a crime has been committed, but face exigent circumstances that prevent them from obtaining an arrest warrant. When an officer restricts a person from leaving the officer's presence or formally places that person under arrest, several constitutional protections come into play. These include the well-known Miranda warnings given to suspects in custody advising them of their constitutional rights. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The investigative tool of police interrogation takes many forms—from direct questioning to the use of subtle psychological techniques. Subject to narrow exceptions, custodial interrogation is not permitted until the suspect has been issued the Miranda warnings and has either waived those rights or has obtained counsel. A Fifth Amendment analogue of the Fourth Amendment exclusionary rule requires that confessions obtained by police through custodial interrogation must be excluded from evidence unless they meet these constitutional criteria (Miranda v. Arizona, supra).

Generally, an individual arrested for a minor misdemeanor is released from police custody and ordered to appear in court at a later date to answer the charge. If the arrest is for a major misdemeanor or felony, the individual is usually held in custody pending an initial appearance before a judge or magistrate. (Arrest and interrogation are discussed thoroughly in Chapter 4.)

Initial Appearance

Under the Constitution, a person accused of a crime has the right to a speedy and public trial. U.S. Const., Amend. VI. This includes the right to be brought before a judge to be formally apprised of the charges. In addition to reading the charges, the judge at the first appearance attempts to ascertain whether the defendant is represented by an attorney. If not, and if the defendant is indigent, the judge generally appoints counsel. Finally, the judge determines whether the accused is to be
released from custody pending further proceedings. A defendant who is granted \textit{pretrial release} can be released either on bail or on his or her own promise to appear in court. In deciding whether to grant pretrial release and whether to require that the defendant post a bond to assure the court the defendant will appear to answer the charges, a judge must weigh the seriousness of the alleged crime as well as the defendant’s prior record and ties to the community.

\section*{Summary Trials for Minor Offenses}

For minor misdemeanors, including many traffic violations, trials are often held in a summary fashion without the use of a jury, usually at the defendant’s first appearance in court. The U.S. Supreme Court has held that a jury trial is not constitutionally required unless the defendant is subject to incarceration for more than six months. \textit{Duncan v. Louisiana}, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In such cases, we might question whether the traditional presumption of innocence readily applies. In a \textit{summary trial} the charges are read, the defendant is asked to plead to the charges, and a verdict is reached, often within a few minutes. In most such cases defendants do in fact plead guilty, but even if they proclaim their innocence they are seldom acquitted. This is largely because judges are more inclined to take the word of the arresting officer than that of the accused, and rarely are there any additional witnesses. Although a person charged with any criminal offense has the right to retain counsel, most defendants charged with minor misdemeanors opt not to be represented by counsel. A principal reason is the expense of retaining a lawyer, which can exceed the fine imposed. The Supreme Court has said that indigent persons do not have a right to counsel at public expense unless they are actually sentenced to more than six months in jail. \textit{Scott v. Illinois}, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

\section*{The Grand Jury Indictment}

According to the Constitution, “no person shall be held to answer for a capital, or other infamous crime, unless on a presentment of indictment of a Grand Jury...” U.S. Const. Amend. V. The \textit{grand jury}, not to be confused with the \textit{trial jury}, is a body that considers evidence obtained by the prosecutor to determine whether there is probable cause to hold a trial. Grand juries also have the power to conduct investigations on their own initiative. As a mechanism designed to prevent unwarranted prosecutions, the grand jury dates back to twelfth-century England.

Each federal judicial district maintains a grand jury. These grand juries comprise twenty-three jurors. Grand juries are also maintained in many state jurisdictions, although the Supreme Court has held that states are not required to use grand juries in charging criminal defendants. \textit{Hurtado v. California}, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

Grand jury proceedings are typically closed to the public. The prosecutor appears before the grand jury with a series of cases that he or she has built against various defendants. Witnesses are called, and physical evidence is presented. If the grand jury believes that a given case is substantial, it hands down an indictment. In the overwhelming majority of cases, grand juries hand down indictments against persons as requested by prosecutors, leading some to question the utility of the grand jury procedure as a means of guarding against arbitrary or unwarranted prosecution.
The Preliminary Hearing

About half of the states, especially those that entered the Union later, have dispensed with or limited the functions of grand juries. These states have opted instead for charging defendants in a fashion that is less cumbersome and arguably more protective of the innocent. Under the more modern approach, the prosecutor files an accusatorial document called an information containing the charge against the accused. A preliminary hearing is then held in which a judge or magistrate must determine whether there is probable cause to hold the defendant for trial. At the preliminary hearing, the prosecutor presents physical evidence and testimony designed to persuade the judge that probable cause exists. The defense attorney, whose client is also usually present, generally exercises the right to cross-examine the prosecution’s witnesses. In addition, the defense may (but seldom does) present evidence on behalf of the defendant at that time.

Several states—for example, Tennessee and Georgia—use the grand jury mechanism supplemented by an optional preliminary hearing. This hybrid model provides a double check against the possibility of unwarranted prosecution. In other states, the grand jury is retained for capital cases; lesser felonies are charged via an information.

Arraignment

The arraignment is the defendant’s first appearance before the court that has the authority to conduct a trial. At this stage the defendant must plead to the charges that have been brought. The defendant has four options: (1) to plead guilty, in which case guilt will be pronounced and a date set for sentencing; (2) to plead not guilty, in which case a trial date will be set; (3) to plead nolo contendere, or no contest (with the approval of the court), which is tantamount to a plea of guilty; (4) to remain silent, in which case the court enters a plea of not guilty on behalf of the accused.

Plea Bargaining

Only a small proportion (perhaps five percent) of felony cases ever reach the trial stage. Many cases are dropped by the prosecutor for lack of evidence. Some cases are dropped because of obvious police misconduct. Others are dismissed by judges at preliminary hearings, usually for similar reasons. Of the cases that reach the arraignment stage, only a fraction result in trials. In most cases, defendants enter pleas of guilty, often in exchange for concessions from the prosecution. To avoid trial, which is characterized by both delay and uncertainty, the prosecutor often attempts to persuade the defendant to plead guilty, either by reducing the number or severity of charges or by promising not to seek the maximum penalty allowed by law.

Under a plea bargain, a charge of possession of cocaine with intent to distribute might be reduced to simple possession. First-degree murder, which may carry a death sentence, might be reduced to second-degree murder, which carries a term of imprisonment. A series of misdemeanor charges stemming from an altercation in a bar might be reduced to a single charge of disorderly conduct.

The U.S. Supreme Court has upheld the practice of plea bargaining against claims that it violates the due process clauses of the Fifth and Fourteenth amendments. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). However, because there is always a danger of coerced guilty pleas, especially when defen-
dants are ignorant of the law, it is the judge’s responsibility to ascertain whether the defendant’s guilty plea is voluntarily and knowingly entered and that there is some factual basis for the offense charged. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Pretrial Motions

Typically, a number of pretrial motions are available to both the defense and prosecution in a criminal case. Of particular importance are these motions:

1. To dismiss the charges against the accused
2. To inspect evidence in the hands of the prosecution
3. To request suppression of evidence because of alleged illegalities in gathering the evidence
4. To request a change of venue (location) of a trial to protect the accused from prejudicial pretrial publicity
5. To request a continuance (postponement) of the trial
6. To inspect the minutes of grand jury proceedings
7. To request psychiatric evaluation of the accused
8. To request closure of pretrial proceedings (again, to protect the right of the accused to a fair trial)

Pretrial motions are important vehicles in the adversary process. They enable the prosecution and defense to explore areas of concern and determine the strength of the prosecution’s case. Thus, the rulings on these motions often lead to dismissal of a case or to plea negotiations, all part of the “sieve effect” we mentioned earlier. When the pretrial processes do not lead to a resolution of a case, they frame the issues and organize the evidence, thereby setting the stage for the formal adversarial presentation that occurs in a criminal trial. (Pretrial procedures from initial appearance through pretrial motions are discussed in greater detail in Chapter 5.)

Jury Selection

The Supreme Court has held that defendants in both state and federal prosecutions have the right to a jury trial if they are subject to more than six months’ incarceration (Duncan v. Louisiana, supra). Potential trial jurors (referred to collectively as the venire) are selected typically, but not universally, from the rolls of registered voters. The actual process of jury selection, known as voir dire, consists of questioning potential jurors to determine their suitability for jury duty. In the federal courts, voir dire is conducted primarily by the judge; in the states, it is typically conducted by the attorneys for both sides. In all jurisdictions, attorneys may challenge jurors they find to be unsuitable. Attorneys have discretion to exercise a limited number of peremptory challenges, which do not require explanation and are generally granted as a matter of course. However, peremptory challenges may not be based solely on the race or gender of a prospective juror. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

Unlike peremptory challenges, challenges for cause must be supported by reasons acceptable to the court. The attorney making the challenge must articulate a reason why the prospective juror is unsuitable. However, there is considerable dis-
cretion in the court’s allowance of such challenges. Although peremptory challenges are limited in number, there is no set limit to the number of challenges for cause.

**Trial Procedures and Adjudication**

The criminal trial is a formal and complex adversarial encounter between the government and the accused. The Sixth Amendment guarantees a defendant the compulsory process of the law to obtain witnesses. The trial is governed by rules of evidence and procedure that are designed to develop the case in an orderly fashion and assist the fact finder (judge or jury) in reaching the correct result. After opening statements by counsel, the prosecution—by introducing testimony and physical evidence—attempts to prove the guilt of the accused beyond a reasonable doubt. The defense’s goal is to create reasonable doubt about the government’s case. In some cases, the defense relies solely on cross-examination of the prosecution’s witnesses to establish doubt. A defendant has the right not to testify, and the prosecution is barred from commenting on the exercise of that right. In most cases, the defense introduces evidence to contradict the evidence against the defendant or to discredit the government’s witnesses. Witnesses called by each side are subject to cross-examination, and physical evidence is subject to inspection and challenge.

During closing arguments, counsel attempt to persuade juries of the merits of their positions. Following this, the trial judge instructs the jury about the relevant points of law and the jurors’ responsibilities in reaching a verdict. When a jury returns a verdict of guilty, defense counsel frequently moves for a new trial or other relief. (Trial procedures are discussed at length in Chapter 6.)

**Sentencing**

After an accused person has been convicted, the process moves into the sentencing phase. Frequently, a separate court appearance is scheduled to allow a presentence investigation before sentence is imposed. In imposing sentences, judges generally must follow statutory requirements governing the type and severity of sentence for particular crimes. Types of sentences include probation, incarceration, work release, monetary fines, community service, and, of course, death. Different statutory approaches govern the length of prison sentences that courts may impose. Indeterminate sentencing occurs when individuals are incarcerated for periods of time to be determined by correctional agencies. Determinate sentencing occurs when statutes specify prison terms for particular crimes. In most jurisdictions, judges can impose particular sentences within broad parameters defined by statutes. In recent years, we have witnessed two trends away from broad judicial discretion in sentencing. First is the tendency for legislatures to require flat or mandatory sentences for the most serious crimes, especially those in which the defendant used a firearm. Second, some jurisdictions have developed sentencing guidelines to address the problem of sentencing disparity.

Congress enacted the Sentencing Reform Act of 1984 to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences also warranted by mitigating or aggravating factors.” 28 U.S.C.A. § 992(b)(1)(B). Where unusual circumstances exist, federal appellate courts have permitted district courts to exercise wide discretion in determining upward or down-
ward departures from the recommended sentences. The Supreme Court took notice of the fact that many cases from the lower federal courts reflected uncertainty with respect to application of the sentencing guidelines. In *Rita v. United States*, 551 U.S. __, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), the Court held that federal appeals courts hearing challenges of a defendant's sentence may presume that a sentence imposed within properly calculated sentencing guidelines is reasonable.

Even before the federal government adopted sentencing guidelines, in 1980 Minnesota—followed by a number of other states—adopted its own guidelines via legislation. Over the past few years, the experience of these states, along with that of the federal courts, has encouraged several state efforts in enacting similar guidelines. (Sentencing and punishment are discussed in Chapter 7.) Sentencing defendants in capital cases (i.e., where the death penalty may be imposed) has become a complex process that we explain in Chapter 7.

**Appeal and Discretionary Review**

Federal law and the laws of every state provide those convicted of crimes a limited right to appeal their convictions to higher tribunals. Appellate courts generally confine their review of convictions to legal, as distinct from factual, issues. Even though appellate courts review the legal sufficiency of evidence, they do not attempt to second-guess the factual determinations of trial judges and juries. Rather, appellate courts review such procedural issues as denial of fair trial, denial of counsel, admission of illegal evidence, and improper jury instructions. Appellate courts focus on errors of consequence and often overlook so-called harmless errors—that is, errors having no substantial effect on the trial court's judgment.

When convictions are upheld on appeal, defendants may petition higher appellate courts for further review. Such review is available at the discretion of the higher court. The Supreme Court receives thousands of petitions each year from defendants whose convictions have been affirmed by the United States Courts of Appeals or the highest appellate tribunals of the states. Of course, the Supreme Court can review only a small percentage of these cases. These tend to be the most difficult cases involving the most significant legal questions.

**Postconviction Relief**

A person who has been convicted of a crime, has exhausted all normal appellate remedies, and is confined to prison may still challenge his or her conviction, sentence, or conditions of confinement by filing a petition for a *writ of habeas corpus*. Habeas corpus is an ancient common-law device that permits judges to review the legality of someone's confinement. In modern American criminal procedure, habeas corpus has become a way for prisoners who have exhausted all other avenues of appeal to obtain judicial review. A federal prisoner petitions the appropriate federal district court for habeas corpus relief. Under most state statutes, state prisoners may file habeas corpus petitions or other similar petitions for *postconviction relief* with the appropriate state courts.

Under federal law, a state prisoner who wants to raise a federal constitutional issue—for example, the alleged denial of the Sixth Amendment right to be represented by counsel—may petition a federal district court for habeas corpus relief. The power of federal courts to issue habeas corpus in state cases can be traced to an act
of Congress adopted just after the Civil War. See Ex parte McCardle, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869).

The denial or grant of habeas corpus relief by a federal district court is subject to appeal in the U.S. Court of Appeals. That court’s ruling is subject to review by the Supreme Court on a discretionary basis. Thus, it can take several years to finally resolve one federal habeas corpus petition, especially if the petition raises difficult constitutional claims where the law is not yet fully settled. If a state prisoner were permitted to raise each of many issues in separate federal habeas corpus petitions, it could take decades to resolve all the claims. This is why the Supreme Court has moved recently to require prisoners to raise all claims in their first habeas corpus petition. The Court has said that, unless there are exceptional circumstances, failure to do so constitutes an abuse of the writ of habeas corpus. McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). (The appellate process, including post-conviction relief, is discussed in detail in Chapter 8.)

Federal habeas corpus review was once the only real means of postconviction relief available to state prisoners who had exhausted their appeals by right in the state courts. Today, most states have statutes or court rules that permit state prisoners, under appropriate circumstances, to challenge illegal convictions or sentences even after their ordinary appeals have been exhausted. These procedures are known as collateral attack or postconviction relief and provide for state-level judicial review of judgments and sentences imposed in violation of the federal or state constitutions. Since access to federal habeas corpus relief has been constricted by Congress and the Supreme Court, these state-level mechanisms have taken on even greater importance. Contentions by convicted defendants who claim they received ineffective counsel and claims that newly discovered DNA may exonerate a defendant are among the more common grounds asserted for postconviction relief.

CONCLUSION

The American system of criminal justice is deeply rooted in English common law, but the specifics of criminal law and procedure have evolved substantially from their medieval English origins. Today, American criminal law is largely codified in statutes adopted by Congress and the state legislatures, as interpreted by the courts in specific cases. And there is an elaborate framework of procedural rules based on constitutional provisions, statutory enactments, rules of court, and judicial interpretations of all of these. Towering above all the legal rules is the Constitution of the United States as interpreted by the United States Supreme Court. As we shall see throughout this book, the Court’s interpretation of the U.S. Constitution has a profound impact on the administration of justice in this country.

Courts are often criticized for their decisions applying constitutional principles to law enforcement, prosecution, and criminal punishment. But if the federal and state constitutions are to remain viable protections of our cherished liberties, then we must accept that they place significant constraints on our efforts to control crime. For instance, to what degree is the public willing to allow erosion of the constitutional protection against unreasonable searches and seizures? To what degree are we willing to sacrifice our constitutionally protected privacy and liberty to aid the ferreting out of crime? Today the question is amplified by the threat of terrorism and the belief of many that government needs greater powers of search and seizure to address terrorist threats. These are the fundamental questions of criminal procedure in a society that prides itself on preserving the rights of the individual.
CHAPTER 1 Fundamentals of Criminal Procedure

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- **WEB-BASED RESEARCH ACTIVITY**
  - Go to http://www.findlaw.com/casecode/supreme.html. Use this page to locate the Supreme Court’s decision in *Mapp v. Ohio* (1961). Read the decision. Identify the key issue and the Court’s holding. What is the rationale for the Court’s decision? Write a brief summarizing the decision, and be sure to include a comment on its significance.

- **QUESTIONS FOR THOUGHT AND DISCUSSION**
  1. What is the essential difference between substantive criminal law and procedural criminal law? Can you give examples of each?
  2. What are the principal steps in the criminal justice process that can occur after an arrest?
  3. What do you perceive be the strengths and the weaknesses in the adversary system of criminal justice that characterizes the American criminal justice system?
4. What means of punishment for criminal offenses exist in your state? Is capital punishment available for persons convicted of first-degree murder? Which punishments, if any, do you think are most effective at controlling crime?

5. Why is the constitutional concept of “due process of law” important in the law of criminal procedure?

6. What have been the effects of the “criminal procedure revolution of the 1960s”?

7. Why is plea bargaining a common practice in the American system of criminal justice?

8. How can a seemingly minor criminal case make its way to the United States Supreme Court? Can you think of any examples of such cases?
CHAPTER 2

Organization of the Criminal Justice System

CHAPTER OUTLINE

Introduction
Legislatures
Law Enforcement Agencies
Prosecutorial Agencies
Counsel for the Defense
Juries
The Courts
The Juvenile Justice System
The Corrections System
Introduction

In every modern country, criminal justice is a complex process involving a plethora of agencies and officials. In the United States, criminal justice is particularly complex, largely because of federalism, the constitutional division of authority between the national and state governments. Under this scheme of federalism, the national government operates one criminal justice system to enforce federal criminal laws, and each state has a justice system to apply its own criminal laws. As a result of this structural complexity, it is difficult to provide a coherent overview of criminal justice in America. The two systems are to some extent different in both substantive and procedural law.

Despite the differences that exist between federal and state criminal justice systems, there are certain similarities. All fifty-one criminal justice systems in the United States involve legislative bodies, law enforcement agencies, prosecutors, defense attorneys, courts of law, and corrections agencies (see Table 2.1). All follow certain general procedures beginning with arrest and, in some cases, ending in punishment. Finally, all systems are subject to the limitations of the U.S. Constitution, as interpreted by the courts. In this chapter we present an overview of the roles played by the institutions that make up the criminal justice system in the United States.

Legislatures

The governmental institution with primary responsibility for enacting laws is the legislature. Because the United States is organized on the principle of federalism, there are fifty-one legislatures in this country—the U.S. Congress and the fifty state legislatures. Each of these bodies has the power to enact statutes that apply within its respective jurisdiction. The U.S. Congress adopts statutes that apply throughout the United States and its territories, whereas the Illinois General Assembly, for example, adopts laws that apply only within the state of Illinois. For the most part, federal and state statutes complement one another. When there is a conflict, the federal statute prevails.

Legislative Powers of Congress

Congress’s legislative authority may be divided into two broad categories: enumerated powers and implied powers. Enumerated powers are those that are mentioned specifically in Article I, Section 8 of the Constitution, such as the power to tax and the power to borrow money on the credit of the United States. Among the constitutionally enumerated powers of Congress, there are only two direct references to criminal justice. Congress is explicitly authorized to “provide for the Punishment of counterfeiting the Securities and current Coin of the United States” and to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” Of course, Congress’s power to define federal crimes is much more extensive than these two clauses suggest.

The enumerated power to “regulate commerce among the states” has provided Congress with a vast reservoir of legislative power. Many of the criminal statutes enacted by Congress in recent decades have been justified on the basis of the Commerce Clause of Article I, Section 8.
Congress’s implied powers are those that are deemed to be “necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested … in the Government of the United States, or in any Department or Officer thereof.” As long as Congress’s policy goal is permissible, any legislative means that are “plainly adapted” to that goal are likewise permissible. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Under the doctrine of implied powers, scarcely any area exists over which Congress is absolutely barred from legislating, because most social and economic problems have a conceivable relationship to the broad powers and objectives contained in the Constitution.

As the nation expanded and evolved, Congress became more active in passing social and economic legislation. In the twentieth century, and especially the last several

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**Table 2.1 Criminal Justice Agencies and Their Functions**

<table>
<thead>
<tr>
<th>Type of Agency</th>
<th>Functions</th>
</tr>
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<tbody>
<tr>
<td>Legislative bodies</td>
<td>Enacting criminal prohibitions</td>
</tr>
<tr>
<td>Law enforcement agencies</td>
<td>Enforcing criminal prohibitions Maintaining public order and security Conducting investigations and gathering evidence Performing searches and seizures Making arrests of persons accused of crimes Interrogating suspects</td>
</tr>
<tr>
<td>Prosecutorial agencies</td>
<td>Enforcing criminal prohibitions Conducting investigations Conducting investigations and gathering evidence Initiating criminal prosecutions Representing the government in court</td>
</tr>
<tr>
<td>Public defender offices</td>
<td>Representing indigent persons accused of crimes</td>
</tr>
<tr>
<td>Grand juries</td>
<td>Reviewing evidence obtained by prosecutors Indicting persons accused of crimes Granting immunity to witnesses</td>
</tr>
<tr>
<td>Courts of law</td>
<td>Issuing search warrants Issuing arrest warrants Conducting summary trials in minor cases Conducting initial appearances Conducting preliminary hearings Conducting arraignments Holding hearings on pretrial motions Conducting trials Sentencing persons convicted of crimes Hearing appeals from lower court rulings</td>
</tr>
<tr>
<td>Corrections agencies</td>
<td>Incarceration of persons convicted of crimes Supervision of persons on probation or parole Carrying out executions of persons sentenced to death</td>
</tr>
</tbody>
</table>
decades, Congress established a host of federal crimes. There is now an elaborate
body of criminal law. Of course, Congress may not enact laws that violate constitu-
tional limitations such as those found in the Bill of Rights.

**PUBLICATION OF FEDERAL STATUTES**

Federal statutes are published in *United States Statutes at Large*, an annual publica-
tion dating from 1789 in which federal statutes are arranged in order of their adop-
tion. Statutes are not arranged by subject matter, nor is there any indication of how
they affect existing laws. Because the body of federal statutes is quite voluminous
and because new statutes often repeal or amend their predecessors, it is essential
that new statutes be merged into legal codes that systematically arrange the statutes
by subject. To find federal law as it currently stands, arranged by subject matter, one
must consult the latest edition of the *Official Code of the Laws of the United States*,
generally known as the **U.S. Code**. The U.S. Code is broken down into fifty subjects, called “titles.” Title 18, “Crimes and Criminal Procedure,” contains many of
the federal crimes established by Congress.

The most popular compilation of the federal law, used by lawyers, judges, and
criminal justice professionals, is the **United States Code Annotated (U.S.C.A.)**. Pub-
lished by West Group, the U.S.C.A contains the entire current U.S. Code, but each
section of statutory law in U.S.C.A. is followed by a series of annotations consisting of
court decisions interpreting the particular statute, along with historical notes, cross-
references, and other editorial features.

**State Legislatures**

Under the U.S. Constitution, each state must have a democratically elected legisla-
ture because that is the most fundamental element of a “republican form of govern-
ment.” State legislatures for the most part resemble the U.S. Congress. Each is com-
posed of representatives chosen by the citizens of their respective states. All of them
are bicameral (i.e., two-house) institutions, with the exception of Nebraska, which
has a unicameral legislature. In adopting statutes, they all follow the same basic pro-
cedures. When state legislatures adopt statutes, they are published in volumes
known as **session laws**. Then statutes are integrated into state codes. Lawyers make
frequent use of annotated versions of state codes. These are available at law school
libraries, and often at local law libraries, to those who wish to see how state statutes
have been interpreted and applied by the state courts.

After the American Revolution, states adopted the English common law as their
own state law. (Congress, on the other hand, never did.) Eventually, however, state
legislatures codified much of the common law by enacting statutes, which in turn
have been developed into comprehensive state codes. Periodically, states revise por-
tions of their codes to make sure they remain relevant to a constantly changing so-
ciety. For example, in 1989 the Tennessee General Assembly undertook a moderni-
zation of its criminal code. Old offenses that were no longer being enforced were
repealed, other offenses were redefined, and sentencing laws were completely
overhauled.

**STATUTORY INTERPRETATION**

Statutes are necessarily written in general language, so legislation often requires ju-
dicial interpretation. Because legislative bodies have enacted vast numbers of laws
defining offenses that are *mala prohibita*, such interpretation assumes an importance largely unknown to the English common law. Courts have responded by developing certain techniques to apply when a statute appears unclear as related to a specific factual scenario. These techniques are generally referred to as **rules of statutory interpretation** and over the years have given rise to references to legislative history and various maxims that courts apply in attempting to determine the legislature’s intention in enacting a statute.

Courts recognize that it is the legislative bodies and not the courts that exercise the power to define crimes and penalties. It follows that the most frequent maxim applied by courts in determining legislative intention is the **plain meaning rule**. As the U.S. Supreme Court observed early in the twentieth century, “Where the language [of a statutory law] is plain and admits of no more than one meaning the duty of interpretation does not arise....” *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). The Court’s dictum seems self-evident, yet even learned judges often disagree as to whether the language of a given statute is plain. This gives rise to certain **canons of construction** applied by courts to determine the legislative intent behind a statutory definition of a crime.

A primary canon of construction is that criminal statutes must be strictly construed. The rule originated at common law, when death was the penalty for committing a felony, but the rule has remained. However, it is now based on the rationale that every criminal statute should be sufficiently precise to give fair warning of its meaning. Today we see the rule applied most frequently in a constitutional context when courts determine a criminal statute to be **void for vagueness**. This is often termed the vagueness doctrine. Another canon of construction provides for an **implied exception** to a statute. For example, courts have ruled that there is an implied exception to a law imposing speed limits on the highway in instances where police or other emergency vehicles violate the literal text of the law. Would a court apply a statute that makes it an offense for any person to sleep in a bus terminal and thereby find a ticketed passenger guilty who fell asleep while waiting for a bus that was overdue? The implied exception doctrine seems to simply reflect a commonsense approach in determining the meaning of a statute.

Often a statute uses a term that has a definite meaning at common law. In general, courts interpret such terms according to their common-law meanings. For example, in defining the crime of burglary a legislature might use the term “curtilage” without defining it. In such an instance, we noted that a court would ordinarily look to the common law, which defined the term to mean “an enclosed space surrounding a dwelling.”

But this rule does not always apply when dealing with modern statutes, particularly at the federal level, where there is generally considerable legislative history in the form of committee reports and floor debates recorded in the *Congressional Record* that can aid in determining the true intent of a statute. Thus, in *Perrin v. United States*, 444 U.S. 37, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979), the Supreme Court determined that the word “bribery” in a federal statute was not limited to its common-law definition because the legislative history revealed an intent to deal with bribery in organized crime beyond its common-law definition. In general, there is considerably less legislative history available at the state legislative level. However, at times courts seek to determine legislative intent based on available resources.
Law Enforcement Agencies

Law enforcement agencies are charged with enforcing the criminal law. They have the power to investigate suspected criminal activity, to arrest suspected criminals, and to detain arrested persons until their cases come before the appropriate courts of law. Society expects law enforcement agencies not only to arrest those suspected of crimes but also to take steps to prevent crimes from occurring.

Historical Development

Before the Norman Conquest in 1066, there were no organized police in England, but by the thirteenth century constables and justices of the peace came to symbolize enforcement of the rule of law in England. Large communities, somewhat similar to counties in America, were called “shires.” The king would send a royal officer called a “reeve” to each shire to keep order and to exercise broad powers within the shire. The onset of the Industrial Revolution led to the development of large cities. Industrialists and merchants began to establish patrols to protect their goods and buildings. But the need for more effective policing became evident. In 1829 Sir Robert Peel, the British Home Secretary, organized a uniformed, but unarmed, police force for London. The name “Bobbies” is still applied to police officers in England in honor of Peel. In later years, Parliament required counties and boroughs to establish police departments modeled along the lines of the London force.

Colonial America basically followed the English system, with local constables and county sheriffs following the English concept of constables and shire reeves. These early law officers were often aided by local vigilante groups of citizens known as “posses.” Once America became a nation, states and local communities began to follow the Peel model, and by the mid-1800s, Boston, New York, and Philadelphia had developed professional police departments. By the twentieth century, police were aided by technological developments, and by the 1930s, many departments were equipped with motorcycles and patrol cars. Detectives were soon added to the force, and police became equipped with modern communications equipment and were trained in ballistics and the scientific analysis of blood samples and handwriting.

Policing in Modern America

In the United States nearly 20,000 federal, state, and local agencies are involved in law enforcement and crime prevention. Collectively, these agencies employ nearly 800,000 sworn officers. Increasingly, law enforcement officers are trained professionals who must acquire a good working knowledge of the criminal law. At the local level, the typical police recruit now completes about 1,000 hours of training before being sworn in. Modern police forces are highly mobile and, except in the smallest communities, are equipped with computers, sophisticated communications technology, and scientific crime detection equipment.

Policing at the National Level

At the national level, the Federal Bureau of Investigation (FBI) is the primary agency empowered to investigate violations of federal criminal laws. Located in the Department of Justice, the FBI is by far the most powerful of the federal law en-
forcement agencies, with broad powers to enforce the many criminal laws adopted by Congress. The FBI currently employs nearly 25,000 people, including more than 10,000 special agents spread out over fifty-six field offices in the United States and twenty-one foreign offices. With an annual budget exceeding two billion dollars, the FBI uses the most sophisticated methods in crime prevention and investigation. Its crime laboratory figures prominently in the investigation and prosecution of numerous state and federal crimes.

The U.S. Marshals Service is the oldest unit of federal law enforcement, dating back to 1790. The Marshals execute orders of federal courts and serve as custodians for the transfer of prisoners. U.S. Marshals played a prominent role in the crises in school integration during the civil rights struggles of the 1950s and early 1960s.

Nearly fifty other federal agencies have law enforcement authority in specific areas. Among them are the Bureau of Alcohol, Tobacco, and Firearms; the Internal Revenue Service; the Bureau of Indian Affairs; the Drug Enforcement Administration; the Bureau of Postal Inspection; the Tennessee Valley Authority; the National Park Service; the Forest Service; the U.S. Capitol Police; the U.S. Mint; the Secret Service; and the Bureau of Citizenship and Immigration Services within the new Department of Homeland Security.

STATE AND LOCAL POLICING

All states have law enforcement agencies that patrol the highways, investigate crimes, and furnish skilled technical support to local law enforcement agencies. Similarly, every state has a number of state agencies responsible for enforcing specific areas of the law, ranging from agricultural importation to food processing and from casino gambling to dispensing alcoholic beverages. Probably among the best known to all citizens are the state highway patrol and the fish and game warden. Generally, cases developed by state officers are processed through local law enforcement and prosecution agencies.

At the local level, we find both county and municipal law enforcement agencies. Nearly every county in America (more than three thousand of them) has a sheriff. In most states, sheriffs are elected to office and exercise broad powers as the chief law enforcement officers of their respective counties. They are usually dependent on funding provided by a local governing body, generally the county commission. In some areas, particularly the urban Northeast, many powers traditionally exercised by sheriffs have been assumed by state or metropolitan police forces. In the rest of the country, however, especially in the rural areas, sheriffs (and their deputies) are the principal law enforcement agents at the county level.

Nearly 15,000 cities and towns have their own police departments. Local police are charged with enforcing the criminal laws of their states, as well as of their municipalities. Although the county sheriff usually has jurisdiction within the municipalities of the county, he or she generally concentrates enforcement efforts on those areas outside municipal boundaries.

In addition to city and county law enforcement agencies, there are numerous special districts and authorities that have their own police forces. Most state universities have their own police departments, as do many airports and seaports.

Besides providing law enforcement in the strictest sense of the term, local law enforcement agencies initiate the criminal justice process and assist prosecutors in the preparation of cases. Sheriffs in many larger counties and many metropolitan police departments have developed SWAT (special weapons and tactics) teams to assist in the rescue of victims of catastrophes and persons taken hostage. They are also heavily involved in order maintenance or “keeping the peace,” hence the term
“peace officers.” Often, keeping the peace involves more of a process of judgment and discretion rather than merely applying the criminal law.

Some of the newer and more innovative policing responsibilities include community relations departments that seek to foster better relations among groups of citizens, especially minorities and juveniles, and to assist social agencies in efforts to rehabilitate drug and alcohol abusers. Finally, the public looks to the police to prevent crime through their presence in the community and through education of the public on crime prevention measures. Under the rubric of community policing, police agencies are making an effort to become actively involved in their communities in order to earn the trust and confidence of the citizens they serve. Most police departments in cities of 50,000 people or more now have specialized community policing divisions.

Prosecutorial Agencies

Although law enforcement agencies are the “gatekeepers” of the criminal justice system, prosecutors are central to the administration of criminal justice. It is the prosecutors who determine whether to bring charges against suspected criminals. They have enormous discretion, not only in determining whether to prosecute but also in determining what charges to file. Moreover, prosecutors frequently set the tone for plea bargaining and have a powerful voice in determining the severity of sanctions imposed on persons convicted of crimes. Accordingly, prosecutors play a crucial role in the criminal justice system.

Historical Background

The early English common law considered many crimes to be private matters between individuals; however, the role of the public prosecutor evolved as early as the thirteenth century, when the King’s counsel would pursue crimes considered to be offenses against the Crown and, in some instances, when injured victims declined to prosecute. Today in England, a public prosecutor prosecutes crimes that have great significance to the government, but the majority of offenses are handled by police agencies that hire barristers to prosecute charges. Unlike American prosecutors, the English barrister may represent the police in one case and in the next case represent the defendant.

The office of public prosecutor in England became the prototype for the office of attorney general in this country at the national and state levels. In colonial days, an attorney general’s assistants handled local prosecutions. However, as states became independent, the practice ceased. The state attorneys general assumed the role of chief legal officers, and local governments began electing their own prosecuting attorneys.

Federal Prosecutors

In the United States, the chief prosecutor at the federal level is the Attorney General, who is the head of the Department of Justice. Below the Attorney General are several U.S. Attorneys, each responsible for prosecuting crimes within a particular federal district. The U.S. Attorneys, in turn, have a number of assistants who handle most of the day-to-day criminal cases brought by the federal government. The Presi-
dent, subject to the consent of the Senate, appoints the Attorney General and the U.S. Attorneys. Assistant U.S. Attorneys are federal civil service employees.

In addition to the regular federal prosecutors, Congress has provided for the appointment of independent counsel (special prosecutors) in cases involving alleged misconduct by high government officials. By far, the most infamous such case was “Watergate,” which resulted in the convictions of several high-ranking officials and led to the resignation of President Richard Nixon in 1974. But there have been numerous cases where, under congressional direction, a special prosecutor has been appointed. The best-known recent example of this was Kenneth Starr’s appointment to investigate the Whitewater scandal that involved close associates of President Bill Clinton and First Lady Hillary Rodham Clinton, an investigation that eventually culminated in President Clinton’s impeachment and his subsequent acquittal by the U.S. Senate in February 1999.

State and Local Prosecutors

Each state likewise has its own attorney general, who acts as the state’s chief legal officer, and a number of assistant attorneys general, plus a number of district or state’s attorneys at the local level. Generally speaking, local prosecutors are elected for set terms of office and have the responsibility for the prosecution of crimes within the jurisdiction for which they are elected. In most states, local prosecutors act autonomously and possess broad discretionary powers. Many local prosecutors function on a part-time basis, but in the larger offices the emphasis is for the prosecutor and assistant prosecutors to serve on a full-time basis. Larger offices are establishing educational programs and developing specially trained assistants or units to handle specific categories of crime—for example, white collar and governmental corruption, narcotics offenses, and consumer fraud.

Cities and counties also have their own attorneys. These attorneys, generally appointed by the governing bodies they represent, sometimes prosecute violations of city and county ordinances, but increasingly their function is limited to representing their cities or counties in civil suits and giving legal advice to local councils and officials.

The Prosecutor’s Broad Discretion

Federal and state prosecutors (whether known as district attorney, state attorney, or county prosecutor) play a vital role in the criminal justice system in the United States. As mentioned, a politically appointed U.S. Attorney supervises prosecutors at the federal level, whereas state and local prosecutors generally come into office by election in partisan contests. Thus, prosecutors become sensitive to the community norms while exercising the broad discretion that the law vests in prosecutorial decision making.

Prosecutors not only determine the level of offense to be charged; in exercise of their very broad discretion they exercise the power of nolle prosequi, usually called nol pros, which allows a prosecutor not to proceed in a given case irrespective of the factual basis for prosecution. Prosecutors sometimes nol pros cases to secure cooperation of a defendant in furthering other prosecution; in other instances, a prosecutor may allow a defendant to participate in some diversionary program of rehabilitation. In recent years, completion of a prescribed program in a drug court has often resulted in a case being nol prosed by a prosecutor.
Counsel for the Defense

In American criminal law, individuals accused of any crime, no matter how minor the offense, have the right to employ counsel for their defense. U.S. Const. Amend. VI. Indeed, the U.S. Supreme Court has held that a defendant has the right to be represented by an attorney at all criminal proceedings that may substantially affect the rights of the accused. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967).

In this country, many lawyers specialize in criminal defense work. Of course, defendants are free to employ an attorney of their choice at their own expense. Some well-known defense attorneys, such as Mark Geragos, Roy Black and the late Johnnie Cochran, are national celebrities who specialize in representing defendants in high-profile trials. However, most criminal defendants are not wealthy, and few people accused of crimes can afford to hire such “dream teams” to represent them.

Many attorneys are highly skilled in handling criminal cases and are available for employment in federal and state criminal proceedings. In fact, it is not uncommon for attorneys who start their careers as prosecutors to eventually enter private practice in criminal matters. Today some state bar associations grant special recognition

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**SUPREME COURT PERSPECTIVE**

**Gideon v. Wainwright**, 372 U.S. 335; 83 S.Ct. 792; 9 L.Ed.2d. 799 (1963)

In this landmark case, the Supreme Court considers whether state courts must as a matter of course appoint counsel to represent indigent defendants accused of felonies. Clarence Earl Gideon was convicted of breaking and entering a poolroom with intent to commit a misdemeanor, a felony under Florida law. Unable to afford legal representation, Gideon requested that the trial judge appoint a lawyer to represent him. The judge refused, as Florida law at that time required judges to appoint counsel at public expense to represent indigent defendants only in capital cases. The Supreme Court held that this was a denial of the Sixth Amendment right to counsel as applied to the states under the Fourteenth Amendment. In his opinion for the Court, Justice Hugo Black reflected on the importance of defense counsel in criminal cases.

**JUSTICE BLACK delivered the opinion of the Court, saying in part:**

“In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”
to lawyers who qualify by virtue of experience and examination as “certified criminal defense attorneys.”

Representation of Indigent Defendants

Beginning in the 1960s, the U.S. Supreme Court greatly expanded the right to counsel by requiring states to provide attorneys to indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

In some states, courts appoint attorneys from the private bar to represent indigent defendants. However, most states have chosen to handle the problem of indigent defense by establishing the office of public defender. Like public prosecutors, public defenders are generally elected to set terms of office. Because of their constant contact with criminal cases, public defenders acquire considerable expertise in representing defendants. Moreover, because they are public officials who, like prosecutors, are provided budgets, public defenders are often able to hire investigators to aid their staff of assistant public defenders in their representation of indigent defendants. We discuss the right to appointed counsel and the right to self-representation in detail in Chapter 5.

The Role of Defense Attorneys

The role of the defense attorney is perhaps the most misunderstood in the criminal justice system. First and foremost, a defense attorney is charged with zealously representing his or her client and ensuring that the defendant’s constitutional rights are fully protected. To anyone who has watched *Perry Mason* or a similar television program, the defense attorney’s most visible role is that of vigorously cross-examining prosecution witnesses or passionately pleading for a client before a jury. The defense attorney’s role is far greater than being a courtroom advocate. As a counselor, defense attorneys must evaluate the alternative courses of action that may be available to a defendant. They must attempt to gauge the strength of the prosecution’s case, advise on the feasibility of entering a plea of guilty, and attempt to negotiate a fair and constructive sentence. In instances where a defendant elects to plead not guilty, defense attorneys challenge the police and prosecution. Many observers point out that these efforts by defense attorneys “keep the system honest” by causing police and prosecuting authorities to be scrupulous in their adherence to constitutional standards.

Perhaps the most frequently voiced reservation concerning defense attorneys relates to representation of a defendant who, from all facts available, is believed to be guilty. Defense attorneys are quick to point out that it is not their function to make a judgment of the defendant’s guilt or innocence; there are other functionaries in the system charged with that responsibility. The answer does not easily satisfy critics. Nevertheless, in our system of adversarial justice the defense attorney is required to represent a defendant with fidelity, to protect the defendant’s constitutional rights, to assert all defenses available under the law of the land, and to make sure before a defendant is found guilty that the prosecution has sustained its burden of proving the defendant guilty beyond a reasonable doubt. A defense attorney must make sufficient objections and other tactical moves to preserve any contention of error for review by a higher court. If the defendant is convicted, the duty continues to ensure imposition of a fair sentence, advise as to the right to appeal to a higher court, and, in some instances, seek postconviction relief if an appeal fails.
Juries

The jury is one of the great contributions of the English common law. By the twelfth century juries began to function in England, but not as we know juries today. Rather, these early juries comprised men who had knowledge of the disputes they were to decide, but eventually juries began to hear evidence and make their verdicts accordingly. By the eighteenth century, juries occupied a prominent role in the English common-law system and served as a buffer between the Crown and the citizenry. The colonists brought the concept to the New World. Today, juries composed of both men and women represent an important component of the American system of criminal justice.

There are two types of juries: the grand jury and the petit (trial) jury. The juries derive their names based on the number of persons who serve, the grand jury consisting of a larger number than the petit jury.

Grand Juries

Grand juries essentially serve to consider whether there is sufficient evidence to bring charges against a person; petit or trial juries sit to hear evidence at a trial and render a verdict accordingly. The Fifth Amendment to the U.S. Constitution stipulates that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.” The constitutional requirement binds all federal courts; however, the Supreme Court has held that states are not bound to abide by the grand jury requirement. Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884).

Sixteen to twenty-three persons serve on a federal grand jury. The number varies according to each state but usually consists of between twelve and twenty-three citizens. Grand jurors serve for a limited time to hear evidence and to determine whether to hand down an indictment, sometimes referred to as a true bill, or to refuse to indict when the jury determines there is insufficient evidence of a crime by returning a no bill. Twelve must vote to return an indictment in federal court, and states usually require at least a majority of grand jurors to return an indictment. Courts have broad authority to call a grand jury into session, and grand juries are authorized to make wide-ranging inquiries and investigations into public matters. Grand juries may make accusations called presentments independently of a prosecutor.

Although the English common-law system gave birth to the grand jury, England abolished grand juries in the 1930s, having found that the return of indictments was almost automatic and that the use of grand juries tended to delay the criminal process. Today, critics argue that grand juries are so dominated by the prosecutors who appear before them that they cease to serve as an independent body to evaluate evidence. Indeed, many states have eliminated the requirement that a grand jury hand down indictments and have substituted a prosecutor’s information, an accusatorial document charging a crime. Yet many reformers would retain the grand jury as an institution for investigation of corruption in government. We discuss grand juries in more detail in Chapter 5.

Trial Juries

Article III, Section 2 of the U.S. Constitution establishes the right to trial by jury in criminal cases. The Sixth Amendment guarantees “the right to a speedy and public
trial by an impartial jury.” The Seventh Amendment grants a right to a trial by jury in civil suits at common law. All state constitutions confer the right of trial by jury in criminal cases; however, the federal constitutional right to a jury trial applies to the states, thereby guaranteeing a defendant a right to a jury trial in a state criminal prosecution if such a right would exist in a federal prosecution. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, as we note below, the right to trial by jury does not extend to juvenile delinquency proceedings.

A common-law trial jury consisted of twelve men. Today, twelve persons are required in federal juries; however, the number varies in states, although all states require twelve-person juries in capital cases. The Supreme Court has approved the use of six-person juries in noncapital felony prosecutions. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Even though trial juries function in a relatively small number of criminal cases, their availability to serve has a considerable impact on the criminal justice system. In Chapter 6 we discuss in detail the various requirements concerning the right to trial by jury, the right to a public trial, the composition of trial juries, the selection of juries, and proposals for jury reforms.

The Courts

Courts of law are the centerpieces of the federal and state criminal justice systems. Courts of law are responsible for determining both the factual basis and the legal sufficiency of criminal charges and for ensuring that criminal defendants are provided due process of law. Essentially, the federal courts adjudicate criminal cases where defendants are charged with violating federal criminal laws; state courts adjudicate alleged violations of state laws.

Basically, there are two kinds of courts: trial and appellate courts. Trial courts conduct criminal trials and various pretrial and post-trial proceedings. Appellate courts hear appeals from the decisions of the trial courts. Trial courts are primarily concerned with ascertaining facts, determining guilt or innocence, and imposing punishments, whereas appellate courts are primarily concerned with matters of law. Appellate courts correct legal errors made by trial courts and develop law when new legal questions arise. In some instances appellate courts must determine whether there is legally sufficient evidence to uphold a conviction.

The first question facing a court in any criminal prosecution is that of jurisdiction, the legal authority to hear and decide the case. A court must have jurisdiction, over both the subject matter of a case and the parties to a case, before it may proceed to adjudicate that controversy. The jurisdiction of the federal courts is determined by both the language of Article III of the Constitution and the statutes enacted by Congress. The respective state constitutions and statutes determine the jurisdiction of the state courts.

The Federal Court System

Article III of the U.S. Constitution provides that “[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Under this authority Congress enacted the Judiciary Act of 1789, creating the federal court system. After passage of the Judiciary Act of 1801 the Supreme Court justices were required to “ride circuit,”
a practice that had its roots in English legal history. The circuit courts then consisted of district court judges who heard appeals alongside “circuit riding” Supreme Court justices. In 1891 Congress created separate appellate courts, and since then Supreme Court justices have remained as reviewing justices.

**U.S. District Courts** handle prosecutions for violations of federal statutes. In addition, federal courts sometimes review convictions from state courts when defendants raise issues arising under the U.S. Constitution. Appeals are heard by U.S. Courts of Appeals, and, of course, the Supreme Court is at the apex of the judicial system.

**U.S. DISTRICT COURTS**
The principal trial court in the federal system is the U.S. District Court. There are district courts in ninety-four federal judicial districts around the country. A criminal trial in the district court is presided over by a judge appointed for life by the President with the consent of the Senate. Federal magistrate judges, who are appointed by federal district judges, often handle pretrial proceedings in the district courts and trials of misdemeanors.


Since Congress created the district courts by the Judiciary Act of 1789, it has created specialized courts to handle specific kinds of cases (for example, the U.S. Court of International Trade and the U.S. Claims Court).

**THE U.S. COURTS OF APPEALS**
The *intermediate appellate courts* in the federal system are the U.S. Courts of Appeals (also known as circuit courts). Twelve geographical circuits (and one “federal circuit”) cover the United States and its possessions. Figure 2.1 indicates the geographical distribution of the circuit courts. The circuit courts hear both criminal and civil appeals from the district courts and from quasi-judicial tribunals in the independent regulatory agencies. In the twelve-month period ending March 31, 2006,

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**Sidebar**

**Jurisdiction over Crimes Committed by Native Americans on Reservations**

Article I, Section 8 of the U.S. Constitution mentions Indian tribes as being subject to Congressional legislation. Congress has provided that federal courts have jurisdiction over specified offenses committed by Native Americans on Indian reservations. 18 U.S.C.A. 1153. At the same time, Congress has permitted certain states to exercise jurisdiction over such offenses. 18 U.S.C.A. 1162. Furthermore, offenses committed by one Native American against another on a reservation are generally subject to the jurisdiction of tribal courts, unless the crime charged has been expressly made subject to federal jurisdiction. *Keeble v. United States*, 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

Courts of the state where a Native American reservation is located have jurisdiction over crimes on the reservation when the offense is perpetrated by a non-Indian against a non-Indian, but non-Indian defendants charged with committing a crime on a reservation are subject to federal jurisdiction if the victim is a member of the tribe. *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).
49,000 appeals were commenced in the federal circuit courts. Of these, 16,195 were criminal cases. See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, March 31, 2006, Table B-7, available online at http://www.uscourts.gov/caseload2006/contents.html.

Generally, decisions of the courts of appeals are rendered by panels of three judges who vote to affirm, reverse, or modify the lower-court decisions under review. There is a procedure by which the circuit courts provide *en banc* hearings, where all judges assigned to the court (or a substantial number of them) participate in a decision. Like their counterparts in the district courts, federal appeals court judges are appointed to life terms by the President with the consent of the Senate.

### The U.S. Supreme Court

The highest appellate court in the federal judicial system is the **U.S. Supreme Court**. The Supreme Court has jurisdiction to review, either on appeal or by *writ of certiorari* (discretionary review), all the decisions of the lower federal courts and many decisions of the highest state courts. The Supreme Court comprises nine justices who, like district and circuit judges, are appointed for life by the President with the consent of the Senate. These nine individuals have the final word in determining what the U.S. Constitution requires, permits, and prohibits in the areas of law enforcement, prosecution, adjudication, and punishment. The Supreme Court also promulgates rules of procedure for the lower federal courts to follow in both criminal and civil cases.
As of February 1, 2008, John Roberts was the chief justice of the Supreme Court, and the associate justices were John Paul Stevens, Antonin Scalia, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, Stephen Breyer, and Samuel Alito. During the 2004 term (which ended in June 2005), the Court received more than 8,500 petitions for certiorari and granted review in only 87 (just over 1 percent) of these cases. During its 2005 term, the Court issued 82 signed opinions. See Chief Justice’s 2006 Year-End Report on the Federal Judiciary, January 1, 2007 available online at http://www.supremecourtus.gov/publicinfo/year-end/2006year-end-report.pdf.

Supreme Court opinions are officially reported in the United States Reports (abbreviated U.S.) and in private publications, Supreme Court Reporter (abbreviated S.Ct.) and Lawyers Edition, 2d (abbreviated L.Ed.2d). Immediate access to a recently issued opinion may be found at www.findlaw.com.

MILITARY TRIBUNALS

Crimes committed by persons in military service are ordinarily prosecuted in proceedings before courts-martial. Article 1, Section 8 of the U.S. Constitution grants Congress the authority to regulate the armed forces. Under this authority, Congress has enacted the Uniform Code of Military Justice (UCMJ), 10 U.S.C.A. 801–940. The UCMJ gives courts-martial jurisdiction to try all offenses under the code committed by military personnel. Notwithstanding this grant of authority, the U.S. Supreme Court held in 1969 that military jurisdiction was limited to offenses that were service connected. O’Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). The O’Callahan decision greatly narrowed military jurisdiction over offenses committed by servicepersons. In 1987 the Court overruled O’Callahan and said that military jurisdiction depends solely on whether an accused is a military member. Solorio v. United States, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). Thus, courts-martial may now try all offenses committed by servicepersons in violation of the UCMJ.

Commanders of various military units convene court-martial proceedings and appoint those who sit similar to a civilian jury. These commanders are called the convening authorities and are assisted by military lawyers designated as staff judge advocates. Military trial procedures and rules of evidence are similar to the rules applied in federal district courts.

There are three classes of court-martial: summary, special, and general. The summary court-martial is composed of one military officer with jurisdiction to impose minor punishments over enlisted personnel. It is somewhat analogous to trial by a civilian magistrate, whereas special and general court-martial proceedings are formal military tribunals more analogous to civilian criminal courts of record.

A special court-martial must be composed of three or more members with or without a military judge, or a military judge alone, if requested by the accused. It can impose more serious punishments on both officers and enlisted personnel. A general court-martial tries the most serious offenses and must consist of five or more members and a military judge (or a military judge alone, if requested by the accused). A general court-martial may try any offense made punishable by the UCMJ and may impose any punishment authorized by law against officers and enlisted personnel, including death for a capital offense. Trial by a military judge alone is not permitted in capital cases.

A military judge presides at special and general courts-martial. A trial counsel serves as prosecutor, and a defendant is furnished legal counsel by the government unless the accused chooses to employ private defense counsel. The extent of punish-
ment that may be imposed varies according to the offense and the authority of the type of court-martial convened.

Decisions of courts-martial are reviewed by military courts of review in each branch of the armed forces. In specified instances, appeals are heard by the U.S. Court of Appeals for the Armed Forces. This court is staffed by civilian judges who are appointed to fifteen-year terms by the President with the consent of the Senate.

Only under conditions of martial law do military tribunals have the authority to try American citizens. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866). Historically, the Supreme Court has permitted “enemy aliens” captured during wartime to be tried by military tribunals. See *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 7 (1942). Under an executive order issued by President George W. Bush on November 13, 2001, the military established special tribunals to try foreign nationals accused of terrorism against the United States. Several accused terrorists detained at the U.S. Naval Base at Guantánamo Bay, Cuba, were brought to trial, but the proceedings were interrupted by a dramatic decision from the nation’s highest court. In *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006), the U.S. Supreme Court ruled that the military tribunals were neither authorized by federal law nor required by military necessity. Moreover, the Court held that they ran afoul of the Geneva Conventions governing the treatment of prisoners of war. Immediately after the *Hamdan* decision, some members of Congress indicated their willingness to support legislation to provide the authorization found lacking by the Court.

State Court Systems

Each state has its own independent judicial system. These courts handle more than 90 percent of criminal prosecutions in the United States. State judicial systems are characterized by variations in structure, jurisdiction, and procedure but have certain commonalities. Every state has one or more levels of trial courts and at least one appellate court. Most states have courts of general jurisdiction, which conduct trials in felony and major misdemeanor cases, and courts of limited jurisdiction, which handle pretrial matters and conduct trials in minor misdemeanor cases. Most states also have some form of intermediate appellate courts that relieve the state supreme court (known as the Court of Appeals in New York and Maryland) from hearing routine appeals. Many states also have separate juvenile courts, which operate in ways that differ significantly from the criminal courts for adults.

Some states, like North Carolina, have adopted tidy, streamlined court systems (see Figure 2.2). Other states’ court systems are extremely complex, as is the case in Texas (see Figure 2.3). In structural complexity, most states’ systems fall somewhere between the two extremes.

Contrasting Judicial Functions and Environments

Trial courts primarily make factual determinations, often assisted by juries; apply settled law to established facts; and impose sanctions. Appellate courts, on the other hand, interpret the federal and state constitutions and statutes, correct errors in law made by trial courts, and develop the law by “filling in the gaps” that often become apparent in the application of statutory laws.

The difference in the roles of trial and appellate courts is also evident in the environment where trial and appellate judges perform their functions. A trial court usually sits in a county courthouse or other county judicial building. Trial judges preside over courtrooms where there is considerable daily activity with juries being impaneled, witnesses providing testimony, and attorneys making objections and
pleas for their clients. At other times the judges are busy hearing arguments in their chambers. In short, the trial scene is one of high visibility and is often attended by the comings and goings of numerous spectators and, where a high-profile case is being tried, by print and television media. In short, the trial court setting is a venue of daily interaction between court personnel and the citizens of the community.

In contrast, appellate courts are often described as “invisible courts” because their public proceedings are generally limited to hearing legal arguments by attorneys on prescribed oral argument days. Few clients and even fewer spectators are generally in attendance. Media representatives usually attend only when some high-profile appeal is being argued. Many of the documents arrive by mail to a staff of clerks. Proceedings are resolved primarily by review of records from the lower court or administrative agency, by study of the law briefs submitted by counsel, and by discussion among the panel of judges assigned a particular case, often supplemented by independent research conducted by judges and their staff attorneys.

Unlike the busy atmosphere that normally characterizes a trial court, an appellate court often sits in the state capitol building or in its own facility, usually with a complete law library. The décor in the buildings that house appellate courts is usually quite formal, often with portraits of former judges regarded as oracles of the law. When a panel of judges sits to hear oral arguments, they normally emerge from behind a velvet curtain on a precise schedule and to the cry of the court’s marshal. When not hearing oral arguments, appellate judges usually occupy a suite of offices with their secretaries and law clerks. It is in these individual chambers that appellate judges study and write their opinions on cases assigned to them.
The U.S. Supreme Court occupies a majestic building in Washington, D.C., with spacious office suites and impressive corridors and library facilities. With enhanced attributes similar to those mentioned for appellate courts, the elegance and dignity of the facilities comport with the significant role of the Court as final arbiter in the nation’s judicial system. Unlike the sparse attendance at most state and intermediate federal appellate courts, parties interested in the decisions that will result from arguments, a coterie of media persons, and many spectators will fill the courtroom to hear arguments that often significantly affect the economic, social, and political life of the nation. Photography is not allowed, and the arguments and dialogue between the parties.
counsel and the justices are observed silently and respectfully by those who attend. There is sometimes a contrasting scene outside the Supreme Court building, where demonstrators sometimes gather to give visibility to the causes they represent.

The Juvenile Justice System

The juvenile justice system includes specialized courts, law enforcement agencies, social services agencies, and corrections facilities designed to address problems of juvenile delinquency as well as child neglect and abuse. “Delinquency” refers to conduct that would be criminal if committed by an adult. In addition to being charged with delinquency, young people may be subjected to the jurisdiction of a juvenile court for engaging in conduct that is prohibited only for minors. Such behaviors, which include truancy (chronic absence from school) and incorrigibility, are often called status offenses, because they are peculiar to the status of children.

Historical Basis

The common law treated all persons above the age of fourteen as adults for purposes of criminal responsibility. Because the American legal system was based on English common law, American courts followed the common-law rules for the treatment of juveniles. Young teenagers were treated essentially as adults for the purposes of criminal justice. During the colonial period of American history, it was not uncommon for teenagers to be hanged, flogged, or placed in the public pillory as punishment for their crimes. Later, as state penitentiaries were established, it was not unusual for 20 percent of prison populations to be juveniles.

In the late nineteenth century, public outcry against treating juveniles like adults led to the establishment of a separate juvenile justice system in the United States. Reformers were convinced that the existing system of criminal justice was inappropriate for young offenders who were more in need of reform than punishment. Reformers proposed specialized courts to deal with young offenders not as hardened criminals, but as misguided youth in need of special care. This special treatment was justified legally by the concept of parens patriae, the power of the state to act to protect the interests of those who cannot protect themselves.

The first state to act in this area was Illinois in 1899. By the 1920s, many states had followed suit, and by 1945, juvenile court legislation had been enacted by Congress and all state legislatures. The newly created juvenile courts were usually separate from the regular tribunals; often, the judges or referees presiding over these courts did not have formal legal training. The proceedings were generally nonadversarial, and there was little in the way of procedural regularity or even the opportunity for the juvenile offender to confront his or her accusers. In fact, juvenile delinquency proceedings were conceived as civil, as opposed to criminal, proceedings. Dispositions of cases were usually nonpunitive in character; therefore, accused juvenile offenders were not afforded most of the rights of criminal defendants.

Because the juvenile justice system emphasized rehabilitation (rather than retribution, incapacitation, or deterrence), juveniles who were found delinquent were often placed in reformatories for indeterminate periods, sometimes until they reached the age of majority. Juvenile courts often suffered from a lack of trained staff and in-
adequate facilities, and by the 1960s, a system that was conceived by reformers was itself under attack by a new generation of reformers.

The Constitutional Reform of Juvenile Justice

The abuses that came to be associated with juvenile courts were addressed by the Supreme Court in the landmark case of In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In Gault, the Court essentially required that juvenile courts adhere to standards of due process, applying most of the basic procedural safeguards enjoyed by adults accused of crimes. Moreover, Gault held that juvenile courts must respect the right to counsel, the freedom from compulsory self-incrimination, and the right to confront (cross-examine) hostile witnesses. Writing for a nearly unanimous bench, Justice Abe Fortas observed that “under our Constitution, the condition of being a boy does not justify a kangaroo court.” 387 U.S. at 28, 87 S.Ct. at 1444, 18 L.Ed.2d at 546.

Four years later in McKeever v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), the Court refused to extend the right to trial by jury to juvenile proceedings. In Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), the Court upheld a pretrial detention program for juveniles that might well have been found violative of due process had it applied to adults. Writing for the Court, Justice William Rehnquist stressed that “the Constitution does not mandate elimination of all differences in the treatment of juveniles.” 467 U.S. at 263, 104 S.Ct. at 2409, 81 L.Ed.2d at 216.

In the wake of Gault, a number of states revised their juvenile codes to reflect the requirements of those decisions and to increase the qualifications of persons serving as juvenile judges and to transform juvenile courts into courts of record. Today it is common for the juvenile court to simply be a division of a court of general jurisdiction, such as a circuit or a superior court. Nevertheless, juvenile courts retain their distinctive character. For example, juvenile court proceedings are not subject to the constitutional “public trial” requirement. The Federal Juvenile Delinquency Act, 18 U.S.C.A. 5031–5042, gives the court discretion on the issue of whether to close proceedings involving a child and whether to grant public access to the records of the proceedings. State laws vary, often allowing the presiding judge to exercise discretion in these matters.

There are significant differences in the adjudication of juvenile cases and adult criminal proceedings as well as the punishments imposed. We discuss some of the aspects of adjudication of juveniles in Chapter 6 and the distinctions between the punishments of juveniles and of adults in Chapter 7.

The Corrections System

The corrections system is designed to fulfill the criminal justice system’s objective of providing punishment and rehabilitation of offenders. As with the court system, corrections facilities are operated at the federal and state levels. The system includes prisons and jails as well as a variety of programs that include probation, parole, and supervised community service.
Historical Background

Punishments inflicted under the English common law were quite severe—the death penalty was prescribed for most felonies, and those convicted of misdemeanors were generally subjected to such corporal punishment as flogging in the public square. The new American colonies generally followed common-law practice; by the time of the American Revolution, the death penalty was in wide use for a variety of felonies, and corporal punishment, primarily flogging, was widely used for a variety of crimes.

The American Bill of Rights (the first ten amendments to the Constitution, ratified in 1791) prohibited the imposition of “cruel and unusual punishments” (Eighth Amendment). The framers sought to prevent the use of torture, which had been common in Europe as late as the eighteenth century; however, they did not intend to outlaw the death penalty or abolish all forms of corporal punishment.

During the nineteenth century, reformers introduced the concept of the penitentiary—literally, “a place to do penance.” The idea was that criminals could be reformed through isolation, Bible study, and hard labor. This gave rise to the notion of rehabilitation, the idea that the criminal justice system could reform criminals and reintegrate them into society. Many of the educational, occupational training, and psychological programs found in modern prisons are based on this theory.

Contemporary Developments in Criminal Punishment

By the twentieth century, incarceration largely replaced corporal punishment as the states, as well as the federal government, constructed prisons to house persons convicted of felonies. Even cities and counties constructed jails for the confinement of persons convicted of misdemeanors. The death penalty, an intensely controversial penalty, remains in effect today in more than half the states, although its use is now limited to the most aggravated cases of murder. Today, the focus of criminal punishment is on the goal of incapacitation to prevent commission of further crimes.

There are procedural as well as substantive issues in the area of sentencing and punishment. Sharp disagreements exist regarding the roles that legislatures, judges, and corrections officials should play in determining punishments. Specifically, criminal punishment is limited by the Eighth Amendment prohibition of cruel and unusual punishments, the due process clauses of the Fifth and Fourteenth Amendments, and similar provisions in all fifty state constitutions. Today the criminal law provides for a variety of criminal punishments, including monetary fines, incarceration, probation, community service, and, of course, the death penalty.

As with courts, there is a federal corrections system and fifty separate state corrections systems. Each of these systems is responsible for supervising those persons sentenced to prison by courts of law. Originally, prisons were conceived as places for criminals to reflect on their misdeeds and repent, hence the term “penitentiary.” In the twentieth century, the emphasis shifted to rehabilitation through psychological and sociopsychological methods. Unfortunately, these efforts were less than successful. Ironically, prisons appear to “criminalize” individuals more than to rehabilitate them. Inmates are exposed to an insular society with norms of conduct antithetical to those of civil society. As essentially totalitarian institutions, prisons do not encourage individuals to behave responsibly; furthermore, prisons provide an excellent venue for the spreading of criminal techniques. It is probably unrealistic to expect rehabilitation programs to succeed in such an environment. Today, prisons are generally
regarded as little more than a way to punish and isolate those persons deemed unfit to live in civil society.

The Burgeoning Prison Population

At the end of June 2006, there were more than 2.2 million inmates in the United States, taking into account federal prisoners, state prisoners, and local jail inmates. About 1.554 million prisoners were incarcerated in the federal and state prison systems; roughly 700,000 were held in local jails. The rest were held in juvenile facilities, territorial prisons, military prisons, detention facilities operated by federal immigration authorities, and jails located on the Indian reservations. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, “Prison and Jail Inmates at Midyear 2006,” June 2007, NCJ 217675, available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf.

During the 1990s, state and federal prison populations grew at an average rate of nearly 6 percent per year. Between June 30, 1998, and June 30, 1999, the federal prison population rose by nearly 10 percent, the largest twelve-month gain ever. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, “Prison and Jail Inmates at Midyear 1999,” April 2000, NCJ 181643. The dramatic increases in state and federal prison populations during the 1990s were not attributable to rising crime rates. In fact, both violent crime and property crime declined sharply in the 1990s. Rather, burgeoning prison populations resulted from the adoption of more punitive sentencing policies in the 1980s and 1990s. These policy changes included the elimination or curtailment of parole and the adoption of “truth in sentencing” laws, “three strikes” laws, and mandatory minimum sentences (see Chapter 7). As a result of these changes in policy, the nationwide incarceration rate nearly doubled, from approximately 300 to 600 inmates per 100,000 residents between 1985 and 1995. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, “Prison and Jail Inmates, 1995,” August 1996, NCJ-161132.

During the first half of the current decade, the number of prisoners continued to grow, but the rate of increase slowed somewhat. Between June 2005 and June 2006, state and federal prison populations grew by 2.8%. At the end of 2005, state prisons were operating between 1% below capacity and 14% above capacity, but federal prisons were operating at 34% above capacity. At midyear 2006, one in every 133 U.S. residents was in prison or jail. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, “Prison and Jail Inmates at Midyear 2006,” June 2007, NCJ 217675, available online at http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf. This is by far the highest incarceration rate among the democratic countries of the world.

The Future Outlook

The public continues to demand harsh sentences for convicted felons, but legislators (and taxpayers) are often unwilling to pay the price of constructing more prisons. Moreover, local residents often object to prisons being built in their “backyards.” Even those states that have been aggressive in prison construction have found that demand for cell space continues to exceed supply. In many instances, federal courts have ordered prison officials to reduce overcrowding to comply with the U.S. Constitution’s prohibition against “cruel and unusual punishments.”
In many state prisons, cells originally designed for one or two inmates now house three or four prisoners. Increasingly, state prison systems must rely on local jails to house inmates, a situation that presents its own set of problems relating both to security and to conditions of confinement. Aside from the threat of federal judicial intervention, overcrowded prisons are more likely to produce inmate violence and even riots.

In addition to prisons, corrections systems include agencies that supervise probation, parole, community service, and other forms of alternative sentences. With burgeoning prison populations, these alternatives to incarceration are assuming more importance and consuming more resources, especially at the state level.

**CONCLUSION**

The American system of criminal justice is extremely complicated. The primary reason for this complexity is the principle of federalism, which refers to the division of political and legal authority in this country between one national government and fifty state governments. The U.S. Congress on behalf of the national government and each state legislature on behalf of its respective state enact their own criminal laws. The national government and all fifty state governments have their own law enforcement agencies, prosecutors, courts, and prison systems. No two systems are exactly alike. Indeed, there is tremendous variation from one jurisdiction to the next, both in the substantive criminal law and in the practices and procedures used by the various components of the criminal process. Yet, despite their substantive and procedural differences, all jurisdictions share two basic goals: to protect society from crime and, at the same time, to protect the rights of the individuals suspected of having committed offenses. Much of the conflict and inefficiency inherent in our criminal justice system stems from the need to balance these two competing objectives.

**KEY TERMS**

legislature, 20  
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WEB-BASED RESEARCH ACTIVITY


QUESTIONS FOR THOUGHT AND DISCUSSION

1. How does the concept of federalism complicate the administration of criminal justice in the United States?
2. How do the functions of federal, state, and local law enforcement agencies differ? How are they alike?
3. Compare and contrast the functions of trial and appellate courts. How are they similar? How are they different?
4. What function does a grand jury serve? Does replacement of the indictment function of grand juries at the state level with prosecutors authorized to charge crimes by filing a sworn information impair the rights of citizens charged with crimes?
5. Is there a justification for the broad discretion vested in a prosecutor?
6. To what extent does the U.S. Constitution protect the right to trial by jury in a criminal case?
7. What are the arguments for and against allowing trial judges broad discretion in criminal sentencing?
8. What factors do you think a prosecutor should take into consideration in determining whether to prosecute an individual the police have arrested for possession of illegal drugs?
9. What chief characteristics distinguish the military justice system under the Uniform Code of Military Justice from civilian criminal prosecutions?
10. What factors should a judge consider in determining whether to sentence a convicted felon to prison?
PART TWO

Law Enforcement and Criminal Procedure

CHAPTER 3  Search and Seizure
CHAPTER 4  Arrest, Interrogation, and Identification Procedures
CHAPTER 5  The Pretrial Process
CHAPTER 6  The Criminal Trial
CHAPTER 7  Sentencing and Punishment
CHAPTER 8  Appeal and Postconviction Relief
CHAPTER

Search and Seizure

CHAPTER OUTLINE

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Historical Background
When, Where, and to Whom the Fourth Amendment Applies
The Scope of Privacy Protected by the Fourth Amendment
The Warrant Requirement
Exceptions to the Warrant Requirement
Exceptions to the Probable Cause Requirement
Electronic Surveillance
The Exclusionary Rule
Introduction

Search and seizure have always been essential tools of law enforcement. A search occurs when government agents look for evidence in a manner that intrudes into a person’s legally protected zone of privacy. A seizure takes place when agents take possession or control of property or persons. Today, as America simultaneously prosecutes a “war on drugs” and a “war on terrorism,” search and seizure are crucial issues for law enforcement agencies, courts, and citizens. Without the powers to conduct searches and seize evidence, law enforcement agencies would be unable to perform their historic missions, let alone combat drug trafficking, organized crime, and international terrorism. On the other hand, unrestricted powers of search and seizure are antithetical to the American traditions of individual liberty and limited government.

Because search and seizure often entail serious invasions of privacy, the power of law enforcement agencies to conduct searches and seizures is limited by the federal and state constitutions and by a number of federal and state statutes. Most important among these legal limitations is the Fourth Amendment to the U.S. Constitution, which provides:

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.

As a general rule, the Fourth Amendment requires law enforcement officers to obtain a warrant before conducting searches and seizures. Although some warrantless searches and seizures are permissible, they all must conform to a standard of reasonableness. Law enforcement officers are not permitted to conduct searches and seizures arbitrarily or even based on their hunches about criminal activity. For a search to be reasonable under the Fourth Amendment, police generally must have probable cause to believe that a search will produce evidence of crime. In certain instances, police may conduct limited searches based on the lesser standard of reasonable suspicion. Subject to certain exceptions, evidence obtained through unreasonable searches and seizures is not admissible in criminal prosecutions.

Historical Background

Before the late seventeenth century, there was very little protection at common law against invasions of privacy by unreasonable searches and seizures. Although a system of warrants had long been in place to provide legal authority for arrests, searches, and seizures, executive as well as judicial authorities could issue warrants. Moreover, there was no requirement that a search warrant specify the location to be searched or the items to be seized. For hundreds of years, English subjects (and, later, American colonists) were subjected to the abuse of the general warrant—that is, a warrant authorizing searches of unspecified persons and places.

The Glorious Revolution of 1688 was the real beginning of democracy in England. It was then that Parliament achieved supremacy over the monarchy. In the wake of the Glorious Revolution, English courts began to place more stringent and
effective limitations on the Crown’s power. The power of search and seizure was one area in which courts moved to limit royal authority.

By far the most significant English case in the area of search and seizure before the American Revolution was Entick v. Carrington, 95 Eng. Rep. 807 (1765). John Entick, who edited a newspaper highly critical of the government, was arrested on a charge of seditious libel. A warrant was issued calling for the seizure of all his books, letters, and papers. Entick successfully sued for trespass. On appeal, the judgment was upheld and the practice of general warrants declared illegal. The opinion in Entick v. Carrington proved to be very influential. The next year, Parliament declared the notorious general warrant invalid. Addressing the House of Commons, William Pitt (the elder) declared that

[1]he poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Adoption of the Fourth Amendment

Although the common law provided some protection against general warrants, the framers of the American Bill of Rights adopted a more explicit, and more thorough, proscription of unreasonable searches and seizures. To a great extent they were motivated by a distaste for the Writs of Assistance, which gave customs officials in the American colonies unlimited powers to search for smuggled goods. In a famous debate in 1761, James Otis called the Writs of Assistance “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book.” Quoted in Boyd v. United States, 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746, 749 (1886). The Fourth Amendment was adopted to ensure that officials of the U.S. government would never be able to exercise such unlimited powers of search and seizure.


In this landmark decision, the U.S. Supreme Court held that evidence obtained by federal agents in violation of the Fourth Amendment is inadmissible in a federal criminal trial.

JUSTICE WILLIAM R. DAY delivered the opinion of the court, saying in part:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
Their distaste for general warrants led the framers of the Bill of Rights to write a particularity requirement into the Warrant Clause of the Fourth Amendment. The Supreme Court has recognized that “limiting the authorization to search to the specific areas and things for which there is probable cause to search … ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72, 80 (1987).

**Extension of the Fourth Amendment to Apply to State and Local Action**

The Fourth Amendment, like all the protections of the Bill of Rights, was originally conceived as a limitation on the powers of the newly created national government. Under the original conception of the Bill of Rights, citizens seeking legal protection against actions of state and local governments had to look to their state constitutions and state courts for relief. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833). However, the protection of the Fourth Amendment, along with most of the protections contained in the Bill of Rights, has been extended to defendants in state criminal prosecutions on the basis of the Fourteenth Amendment’s limitations on state action. In 1949 the Supreme Court held that the freedom from unreasonable searches and seizures is “implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause [of the Fourteenth Amendment].” *Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, 1785 (1949). The judicial extension of the Fourth Amendment and other protections of the Bill of Rights to limit the actions of the state and local governments are referred to as the **doctrine of incorporation**. Under this doctrine, provisions of the Bill of Rights deemed to be essential to a scheme of ordered liberty are incorporated into the Fourteenth Amendment’s broad limitations on state and local authority. *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

**JUDICIAL FEDERALISM AND THE FOURTH AMENDMENT**

As a result of *Wolf v. Colorado*, supra, the Fourth Amendment limits search and seizure activities by law enforcement agencies at all levels of government, whether federal, state, or local. The application of the Fourth Amendment to state prosecutions ensures a minimal national standard governing search and seizure. Under our system of federalism, state courts are free to provide higher levels of protection for individuals under applicable provisions of their state constitutions than are provided by the Fourth Amendment. But they cannot provide less protection to the individual without running afoul of the Fourteenth Amendment. Indeed, this is true of all constitutional protections. As long as state courts make clear that decisions that favor the rights of suspects, defendants, and prisoners rest on independent state constitutional grounds, those decisions are not subject to review by the federal courts. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

State constitutional law in the search and seizure area has become extremely complex, as there are numerous issues on which certain state courts have refused to follow federal decisions restricting Fourth Amendment protections. We will mention a few examples on the pages that follow. In an attempt to reduce confusion and unnecessary complexity owing to different federal and state standards of search and seizure, Florida amended its constitution in 1982 to render its prohibition of unreasonable searches and seizures coextensive with that of the Fourth Amendment. West’s Fla. Const. Art. 1, § 12 (as amended 1982). Interpreting this novel amendment, the Florida Supreme Court has held that, in effect, the Florida Constitution incorpo-
rates all decisions of the U.S. Supreme Court interpreting the Fourth Amendment, regardless of when they were rendered. *Bernie v. State*, 524 So.2d 988 (Fla. 1988).

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**When, Where, and to Whom the Fourth Amendment Applies**

Because the Constitution limits government action, the Fourth Amendment protects a person's rights against the police and other government agents but not against searches and seizures conducted by private individuals. The Supreme Court has said that the Fourth Amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94 (1984). In determining whether a private citizen has acted as an agent of the government, the court must consider (1) whether the government knew of and acquiesced in the activity and (2) whether the citizen was motivated on the basis of assisting the government. *United States v. Feffer*, 831 F.2d 734, 739 (7th Cir. 1987). Thus, a search by a privately employed security guard is ordinarily considered a search by a private citizen. Likewise, a search of a package by an employee of a common carrier is not considered a violation of the Fourth Amendment unless the search was instigated by government action. *United States v. Monroe*, 943 F.2d 884 (8th Cir. 1991).

**Border Searches and Searches Outside the United States**

Travelers crossing the borders of the United States are routinely subjected to searches even when they are not the targets of suspicion. Suspicionless *border searches* are justified by the view that persons crossing the national border are not entitled to the protections of the Fourth Amendment. *United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977). This is not to say that agents conducting border searches are beyond the law. Regardless of the applicability of the Fourth Amendment, methods of search and seizure may not be so severe or extreme as to "shock the conscience." *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

The border search exception to the Fourth Amendment extends to searches conducted at established stations near the border or other functional equivalents of a border search. An example would be the search of a ship when it first docks after entering the territorial waters of the United States. *United States v. Prince*, 491 F.2d 655 (5th Cir. 1974). On the other hand, in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), the Supreme Court invalidated a search by a roving patrol some twenty-five miles within the border because agents lacked probable cause.

The Fourth Amendment does not apply to searches and seizures conducted by U.S. agents outside the territory of the United States. The purpose of the amendment is to restrict only those searches and seizures conducted domestically. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990).

**The Home, Its Curtilage, and the Open Fields Doctrine**

The English common law held that "a man’s home is his castle," and it sought to protect persons in their homes by, among other things, creating the crime of burglary.
The Fourth Amendment specifically mentions the right of the people to be secure in their houses. Of course, it also mentions their persons, papers, and effects. But it is fair to say that when a person is in his or her home, the protection afforded by the Fourth Amendment is at its maximum.

At common law, the concept of curtilage was developed to afford the area immediately surrounding a house the same protection under the law of burglary as afforded the house itself. The term “curtilage” refers to the enclosed space of ground surrounding a dwelling. The Supreme Court has held that the Fourth Amendment provides the same protection to the curtilage as to the house itself. On the other hand, the open fields surrounding the house and curtilage are not entitled to Fourth Amendment protection. Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). Writing for the Supreme Court in Hester, Justice Oliver Wendell Holmes noted that

the 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. 265 U.S. at 59, 44 S.Ct. at 446, 68 L.Ed. at 900.

The open fields doctrine was reaffirmed by the Supreme Court in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). In Oliver, narcotics officers entered the defendant’s land by going around a locked gate and ignoring “No Trespassing” signs. When they observed a field of marijuana, they arrested the owner of the property for manufacturing contraband. The Court upheld the search because it concluded that the Fourth Amendment did not apply to the open fields around his home, despite his attempt to protect it by posting signs.

State courts are divided on whether to provide greater protection under their state constitutions. In People v. Scott, 593 N.E.2d 1328 (N.Y. 1992), New York’s highest court ruled that where property owners fence or post “No Trespassing” signs on their private property or, by some other means, indicate that entry is not permitted, they have a reasonable expectation of privacy that must be respected. The New York decision illustrates that a state is free to provide greater protection under its state constitution than the U.S. Supreme Court determines is required under the federal constitution. A New Jersey appellate court was unwilling to grant greater protection than afforded by the federal constitution when it excused a warrantless entry onto private lands by conservation officers investigating a suspected violation of fish and game law. State v. Gates, 703 A.2d 696 (N.J. Super. 1997).

Applicability of the Fourth Amendment to Administrative Searches

Although the Fourth Amendment refers to “houses,” its protections are extended to stores, offices, and places of business. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). However, an exception is made for those areas of commercial properties that carry an implied invitation for the public to enter. Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). Moreover, various statutes provide for unannounced inspections of “pervasively regulated businesses,” such as establishments that sell alcoholic beverages. In 1998 the Michigan Supreme Court considered a massage parlor to be a pervasively regulated business and on that basis upheld a warrantless search of the premises. Gora v. City of Ferndale, 576 N.W.2d 141 (Mich. 1998).
Local ordinances also allow routine inspections to enforce building codes and other regulations. The Supreme Court has recognized these administrative searches as exceptions to normal Fourth Amendment protections. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970). The Fourth Amendment applies, but the standard is one of “reasonableness” rather than the more stringent test required of searches conducted by the police. *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). To determine whether an administrative search meets the reasonableness requirement, courts balance the need to search against the invasion that such search entails. *United States v. Bulacan*, 156 F.3d 963 (9th Cir. 1998).

**Searches of Abandoned Property**

Because it mentions “effects,” the Fourth Amendment applies to items of personal property as well as to real estate. However, it should be noted that the Fourth Amendment does not apply to property that has been abandoned. Therefore, police may search abandoned premises and seize abandoned property without the necessity of legally justifying their actions. *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). The key question in such cases is whether the property was abandoned at the time of the search. In a 1960 decision, the Supreme Court observed that a “passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have ‘abandoned’ it. An occupied taxicab is not to be compared to an open field … or a vacated hotel room.” *Rios v. United States*, 364 U.S. 253, 262, n. 6, 80 S.Ct. 1431, 1437, 4 L.Ed.2d 1688, 1694 (1960). Similarly, in 1990 the Supreme Court held that “a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer’s inquiry, clearly has not abandoned that property.” *Smith v. Ohio*, 494 U.S. 541, 543-544, 110 S.Ct. 1288, 1290, 108 L.Ed.2d 464, 468 (1990).

**Automobile Inventory Searches**

Most law enforcement agencies that impound automobiles for parking violations or abandonment, or pursuant to the arrest of a motorist, routinely conduct an inventory search.

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**Does the Fourth Amendment Apply to Garbage Placed by the Curb?**

A police officer asked a trash collector to turn over bags of garbage collected from the Greenwood home in Laguna Beach, California. The officer searched the garbage bags and found evidence indicating illicit drug use. She used this evidence as a basis for obtaining a warrant to search the Greenwood home. During the search, the police discovered cocaine and hashish. As a result, the police charged the defendants with possession of illicit drugs. The trial court dismissed the charges on the ground that the warrantless trash search violated the Fourth Amendment, and the California appellate court affirmed. The U.S. Supreme Court granted review and reversed on the ground that the defendants, by placing their garbage outside the curtilage, had exposed their garbage to the public, and regardless of whether they may have had an expectation of privacy in their garbage, it was not an expectation that society is prepared to accept as being objectively reasonable. *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).
of the contents and remove any valuables for safekeeping. When conducted according to standard police procedures, an inventory search is generally regarded as an administrative search not subject to ordinary Fourth Amendment requirements. Inventory searches are justified by the need for protection of the owner’s property while the vehicle remains in police custody, protection of the police from claims of lost property, and protection of the police from potential dangers that might be lurking inside closed automobiles. Of course, if a routine inventory search yields evidence of crime, it may be seized and admitted into evidence without violating the Fourth Amendment. 

\[ \text{South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).} \]

It should be recognized that police are not permitted to use an inventory search as a pretext for a criminal investigation. \[ \text{Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).} \] Nevertheless, once the police have legitimately taken a vehicle into custody, they are not required to overlook contraband articles discovered during a valid inventory search, and such items may be used as evidence. Lower federal and state courts have emphasized that an inventory search must be in accordance with established inventory procedures. See, for example, \[ \text{United States v. Velarde, 903 F.2d 1163 (7th Cir. 1990).} \] In 1998 the Arkansas Supreme Court held that the fact that the defendant lacked a valid driver’s license constituted good cause to justify a police officer’s impounding his vehicle and completing a warrantless inventory of its contents pursuant to the police department’s standards. \[ \text{Thompson v. State, 966 S.W.2d 901 (Ark. 1998).} \]

**Searches Based on Consent**

Constitutional rights may be waived, and Fourth Amendment rights are no exception. Voluntary cooperation with police officers often results in fruitful searches and seizures. The Supreme Court has refused to require law officers to inform suspects of their right to refuse to consent to a search. \[ \text{Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).} \] More recently, the Court held that police are not required to inform motorists who are stopped for other reasons that they are “free to go” before asking them to consent to a search of their automobile. \[ \text{Ohio v. Robinette, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996).} \]

**THE VOLUNTARINESS REQUIREMENT**

To be valid, consent must be truly voluntary. If a person actually assists the police in conducting a search, or consents after having been advised that consent is not required, courts have little difficulty in finding that consent was voluntary. Yet consent has to involve more than mere acquiescence to the authority of the police. Thus, in \[ \text{Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).} \] the Court held that a claim of police authority based on a nonexistent warrant was so coercive as to invalidate the defendant’s consent. Similarly, a Georgia appellate court invalidated an automobile search where the defendant and a companion were surprised by six heavily armed law officers, were searched at gunpoint, and were then asked to consent to a search of their automobile. \[ \text{Love v. State, 242 S.E.2d 278 (Ga. App. 1978).} \]

When a person summons the police to the home to investigate a crime that has allegedly taken place there, there is an implied consent to a search of the premises related to the routine investigation of the offense. Of course, once police are lawfully on the premises, any evidence of crime that is in their plain view may be seized, even if the person who initially summoned the police may be ultimately prosecuted as a result of such evidence.
THIRD-PARTY CONSENT
A perennial problem in the area of consent searches is that of third-party consent. The problem is especially acute in situations where several persons share a single dwelling, as is common among college students. For example, may an apartment dweller consent to the search of his or her roommate’s bedroom? The Supreme Court has said that the consent of a third party is valid only when there is mutual use of the property by persons generally having joint access or control. Thus, any of the co-occupants has the right to permit the inspection. The others have assumed the risk that one of their number might permit the common area to be searched. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Matlock stands for the principle that the validity of third-party consent is tested by the degree of dominion and control exercised by the third party over the searched premises and that a joint occupant may provide valid consent only if the other party is not present.

In Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), the Supreme Court shifted the focus from the dominion and control of the third party to the police officer’s subjective belief that the third party has the authority to grant consent to a search of the premises. Writing for the Court, Justice Antonin Scalia opined that a warrantless entry is valid when based on the consent of a third party whom the police reasonably believe to possess common authority over the premises, even if the third party does not in fact have such authority.

There are a number of well-established situations in which third-party consent is not valid. Tenancy arrangements are a good example. A landlord does not have the implied authority to consent to the search of a tenant’s premises. Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). Likewise, a hotel manager or clerk does not have the right to consent to the search of a guest’s room during the time the guest has a legal right to occupy the room. Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

Courts have taken different approaches to searches of college dormitory rooms, often depending on the regulations the student agrees to when occupying the dormitory room. A search routinely performed by college officials for reasons of health or safety that reveals incriminating evidence in plain view would probably not be in violation of the Fourth Amendment. On the other hand, a search of a dormitory room by police would ordinarily require a search warrant issued on the basis of probable cause. In Commonwealth v. McCloskey, 272 A.2d 271 (Pa. Super. 1970), the court held that absent exigent circumstances, police entry into a college dormitory room by means of a pass key possessed by the head resident was improper. Even though the university had reserved the right to check the room for damage and use of unauthorized appliances, the court found that in the absence of exigent circumstances the university did not have authority to consent to a governmental search of the student’s room.

Some current problems in the area of third-party consent involve parental consent to searches of premises occupied by their adult children and spousal consent to searches of the other spouse’s property, such as an automobile. But again, the Supreme Court has shifted the focus to the police officer’s subjective belief regarding the authority of third parties. In general, state courts have followed the Matlock approach. The Louisiana Supreme Court did that in 1999 by holding that a warrantless search may be valid even if consent was given by one without authority if the facts available to officers at the time of entry justified the officers’ reasonable, albeit erroneous, belief that the one consenting to the search had authority over the premises. State v. Edwards, 750 So.2d 893 (La. 1999). But not all state courts have been willing to follow Matlock; some provide more protection to their citizens. For example, Ore-
gon courts have ruled that the state constitution requires that consent by a third party must be based on actual authority. See State v. Will, 885 P.2d 715 (Or. App. 1994).

WHAT HAPPENS WHEN SPOUSES DISAGREE AS TO WHETHER POLICE MAY SEARCH THEIR RESIDENCE?

In Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), the Supreme Court granted review of a case in order to resolve a split of authority in lower federal courts in instances where one co-occupant gives the police consent to search shared premises, yet another co-occupant who is present refuses to permit the search. In 2006 the Court reviewed a case in which police entered a home based on a wife’s consent even though her husband, who was present at the time, objected to the entry. The wife led police to cocaine belonging to her husband. In reversing the conviction on the ground that the police had made an unlawful search and seizure, the Court said that police may not search a home when one resident invites them in but another refuses to grant access. In a strongly worded dissenting opinion, Chief Justice John Roberts expressed concern about the impact of the decision on the ability of police to protect women from their abusive partners.

The Scope of Privacy Protected by the Fourth Amendment

The term "seizure" refers to the taking into custody of physical evidence, property, or even a person. What constitutes a "search"? The answer is not so clear. Originally, the protection of the Fourth Amendment was limited to physical invasions to one’s person or property. Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). Historically, courts looked at whether a trespass had taken place in deciding whether the Fourth Amendment was implicated. Thus, surveillance without physical contact with the suspect or the suspect’s property was deemed to fall outside the protections of the Fourth Amendment. Accordingly, the Fourth Amendment was not deemed applicable to wiretapping or electronic eavesdropping.

In Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Supreme Court overruled Olmstead and abandoned the trespass doctrine, saying “the Fourth Amendment protects people, not places.” 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 582. The contemporary approach to determining the scope of protected privacy under the Fourth Amendment is nicely stated in Justice John M. Harlan’s concurring opinion in Katz:

My understanding of the rule as it 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.’ 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 587.

Reasonable Expectations of Privacy

Potentially, the term “search” applies to any official invasion of a person’s reasonable expectation of privacy as to one’s person, house, papers, or effects. In Katz, the Court held that a suspected bookie who was using a public telephone allegedly in conduct of a gambling business enjoyed a reasonable expectation of privacy and that a police wiretap of the phone booth was a search within the meaning of the Fourth Amendment. This decision brought wiretapping and other forms of electro-
nic eavesdropping within the limitations of the Fourth Amendment. Currently, any means of invading a person’s reasonable expectation of privacy is considered a search for Fourth Amendment purposes. The critical question that courts must address in reviewing cases where police conduct surveillance or eavesdropping without probable cause or prior judicial authorization is whether such surveillance intruded on a person’s reasonable expectation of privacy.

The issue of what constitutes a reasonable expectation of privacy has been litigated in hundreds of cases in federal and state courts. Police techniques such as canine sniffs are considered among the least intrusive means of government investigation. Thus, police were allowed to conduct a “sniff test” of a passenger’s luggage at an airport without reasonable suspicion because it did not violate a person’s reasonable expectation of privacy. United States v. Place, 462 U.S. 696, 106 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, the uniqueness of individual situations has resulted in disparate views, with police frequently complaining that judicial decisions fail to furnish any “bright line” rules. In a number of well-defined situations, however, courts have upheld minimally intrusive, suspicionless searches on the assumption that people’s privacy expectations are reduced in such situations.

With increased concern over airplane hijacking and terrorism has come increased security at the nation’s airports. Passengers attempting to board aircraft routinely pass through metal detectors; their carry-on baggage and checked luggage are routinely subjected to X-ray scans. Should these procedures suggest the presence of suspicious objects, physical searches are conducted to determine what the objects are. There is little question that such searches are reasonable given their minimal intrusiveness, the gravity of the safety interests involved, and the reduced privacy ex-

The Privacy Expectations of Bus Passengers

Steven D. Bond was traveling on a Greyhound bus from California to Little Rock, Arkansas. When the bus stopped at a border patrol checkpoint in Texas, an agent boarded the bus to check for undocumented aliens. During the course of the inspection, the agent squeezed the soft luggage in the overhead storage space above the seats. In squeezing a canvas bag belonging to Bond, the agent detected a “brick-like” object that aroused his suspicions. Upon the agent’s request, Bond consented to a search of the bag, which produced a brick of methamphetamine wrapped in duct tape.

After his motion to suppress the contraband was denied, Bond was convicted of possession with intent to distribute methamphetamine and was sentenced to fifty-seven months in prison. The Court of Appeals upheld the denial of the suppression motion, holding that the agent’s action in squeezing the canvas bag was not a search within the meaning of the Fourth Amendment. On certiorari, the Supreme Court reversed, dividing 7–2. Writing for the Court, Chief Justice William Rehnquist opined, “When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another.... He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here.” In dissent, Justice Stephen Breyer, joined by Justice Antonin Scalia, observed that “the traveler who wants to place a bag in a shared overhead bin and yet safeguard its contents from public touch should plan to pack those contents in a suitcase with hard sides, irrespective of the Court’s decision today.”

pectations associated with airline travel. Indeed, travelers are often notified through airport public address systems and signs that “all bags are subject to search.” Such announcements place passengers on notice that ordinary Fourth Amendment protections do not apply.

**Sobriety Checkpoints**

In the last twenty-five years society has become incensed about drunk driving and the resulting carnage on the nation’s highways. One method increasingly used by law enforcement to combat this problem is the use of **sobriety checkpoints**, in which all drivers passing a certain point are stopped briefly and observed for signs of intoxication. To the extent that police officers at these checkpoints visually inspect the passenger compartments of stopped automobiles, these brief encounters involve searches, although in most instances these procedures entail only minor intrusion and inconvenience. Critics of sobriety checkpoints object to the fact that police temporarily detain and visually search cars without any particular suspicion. Yet the courts have generally approved such measures. See, for example, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). It is noteworthy, however, that in 2000, the U.S. Supreme Court disallowed a checkpoint that was established primarily for the purpose of detecting illegal drugs. *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct 447, 148 L.Ed.2d 333 (2000). (This topic is explored further in the next chapter.)

**Jail and Prison Searches and Strip Searches**

Obviously, anyone lawfully incarcerated in a prison or jail has no reasonable expectation of privacy. Jail and prison cells are routinely “swept” for weapons and other contraband, and inmates are routinely subjected to searches of their persons. The Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), upheld **strip searches** of prison inmates because of the demands for institutional security. But the Court did not give prison officials carte blanche. Rather, the Court held that the Fourth Amendment requires balancing the need for the particular search against the invasion of personal rights. Thus, courts must consider the justification and scope of the intrusion and the manner and place in which it is conducted.

Absent cause for suspicion, visitors to a prison may be subjected to reasonable searches—for example, a pat-down search or a metal detector sweep. However, before conducting a strip search of a visitor, prison authorities must have at least a reasonable suspicion that the visitor is bearing contraband. *Spear v. Souder*, 71 F.3d 626 (6th Cir. 1995).

Courts have generally disapproved of blanket policies that allow strip searches of all persons who have been arrested, particularly where traffic violators are concerned. Some courts hold that strip searches are violative of Fourth Amendment rights unless there is probable cause to believe the arrestee is concealing weapons or contraband. See, for example, *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1983). Other courts have permitted such searches where there is a reasonable suspicion that the arrestee is concealing weapons or contraband. See, for example, *Webster v. Dell*, 804 F.2d 796 (2d Cir. 1986).

Strip searches can also have civil consequences. For example, in *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985), Marlin E. Jones was arrested and taken into custody for failing to sign a summons and complaint on an animal leash law violation. He was subjected to a visual strip search of his anal and genital area. The court ruled that such a search, under these circumstances, subjected the police and jail personnel to
liability for the violation of the arrestee’s civil rights. The court emphasized that the police had no reason to suspect that Jones was harboring weapons or contraband on his person.

The Warrant Requirement

As pointed out, when searches are challenged as being unreasonable, courts must first determine if the Fourth Amendment is applicable. The Fourth Amendment does not apply to border searches or searches conducted outside the United States, nor does it apply to open fields or abandoned property. Indeed, the Fourth Amendment does not apply to any situation where a person lacks a reasonable expectation of privacy. Where it does apply, the Fourth Amendment expresses a decided preference for searches and seizures to be conducted pursuant to a warrant. The warrant requirement is designed to ensure that the impartial judgment of a judge or a magistrate is interposed between the citizen and the state. The right of privacy is “too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.” *McDonald v. United States*, 335 U.S. 451, 455-456, 69 S.Ct. 191, 195-96, 93 L.Ed. 153, 158 (1948).

The Probable Cause Requirement

With the exception of warrants permitting administrative searches, search warrants must be based on probable cause. Like many legal terms, “probable cause” is not susceptible to precise definition. Probable cause exists when prudent and cautious police officers have trustworthy information leading them to believe that evidence of crime might be obtained through a particular search. See *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The Supreme Court has said that courts should view the determination of probable cause as a “commonsense, practical question” that must be decided in light of the **totality of circumstances** in a given case. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, 543 (1983). This approach has been amplified by lower federal courts, which have observed that even though an innocent explanation might be consistent with the facts alleged in an affidavit seeking a search warrant, this does not negate probable cause. See, for example, *United States v. Fama*, 758 F.2d 834 (2d Cir. 1985).

Although state courts are free to impose a higher standard, most have followed this approach. For example, the Ohio Supreme Court ruled that an affidavit by a police agent saying that he observed a tall marijuana plant growing in an enclosed backyard furnished probable cause for a magistrate to conclude there was marijuana or related paraphernalia in the residence. *State v. George*, 544 N.E.2d 640 (Ohio 1989). Some state courts have declined to follow the *Gates* approach and have opted to provide their citizens more protection than allowed by the federal view. In some instances, these state views result from linguistic variations in state constitutional counterparts to the Fourth Amendment. For example, in *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985), the court noted the Massachusetts Constitution provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause. Thus, the court held that an affidavit based on a telephone tip from an anonymous informer whose veracity was not shown did not establish probable cause for issuance of a warrant to search a mobile home.
Issuance of the Search Warrant

Under normal circumstances, a police officer with probable cause to believe that evidence of a crime is located in a specific place must submit under oath an application for a search warrant to the appropriate judge or magistrate. Rule 41 of the Federal Rules of Criminal Procedure allows a federal agent to obtain a search warrant from a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located. Whether by statute or judicial rules, states usually provide similar authorization.

In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), the Supreme Court invalidated a warrant issued by the state attorney general. The Court said that a warrant must be issued by a neutral and detached magistrate and certainly not by an official responsible for criminal prosecutions. Similarly, in *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), the Court invalidated a statute that permitted electronic eavesdropping to be authorized solely by the U.S. Attorney General in cases involving national security. Writing for the Court, Justice Lewis Powell observed that “unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy…” 407 U.S. at 317, 92 S.Ct. at 2136, 32 L.Ed.2d at 766.

The Supporting Affidavit

An affidavit is a signed document attesting under oath to certain facts of which the affiant (the person submitting the affidavit) has knowledge (see Figure 3.1). Generally, an affidavit by a law enforcement officer requesting issuance of a search warrant is presented to a judge or magistrate. The manner in which the affidavit is recorded and transmitted may vary. For example, the Idaho Supreme Court, finding that electronically recorded testimony is no less reliable than a sworn, written statement, held that the word “affidavit” under the Idaho constitution was sufficiently broad to include a tape recording of oral testimony. *State v. Yoder*, 534 P.2d 771 (Idaho 1975).

Rule 41(d)(3)(A) of the Federal Rules of Criminal Procedure provides that a federal magistrate judge may issue a warrant based upon sworn oral testimony communicated by phone or other appropriate means, including facsimile transmission. Some states follow this approach—for example, California law permits police officers to complete affidavits using the telephone to expedite the issuance of a warrant. West’s Ann. Cal. Pen. Code. § 1526(b).

The officer’s affidavit in support of a search warrant must always contain a rather precise description of the place(s) or person(s) to be searched and the things to be seized. Moreover, the affidavit must attest to specific facts that establish probable cause to justify a search. An affidavit cannot establish probable cause for issuance of a search warrant if it is based merely on the affiant’s suspicion or belief without stating the facts and circumstances that the belief is based on.

The information on which an affidavit is based must be sufficiently fresh to ensure that the items to be seized are probably located on the premises to be searched. The issue of when a search warrant becomes invalid because the information the affidavit is based on is stale has been litigated in many cases, with varying results. No set rule can be formulated. For example, a Delaware appellate court invalidated a search warrant where there was a delay of twenty-three days between the last alleged fact and the issuance of the warrant. In *State v. Pulgini*, 374 A.2d 822 (De1. 1977), the Delaware Supreme Court reversed the decision, noting the affidavit for the warrant recited facts indicating activity of a protracted and continuous nature during the
FIGURE 3.1  Application for a Search Warrant

Commonwealth of Massachusetts

Middlesex , ss. Concord District Court

Court

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT*

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended

I, Sam Buckley , being duly sworn, depose and say:

Name of applicant

1. I am Police Chief of Concord, Massachusetts

(Describe position, assignment, office, etc.)

2. I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (If space is insufficient, attach affidavit or affidavits hereto)

Based on information from a Federal Drug Enforcement Officer, the above has reason to believe at 123 Smith Street, one-story red brick house, with garage, 2 bedrooms, kitchen, living room, and bathroom, there is a small brown suitcase containing a controlled substance believed to be heroin.

3. Based upon the foregoing reliable information - and upon my personal knowledge and belief - and searched affidavits - there is probable cause to believe that the property hereinafter described - has been stolen - or is being concealed, etc.

and may be found in the possession of Miss Francine Taggart

Name or person of persons

at premises 123 Smith Street, Concord

(Identify number, street, place, etc.)

4. The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible).

One small brown suitcase taken from a station locker by Francine Taggart on June 19, 1980, containing heroin.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person or persons to be searched)

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

Signature of applicant

Then personally appeared the above named and made oath that the foregoing affidavit by him subscribed is true.

Before me this day of June, 1980

Justice of Special Justice

Clerk or Assistant Clerk of the Municipal District Court.

* Strike inapplicable clauses

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APPROVED BY THE CHIEF JUSTICE OF THE DISTRICT COURTS
period of delay. The court said that under such circumstances the passage of time becomes less significant. In United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), a twenty-one-day time lapse between observation of the receipt of stolen property and issuance of the warrant did not invalidate the warrant because the magistrate could determine there was a reasonable probability that the stolen goods were still in the defendant’s home.

In State v. Carlson, 4 P.3d 1122 (Idaho App. 2000), an Idaho appellate court held that a warrant to search a defendant’s residence was not based upon stale information even though there was a lapse of twenty-four days between the informant’s initial observations and the issuance of the search warrant. The court considered the fact that the information was supplemented by a second report regarding observation of a marijuana plant three days prior to the issuance of the warrant and the implication that a marijuana operation continued in the interim period.

In Hemler v. Superior Court, 118 Cal. Rptr. 564 (Cal. App. 1975), the court acknowledged that the question of “stale” information depends upon the facts of each case. The court stated that an affidavit clearly furnished probable cause for the issuance of a search warrant either immediately or within a short time after observation of the sale of narcotics in an apartment. Nevertheless, the court held that the affidavit did not furnish probable cause for the issuance of a search warrant thirty-four days later.

Most appellate courts have not set specific time limits as to when information supporting the issuance of a search warrant becomes stale. However, in House v. State, 323 So.2d 659 (Fla. App. 1975), the court stated that if the observation of an alleged offense was no more than thirty days before the issuance of a warrant, a trial court’s finding that probable cause existed would not be disturbed.

Tips from Police Informants

A magistrate’s finding of probable cause may be based on hearsay evidence. See, for example, Fed. R. Crim. P. 41(c)(1), which permits police to obtain search warrants based on tips from anonymous or confidential informants. Confidential informants, or CIs, are often persons who have been involved with the police and are seeking favorable consideration in respect to their own offenses. Because their motivation may be suspect, their reliability is checked carefully. For many years the Supreme Court required magistrates to apply a rigorous two-pronged test to determine probable cause. See Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

The Aguilar-Spinelli test required that the officer’s affidavit satisfy two criteria: (1) it had to demonstrate that the informant was both credible and reliable, and (2) it had to reveal the informant’s basis of knowledge.

The Aguilar-Spinelli test made it very difficult for police to use anonymous tips. In 1983 the Supreme Court relaxed the test and permitted magistrates to consider the totality of circumstances when evaluating applications based on hearsay evidence. Illinois v. Gates, supra. The following year, the Court held that the standard for determining probable cause announced in the Gates decision was to be given a broad interpretation by lower courts. Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984).

Despite the Supreme Court’s relaxed standard for determining probable cause based on tips from informants, several states have chosen to follow the stricter standards formerly imposed by the Aguilar and Spinelli decisions. This, of course, is the prerogative of the states. In a comprehensive opinion in State v. Cordova, 784 P.2d 30 (N.M. 1989), the New Mexico Supreme Court reviewed an affidavit for a search war-
rant that recited that Cordova had brought heroin into town and was selling it at the house in question. However, the affidavit was devoid of explanation about how the informant gathered this information. Further, although the affidavit stated that the informant had personal knowledge that “heroin users” had been at the residence in question, there was nothing to indicate the source of the informant’s knowledge and no explanation of how the informant knew that the persons in question were heroin users. Because the affidavit did not establish that the informant was both credible and reliable, the court found it did not provide a substantial basis for believing the informant and for concluding that the informant gathered the information in a reliable manner. Further, the affidavit did not adequately state the informant’s basis of knowledge that the defendant was selling heroin. In rejecting the state’s appeal, the New Mexico Supreme Court declined to follow the Gates totality-of-circumstances rule and found the affidavit did not meet the requirements of the New Mexico Constitution and its rules of criminal procedure.

In 1985 the Connecticut Supreme Court criticized the totality-of-circumstances test as being “too amorphous” and an inadequate safeguard against unjustified police intrusions. Nevertheless, that court has recently held that if the information supplied by a CI fails the Aguilar–Spinelli test, probable cause may still be found if the affidavit sets forth other circumstances that bolster any deficiencies. State v. Barton, 594 A.2d 917 (Conn. 1991). Four years later, the Tennessee Supreme Court held that the two-pronged standard for probable cause inquiries incident to the issuance of a search warrant announced in the Aguilar and Spinelli cases, if not measured hyper-technically, is the standard to measure whether there is probable cause to issue a warrant. State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989).

When a defendant demands to know the identity of the informant who provided the police with information on which they based their affidavit for a search warrant, courts face a delicate problem. There is a limited privilege to withhold the identity of the confidential informant. In determining whether to require disclosure, the court balances the interest of the public in preserving the anonymity of the informant against the defendant’s need to have this information to prepare a defense, and where the questioned identity “is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.” Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

In State v. Litzau, 650 N.W.2d 177 (Minn. 2002), the Minnesota Supreme Court, citing Roviaro, pointed out that where an informant is merely a transmitter of information rather than an active participant in or a material witness to the crime, that disclosure is generally not required. But the court said, “Where an informant is an eyewitness to the crime, an in camera hearing is appropriate to determine whether there is a reasonable probability that the informer’s testimony is necessary to a fair determination of guilt or innocence.” Id. at 184. In considering a request for disclosure of the identity of an informant, the Minnesota court stated that the trial court considers (1) whether the informant is a material witness, (2) whether the informant’s testimony will be material to the issue of guilt, (3) whether the state’s evidence is suspect, and (4) whether the informant’s testimony might disclose entrapment. Id. at 184.

**Required Specificity of a Search Warrant**

The Fourth Amendment mandates that “no warrants shall issue” except those “particularly describing the place to be searched and the persons or things to be seized.” Thus, the scope of a search and seizure is bound by the terms of the warrant (see Figure 3.2). Consequently, a warrant that described property to be seized as “various long play phonographic albums, and miscellaneous vases and glassware” was held in-
sufficient. Nevertheless, in 1999 the Maine Supreme Judicial Court upheld a search warrant that authorized the seizure of all computer-related equipment in the defendant’s house. The police knew only that images of minors who were allegedly sexually exploited were taken by digital camera and downloaded on a computer. *State v. Lehman*, 736 A.2d 256 (Me. 1999).
Courts tend to be less strict when it comes to the description of contraband (such as heroin), because it is illegal per se, but stricter in cases involving First Amendment rights. For example, a federal appeals court invalidated a warrant authorizing the seizure of “a quantity of obscene materials, including books, pamphlets, magazines, newspapers, films and prints.” United States v. Guarino, 729 F.2d 864, 865 (1st Cir. 1984). In United States v. Hall, 142 F.3d 988 (7th Cir. 1998), the court held that search warrants were written with sufficient particularity because the items listed on the warrants were qualified by ... such phrases as ‘child pornography,’ ‘minors engaged in sexually explicit conduct,’ and ‘sexual conduct between adults ... and minors.’ Id. at 996-997.

Anticipatory Search Warrants

The dramatic increase in drug trafficking over the last few decades has given rise to a countermeasure known as the anticipatory search warrant. Traditionally, police wait until a suspect receives contraband and then prepare an affidavit to obtain a search warrant. If the magistrate finds that probable cause exists at that time, a search warrant is issued. In the case of an anticipatory warrant, probable cause does not have to exist until the warrant is executed and the search conducted.

During the 1980s, several state appellate courts approved anticipatory search warrants. See, for example, State v. Coker, 746 S.W.2d 167 (Tenn. 1987). In one of these cases, Bernie v. State, supra, a freight delivery service notified police that a package that broke in transit revealed a suspicious substance that later proved to be cocaine. An anticipatory warrant was issued to search the residence to which the package was addressed. Police were on the scene when the freight company delivered the package. The warrant was served, the cocaine seized, and the defendant taken into custody. On appeal, the search was upheld by the state supreme court, which observed that neither the federal nor the state constitution prohibited issuance of a search warrant to be served at a future date in anticipation of the delivery of contraband.

The Alaska Supreme Court has cautioned that a magistrate issuing an anticipatory warrant should make its execution contingent on the occurrence of an event that evidences probable cause that the items to be seized are in the place to be searched rather than directing that the warrant be executed forthwith. Johnson v. State, 617 P.2d 1117 (Alaska 1980).
In January 2000, a Michigan appellate court first addressed the issue; following the trend of appellate courts, it concluded that an anticipatory search warrant does not violate the federal and state constitutional prohibitions against unreasonable searches and seizures. *People v. Kaslowski*, 608 N.W.2d 539 (Mich. App. 2000).

While there has been a split of authority, the majority of federal appellate courts have upheld the basic concept that contraband does not have to be currently located at the place described in a search warrant if there is probable cause to believe it will be there when the warrant is executed. In 1986 the Ninth Circuit Court of Appeals held that an anticipatory search warrant is permissible "where the contraband to be seized is on a sure course to its destination." *United States v. Hale*, 784 F.2d 1465, 1468 (9th Cir. 1986). Two years later, the U.S. Court of Appeals for the Fourth Circuit upheld an anticipatory search warrant permitting an inspector to search an apartment for child pornography where the issuing magistrate conditioned the validity of the warrant on the contraband being placed in the mail. Thus, when the mailing was accomplished, the contraband was on a certain course to its destination. *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988).

In *United States v. Grubbs*, 547 U.S. 90, 126 S.Ct. 1494, 164 L.Ed.2d 195 (2006), the Supreme Court held that anticipatory search warrants do not contravene the Fourth Amendment. In an opinion by Justice Scalia, the Court said,

Anticipatory warrants are … no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found if the condition is met… Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment’s requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that if the triggering condition occurs “there is a fair probability that contraband or evidence of a crime will be found in a particular place,” … but also that there is probable cause to believe the triggering condition will occur. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. 547 U.S. at 96, 126 S.Ct. at 1500, 164 L.Ed.2d at 203.

**Execution of a Search Warrant**

Applicable federal and state laws and rules of criminal procedure govern the manner and time in which warrants are executed. Rule 41(e) of the Federal Rules of Criminal Procedure provides that the warrant

shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named or the property or person specified. The warrant shall be served in the daytime, unless the issuing authority … authorizes its execution at times other than daytime.

Rule 41(a)(2)(B) defines “daytime” as the period between 6:00 A.M. and 10:00 P.M. according to local time. States have varying provisions governing the period of time within which a search warrant may be executed. Texas allows three days, excluding the date of issuance and the date of execution, Vernon’s Ann. Texas C.C.P. Art. 18.07, whereas California allows ten, West’s Ann. Cal. Penal Code § 1534. Likewise, state laws vary on the hours during which a search warrant may be executed. California law pro-
vides that upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 A.M. and 10 P.M. West’s Ann. Cal. Penal Code § 1533. Some states, including Texas, do not impose restrictions on the hours when a warrant may be executed; others allow nighttime searches under special circumstances.

The Knock-and-Announce Rule

At the time the Constitution was adopted, there was a principle of the English common law that law enforcement officers should ordinarily announce their presence and authority before entering a residence to conduct a search or make an arrest pursuant to a warrant. Under federal law an officer is required to knock and announce on arrival at the place to be searched. 18 U.S.C.A. § 3109. That section stipulates:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Most states have similar “knock-and-announce” requirements, but courts have created some exceptions to protect officers and to prevent the destruction of evidence. In Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), the U.S. Supreme Court elevated the knock-and-announce rule to constitutional status under the Fourth Amendment. However, the Court did recognize that exigent circumstances may render the knock-and-announce requirement unnecessary.

The purpose of the knock-and-announce requirement is to reduce the potential for violence and to protect the right of privacy of the occupants. Courts have generally ruled that there are no rigid limits as to the time that must elapse between the announcement and the officers’ entry. A few seconds may even suffice. Moreover, courts frequently excuse compliance when to require it would endanger the lives of the officers or simply provide an occasion for occupants to dispose of evidence. The most common example of disposing of evidence after police have announced their presence is the flushing of contraband down a toilet. For example, in State v. Stalbert, 783 P.2d 1005 (Or. App. 1989), the court found no violation of the knock-and-announce rule where police officers arrived at the defendant’s residence to execute a search warrant, yelled “Police officers, search warrant,” and paused no more than two seconds between knocking and breaking through the door.

In Wilson v. Arkansas, supra, the Supreme Court noted that officers facing exigent circumstances such as the need to preserve evanescent evidence could dispense with the knock-and-announce requirement. But in Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), the Court ruled that states may not create a blanket “drug exception” to the requirement that police officers knock and announce prior to executing a search warrant. Writing for a unanimous bench, Justice John Paul Stevens observed that

the fact that felony drug investigations may frequently present circumstances warranting a no knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock and announce requirement. 520 U.S. at 394, 117 S.Ct. at 1421, 137 L.Ed.2d at 624.
In *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), the Supreme Court retreated from the position taken in *Wilson v. Arkansas*, holding that violations of the knock-and-announce requirement do not require the suppression of all evidence seized as the result of such violations. Speaking for a sharply divided Court, Justice Scalia concluded that when it comes to knock-and-announce violations, “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.” 547 U.S. at ___, 126 S.Ct. at 2168, 165 L.Ed.2d at 69. Scalia also noted, “In addition to the grave adverse consequence that excluding relevant incriminating evidence always entails (viz. the risk of releasing dangerous criminals), imposing such a massive remedy would generate a constant flood of alleged failures to observe the rule....” 547 U.S. at ___, 126 S.Ct. at 2161, 165 L.Ed.2d at 66. Writing for four dissenters, Justice Breyer observed that the decision “destroys the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement.” 547 U.S. at ___, 126 S.Ct. at 2171, 165 L.Ed.2d at 73.

**Testing the Sufficiency of the Basis for Issuing a Search Warrant**

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court was faced with the issue of whether a defendant can challenge the affidavit for a search warrant in a pretrial proceeding. The Delaware Supreme Court had ruled that a defendant could not challenge the veracity of the statements made by the police to obtain their search warrant. The U.S. Supreme Court reversed and held that the Fourth Amendment requires an evidentiary hearing (called a *Franks hearing*) into the truthfulness of allegations in an affidavit in support of an application for a search warrant “where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.” 439 U.S. 154, 155–156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978).

**Return of Seized Property**

Illegally seized property must be returned to the owner; however, the government may retain property lawfully seized as long as the government has a legitimate interest in its retention. Whether seized legally or illegally, contraband or property subject to forfeiture is not subject to being returned. See *United States v. Carter*, 859 F. Supp. 202 (E.D. Va. 1994). The return of other seized property is generally handled expeditiously based on a motion of the party seeking return. See, for example, Fed. R. Crim. P. 41(g).

**Exceptions to the Warrant Requirement**

Courts have recognized that an absolute warrant requirement would be impractical. Consequently, they have upheld the reasonableness of warrantless searches under so-called exigent circumstances. Yet, despite a number of exceptions, the warrant requirement remains a central feature of Fourth Amendment law. Whenever possible, police officers should obtain warrants because their failure to do so can jeopardize the
fruits of a successful search. The following are well-defined exceptions to the warrant requirement. However, it is important to understand that all these exceptions assume that police officers have probable cause to believe that a given search is likely to produce evidence of crime.

Evidence in Plain View

The Supreme Court has said that evidence in plain view of a police officer is not subject to the warrant requirement. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). Police officers are not required to close their eyes or wear blinders in the face of evidence of a crime. Police officers have long been permitted to seize evidence that comes to their attention inadvertently, provided that (1) the officer has a legal justification to be in a constitutionally protected area when the seizure occurs, (2) the evidence seized is in the plain view of the officer who comes across it, and (3) it is apparent that the object constitutes evidence of a crime. *Coolidge v. New Hampshire*, supra. An officer may not seize anything and everything in plain view—the officer must have probable cause.

The “inadvertent discovery” requirement announced in *Coolidge v. New Hampshire* remained in effect for more than a decade. However, in *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Supreme Court noted that the inadvertence requirement was not an essential part of the plurality opinion in *Coolidge v. New Hampshire*. As the Court observed in 1983, “There is no reason [the police officer] should be precluded from observing as an officer what would be entirely visible to him as a private citizen.” *Texas v. Brown*, 460 U.S. 730, 740, 103 S.Ct. 1535, 1542, 75 L.Ed.2d 502 (1983). Notwithstanding, some state courts have continued to insist that the inadvertence requirement is a limitation on the plain view exception to the warrant requirement. See, for example, *State v. Davis*, 828 A.2d 293 (N.H. 2003).

The plain-view doctrine may apply both where the item seized is in plain view before the commencement of a search and where it comes into the plain view of an officer conducting an otherwise valid search or entry. For example, in *United States v. Pacelli*, 470 F.2d 67 (2d Cir. 1972), the court invoked the plain view doctrine to uphold the seizure of illegal chemicals found during a search based on a warrant to search for heroin. The search warrant gave police officers the right to enter and search the premises; other items of contraband found in plain view during the search were deemed properly seized.

In contrast with *Pacelli*, consider the case of *Arizona v. Hicks*, 450 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). There, police who had lawfully entered an apartment to search for weapons noticed stereo equipment that seemed out of place, given the squalid condition of the apartment. His suspicion aroused, an officer moved the stereo equipment to locate the serial numbers. A check of the numbers indicated that the equipment was stolen. The Supreme Court disallowed the “search” of the serial numbers because they were not in plain view when the police entered the apartment.

Emergency Searches

Police frequently must respond to emergencies involving reports of crime or injuries. In other instances, they accompany firefighters to the scene of a fire. Increasingly, law enforcement authorities are called to investigate bomb threats where explosive devices are possibly sequestered inside buildings. Although these are among
the most dramatic emergencies, in many other situations police are called to conduct emergency searches. The law recognizes that police do not have the time to obtain search warrants in such instances. Of course, police must possess probable cause to make warrantless emergency searches of dwellings. While they are on premises in response to an emergency, police may seize evidence in plain view during the course of their legitimate emergency activities. *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978).

Even when investigating a crime scene, police are not permitted to search anything and everything found. In *Flippo v. West Virginia,* 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999), the police responded to a 9-1-1 call reporting that a man and his wife had been attacked in a cabin at a state park. When they arrived, the police found the woman fatally wounded. While investigating the crime scene, they discovered a briefcase. They opened it and an envelope within it and found photographs that tended to incriminate the husband. The prosecutor attempted to justify the seizure based on a “crime scene” exception to the warrant requirement. While recognizing that police may make warrantless searches for perpetrators and victims at a crime scene, the Supreme Court rejected the contention that there is a “crime scene exception” to the Warrant Clause of the Fourth Amendment. In remanding the case to the lower court, the Court allowed that the police might have secured the evidence by consent, under the plain view doctrine, or under the inventory exception to the warrant requirement but not on the basis of a claimed crime scene exception.

Police do not violate the Fourth Amendment if they stop a vehicle when they have adequate grounds to believe the driver is ill or falling asleep. *State v. Pinkham,* 565 A.2d 318 (Me. 1989). Likewise, police who make warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid do not violate the protections against unreasonable search and seizure. Under these circumstances, the police may justifiably seize evidence in plain view. See *Mincey v. Arizona,* 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290, 300 (1978). An officer’s belief that an emergency exists must be reasonable, however. Chief Justice (then judge) Warren Burger in *Wayne v. United States,* 318 F.2d 205, 212 (D.C. Cir. 1963), opined that “the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.” In *United States v. Al-Azzawy,* 784 F.2d 890 (9th Cir. 1985), the court upheld a warrantless search where a suspect was believed to be in possession of explosives and in such an agitated state as to create a risk of endangering the lives of others.

### Preservation of Evidence

A frequently invoked justification for a warrantless search and seizure is the preservation of evanescent evidence—evidence that might be lost or destroyed. Where there is a reasonable belief that loss or destruction of evidence is imminent, a warrantless entry of premises may be justified, *United States v. Gonzalez,* 967 F.2d 1032 (4th Cir. 1992), but a mere possibility of such is insufficient, *United States v. Hayes,* 518 F.2d 675, 678 (6th Cir. 1975). The leading case in this area is *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), where the Supreme Court upheld a warrantless blood-alcohol test of a person who appeared to be intoxicated. The Court characterized the forcible blood test as a “minor intrusion” and noted that the test was performed by qualified medical personnel. However, the most significant fact of the case was that the suspect’s blood-alcohol level was rapidly diminishing, and the time required for police to obtain a search warrant could well have changed the results of the test.
In 1984 the Supreme Court narrowed the doctrine, saying that destruction of evidence does not constitute exigent circumstances if the underlying offense is relatively minor. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). Since then, lower courts have disagreed over what constitutes a “relatively minor” offense. In particular, drug offenses, many of which are felonies or misdemeanors depending on the quantity of contraband involved, have proven vexing to police and courts trying to apply the “relatively minor” standard. In 1993 the Idaho Supreme Court said that a minor offense is one that is nonviolent; thus, drug possession offenses, even if felonies, are “minor offenses.” The court announced its decision in a case where police, acting with probable cause but without a warrant, entered a home and seized marijuana they believed was about to be destroyed. *State v. Curl*, 869 P.2d 224 (Idaho 1993). It remains to be seen whether other states will take the position adopted by the Idaho Supreme Court.

**Search Incident to a Lawful Arrest**

A search incident to a lawful arrest is an exception to the warrant requirement in order that the police may disarm an arrestee and preserve evidence. It has long been recognized that such a search is permissible. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). For many years, this rule was interpreted quite broadly. For example, in *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), the Supreme Court upheld a warrantless search of an entire home incident to a lawful arrest that occurred there. In 1969 the Supreme Court narrowed the permissible scope of searches incident to lawful arrests. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Under *Chimel*, police may search the body of an arrestee and the area within that person’s immediate control. The area of immediate control is often defined as the area within the “grasp” or “lunge” of the arrestee. To conduct a more extensive search, police must generally obtain a search warrant.

Even if a formal arrest is not made until after a search, the search will be upheld as one incident to arrest if there was probable cause for the arrest before the search was begun. *Bailey v. United States*, 389 F.2d 305 (D.C. Cir. 1967). On the other hand, courts will not uphold a search where it is shown that the arrest was a mere pretext to conduct a warrantless search. See, for example, *United States v. Jones*, 452 F.2d 884 (8th Cir. 1971).

There are definite limitations on police conducting a search incident to arrest. Despite the existence of probable cause, absent extraordinary circumstances, the police have no right to search a dwelling when an arrest occurs outside it. As the Supreme Court observed in *Payton v. New York*, 445 U.S. 573, 591, 100 S.Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980), “The Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” Exigent circumstances would most likely include a situation where, after an arrest, the officers have a reasonable basis to suspect there may be others on the premises who pose a danger to the police or who may destroy evidence. See *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970). Thus, police who made an arrest outside a residence and had knowledge regarding cocaine trafficking taking place inside were not barred from entering the house to conduct a “protective sweep” for other persons who might pose a threat to their safety. *United States v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989). Nevertheless, once a person is arrested and in custody, searching that person’s car at another location is not a search incident to arrest. *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).
Hot Pursuit

Officers in hot pursuit of a fleeing suspect already have probable cause to make an arrest. The Supreme Court has long recognized that police may pursue the suspect into a protected place, such as a home, without having to abandon their pursuit until a warrant can be obtained. Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). As the police enter a building and look for a suspect therein, they are by definition engaged in a search. If they find the suspect and make an arrest, they have in effect made a seizure. Once the suspect is in custody, police may engage in a warrantless search of the immediate area, which might produce evidence such as discarded weapons or contraband.

Automobile Stops and Roadside Searches of Motor Vehicles

Police may stop an automobile without a warrant and temporarily detain the driver as long as they have probable cause to believe that criminal activity is taking place or that traffic laws or automobile regulations are being violated. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Sometimes, police use a minor traffic or equipment violation as a pretext for stopping an automobile that they wish to investigate. When police make such stops, evidence of drug or alcohol use or some other criminal violation may become readily apparent, which allows police to make a warrantless arrest and a warrantless search incident to that arrest.

In New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Supreme Court held that a police officer who makes a valid arrest of an occupant of an automobile may search the passenger compartment of the car even in the absence of probable cause to believe there is evidence located there. This search incident to arrest is justified on the assumption that the arrestee could reach into the passenger compartment to destroy evidence or obtain a weapon. Of course, if a person is in handcuffs or otherwise under the control of the police, it would seem unlikely that he or she could exercise any control over the passenger compartment of the car. Thus, Belton has been criticized as moving beyond the rationale of Chimel. Most state courts have followed the Belton approach, but several have not. For example, in People v. Belton, 432 N.E.2d 745 (N.Y. 1982) (a different case involving a different Belton), the New York Court of Appeals declined to adopt the U.S. Supreme Court's decision in Belton (discussed above) as a matter of state constitutional law. Likewise, in State v. Brown, 588 N.E.2d 113 (Ohio 1992), the Ohio Supreme Court rejected Belton, which it characterized as allowing police "to search every nook and cranny of an automobile just because the driver is arrested for a traffic violation." 588 N.E.2d at 115. Of course, if a driver is taken into custody and there is no one else legally able to take control of the car, police may impound the vehicle and conduct an inventory search.

As interpreted by the state supreme court, Iowa law allowed an officer to conduct a full-blown search of an automobile and its driver when the officer stopped a motorist for speeding and issued a traffic citation. The officer searched the vehicle without consent or probable cause, and the search revealed a bag of marijuana and a "pot pipe." The search was upheld by the Iowa Supreme Court. State v. Knowles, 569 N.W.2d 601 (Iowa 1997). But the U.S. Supreme Court granted review and the following year held that a search under these circumstances (where a traffic citation was issued and no custodial arrest was involved) violates the Fourth Amendment. Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).
THE SCOPE OF WARRANTLESS ROADSIDE AUTOMOBILE SEARCHES

Quite often, automobile stops involve fairly extensive roadside searches and seizures. The Supreme Court has long recognized the validity of the so-called automobile exception to the warrant requirement, as long as police have probable cause to believe the vehicle contains contraband or evidence of crime, on the premise that the mobile character of a motor vehicle creates a practical necessity for an immediate search. *Carroll v. United States*, supra. The Court has held that once begun under exigent circumstances, a warrantless search of an automobile may continue after the vehicle has been taken to the police station. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

Several state supreme courts have refused to go along with *Chambers v. Maroney*. For example, in August 1993, the Connecticut Supreme Court refused to adopt *Chambers v. Maroney* as a matter of state constitutional law. In *State v. Miller*, 630 A.2d 1315 (Conn. 1993), the court noted that any exigent circumstances that might justify a roadside automobile search disappear once the vehicle has been impounded. Writing for the court was Chief Justice Ellen A. Peters:

> We tolerate the warrantless on-the-scene automobile search only because obtaining a warrant would be impracticable in light of the inherent mobility of automobiles and the latent exigency that that mobility creates. The balance between law enforcement interests and individuals’ privacy interests thus tips in favor of law enforcement in the context of an on-the-scene automobile search. If the impracticability of obtaining a warrant no longer exists, however, our state constitutional preference for warrants regains its dominant place in that balance, and a warrant is required. 630 A.2d at 1325.

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In this case the Supreme Court held that singling out and stopping an automobile in order to check the driver’s license and registration is unreasonable under the Fourth Amendment unless there is at least reasonable suspicion to believe that the driver is unlicensed, the vehicle is unregistered, or some other criminal activity is afoot. In the course of his opinion for the Court, Justice Byron White discusses the approach that courts should take in judging the reasonableness of particular police practices that are challenged under the Fourth Amendment.

**JUSTICE WHITE** delivered the Opinion of the Court, saying in part:

> The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of “reasonableness” upon the exercise of discretion by government officials, including law enforcement agents, in order “to safeguard the privacy and security of individuals against arbitrary invasions.” … Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against “an objective standard,” whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon “some quantum of individualized suspicion,” other safeguards are generally relied upon to assure that the individual’s reasonable expectation of privacy is not “subject to the discretion of the official in the field.”
One perennial problem associated with warrantless automobile searches is how closed containers, such as suitcases, found inside automobiles should be treated. In 1982 the U.S. Supreme Court held that a police officer having probable cause to believe that evidence of a crime is concealed within an automobile may conduct a search as broad as one that could be authorized by a magistrate issuing a warrant. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). This ruling effectively allowed police officers to search closed containers found during the course of an automobile search without first having to obtain a warrant. In *United States v. Johns*, 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), the Court upheld the warrantless search of plastic containers seized during an automobile search even though the police had waited several days before opening the containers. The Court reasoned that since police legitimately seized the containers during the original search of the automobile, no reasonable expectation of privacy could be maintained once the containers came under police control. The search of the containers, which produced a substantial quantity of marijuana, was therefore not unreasonable simply because it was delayed.

In 1998 a highway patrol officer in Wyoming stopped a speeding car. While speaking to the driver, the officer noticed a syringe in the driver’s pocket. The driver admitted using the syringe to inject drugs. Having probable cause to search the car, the officer then opened a passenger’s purse on the back seat and found contraband. The Wyoming Supreme Court ruled that the search that yielded the contraband was not within the permissible scope of search of the vehicle and thus violated the Fourth Amendment. *Houghton v. State*, 956 P.2d 363 (1998). On review, the U.S. Supreme Court held that police officers who have probable cause to search a vehicle may search the belongings of passengers who are capable of concealing objects of the search. *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 140 L.Ed.2d 408 (1999).

### Exceptions to the Probable Cause Requirement

Warrantless searches are now well established in the law, and although reasonable people might disagree about specific cases, there is consensus that warrantless searches are often necessary and proper. The same cannot be said for the next category of searches—those based on something less than probable cause. In these special situations, courts permit limited searches based on the lesser standard of reasonable suspicion. Reasonable suspicion is the belief, based on articulable circumstances, that criminal activity might be afoot. The classic application of the reasonable suspicion standard is to the so-called “stop-and-frisk.”

### Stop-and-Frisk

The *stop-and-frisk* is a routine law enforcement technique whereby police officers stop, question, and sometimes search suspicious persons. In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the Supreme Court upheld the authority of police officers to detain and conduct a limited “pat-down” search of several men who were acting suspiciously. Given the limited intrusiveness of the pat-down and the compelling need to protect officers in the field, the Court allowed the warrantless search for weapons on a reasonable suspicion standard instead of imposing the traditional probable cause requirement. Subsequently, the Court stressed the narrow scope of

In Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the Supreme Court held that seizure of contraband other than weapons during a lawfully conducted Terry search was justified under the plain view doctrine. Going a step further in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the Court said that police may seize nonthreatening contraband detected through their sense of touch during a protective pat-down search as long as that search stays within the bounds of a Terry search. This extension of Terry is sometimes referred to as a “plain feel” exception to the warrant requirement of the Fourth Amendment. Nevertheless, in Dickerson the Court found the search and seizure of contraband invalid because the officer conducting the search determined that the item he seized was contraband only after searching beyond the scope authorized in Terry. (More attention is given to the so-called Terry stop in Chapter 4.)

IS A STOP-AND-FRISK PERMISSIBLE BASED ON AN ANONYMOUS TIP?
In Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), police received an anonymous tip that a certain female was carrying cocaine and that she would leave a certain apartment at a specified time, get into a car matching a particular description, and drive to a particular motel. The police conducted surveillance of the woman, which verified elements of the tip. Only then did they move in to stop her car, detain her, and seize the cocaine. Characterizing the case as a “close” one, the Supreme Court upheld the police procedure but said that the tip alone would not have justified the stop-and-frisk. It was on that basis that the Court invalidated a seizure of a firearm in Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). In the latter case, the Court observed that “an anonymous tip lacking indicia of reliability … does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.” 529 U.S. at 274, 120 S.Ct. at 1380, 146 L.Ed.2d at 262.

Drug Courier Profiles
In attempting to identify and to apprehend drug smugglers, law enforcement agencies have developed drug courier profiles. These profiles are sets of characteristics
that typify drug couriers, such as paying for airline tickets in cash, appearing nervous, carrying certain types of luggage, and so forth. In Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980), the Supreme Court suggested that fitting a drug courier profile was not in itself sufficient to constitute the reasonable suspicion necessary to allow police to detain an airline passenger. Therefore, the stopping of an airline passenger on that basis violated the Fourth Amendment. However, in United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), the Court upheld a similar investigatory detention in which a drug courier profile was employed. It is instructive to examine these decisions side by side to determine how and why the Court distinguished the two situations.

**School Searches**

In the First Amendment context, the Supreme Court has said that students in public schools do not “shed their constitutional rights … at the schoolhouse gate.” Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969). Following this premise, the Court has held that the Fourth Amendment protects children in the public schools from unreasonable searches and seizures. However, the Court has said that such searches are to be judged by a reasonableness standard and are not subject to the requirement of probable cause. Moreover, the Court has said that such searches are to be judged by a reasonableness standard and are not subject to the requirement of probable cause. Furthermore, the Court has said that the warrant requirement is particularly unsuited to the unique circumstances of the school environment. New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The pervasive problem of illicit drug use in the schools as well as the notorious incidents of school violence in recent years have added pressure to relax Fourth Amendment standards in the public school context. Although there are certainly exceptions, most search and seizure policies implemented by public schools have been upheld by the courts. These include “sweeps” for drugs and guns using such devices as drug sniffing dogs and metal detectors, as well as routine searches of backpacks, lockers, and even automobiles coming onto school grounds.

In Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998), a leading case decided by the Pennsylvania Supreme Court, a public high school principal brought in police and drug sniffing dogs to detect drugs sequestered in student lockers. When a dog “alerted” to a particular locker, school officials would open it and search the contents. Eighteen lockers were searched, and one of them was found to contain a small amount of marijuana and some related paraphernalia. The student to whom that locker was assigned was suspended from school for ten days, required to attend drug counseling, and charged criminally with possession of marijuana and possession of drug paraphernalia. In rejecting a challenge to the constitutionality of the search that led to the discovery of the contraband, the Pennsylvania Supreme court observed:

> Common sense dictates that when a student is given permission to store his or her belongings in a locker designated for his or her personal and exclusive use, that student can reasonably expect a measure of privacy within that locker. Common sense further dictates that when the student’s use of the locker is expressly conditioned upon the acknowledgment that the locker belongs to the school, that measure of privacy is necessarily limited. Id. at 359.

**Drug Testing**

Because of the paramount interest in ensuring the public safety, courts have upheld the constitutionality of regulations permitting supervisory personnel to order urinaly-
sis testing of public safety officers based on reasonable suspicion of drug abuse. See, for example, *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985). In 1989 the U.S. Supreme Court upheld federal regulations requiring drug and alcohol testing of railroad employees involved in train accidents. *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 109 S.Ct. 1402, 1411, 103 L.Ed.2d 639 (1989). The Court has also sustained a Customs Service policy requiring drug tests for persons seeking positions as customs inspectors. *Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). As yet, the Supreme Court has not addressed the issue of general, random drug testing of public employees. However, it has invalidated a policy under which all political candidates were required to submit to drug testing as a condition of qualifying for the ballot. *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).

In 1995 the U.S. Supreme Court stated that a public school district’s student athlete drug policy, which authorized random urinalysis drug testing of students who participated in athletic programs, did not violate a student’s right to be free from unreasonable searches. While mandatory drug testing is a search, Justice Scalia, writing for a 6-3 majority of the Court, pointed out that, given the decreased expectation of privacy of a public school student, the relative unobtrusiveness of the search, and the severity of the need, such a search was not unreasonable. *Vernonia School District v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

Several state courts have addressed the question of random drug testing of public employees, and at least one state appellate court has found such a policy to be unconstitutional. *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. App. 1985). Given the scope of the drug problem and the governmental resolve to do something about it, the issue of random drug testing is certain to be litigated for some time to come.

When administrative personnel turn over results of drug tests to law enforcement agencies for criminal prosecution, courts tend to exercise a higher level of scrutiny. The leading case in this regard is *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), in which the U.S. Supreme Court invalidated a policy under which a public hospital turned over to police urine samples of pregnant women who had tested positive for cocaine. The High Court noted that the fact that positive test results were turned over to the police does not merely provide a basis for distinguishing our prior cases applying the “special needs” balancing approach to the determination of drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment. 532 U.S. at 84, 121 S.Ct. at 1292, 149 L.Ed.2d at 220.

### Electronic Surveillance

The drafters of the Fourth Amendment obviously did not contemplate present-day technology. Yet, in framing the Bill of Rights, they used simple, straightforward language that has endured through the centuries—language capable of being adapted to the needs of the people. Today’s technology makes possible silent and invisible intrusions on the privacy of the individual, and the courts are responding to these new, innovative means of surveillance, always cognizant that the touchstone of the Fourth Amendment is the protection of the individual from governmental surveillance.
Amendment is its prohibition of “unreasonable” searches and seizures. Of course, the interpretation of what is “reasonable” is apt to be affected by pressing public needs. The attacks on American cities on September 11, 2001, and the subsequent “war on terrorism” have had an enormous impact in the area of electronic surveillance, both in terms of what law enforcement agencies are now doing and what legislation and judicial opinions authorize.

**Expectations of Privacy with Respect to Electronic Surveillance**

Generally speaking, the use of wiretaps, microphones, video recorders, and other devices that permit agencies to intercept the content of what would otherwise be private communications implicates the Fourth Amendment. *Katz v. United States*, supra. However, merely using technology to augment the senses does not necessarily trigger Fourth Amendment protections. For example, the Supreme Court has approved the use of searchlights, field glasses, aerial photography, and various other means of enhancing the police’s powers of observation, even in the absence of a warrant or probable cause. *United States v. Lee*, 274 U.S. 559, 71 S.Ct. 746, 71 L.Ed. 1202 (1927); *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). Lower federal courts have even approved miniaturized television camera surveillance. *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984). The question is whether the police use methods that infringe on a person’s reasonable expectations of privacy. If so, they need a warrant or some other form of judicial authorization before deploying these technologies.

**CORDLESS AND CELLULAR TELEPHONES: A CASE STUDY IN PRIVACY EXPECTATIONS**

Changes in technology often create new legal questions. An excellent example is the proliferation of cordless telephones in the 1980s. When one uses a cordless phone, one is essentially broadcasting a low-power radio signal to a nearby receiver (the base unit) that is connected to a phone line. But any nearby receiver tuned to the correct frequency can intercept a conversation being conducted on a cordless phone. Analog cellular telephones operate in much the same way, although their signals are more powerful so they can communicate with towers located within “cells.” The new digital cell phones are more difficult to eavesdrop upon as their signals are encrypted. Realizing the potential for monitoring conversations on cordless telephones and analog cellular phones, police sometimes employ receivers or scanners mounted in vehicles to eavesdrop on conversations. In doing this without a warrant or even probable cause, are police in violation of the Fourth Amendment?

In *Tyler v. Beroldt*, 877 F.2d 705 (8th Cir. 1989) and *United States v. Smith*, 978 F.2d 171, 177 (5th Cir. 1992), two federal courts ruled that users of cordless phones had no reasonable expectation of privacy; therefore, the interception of their calls was not a “search” within the meaning of the Fourth Amendment. However, in *State v. Mozo*, 655 So.2d 1115 (Fla. 1995), the Florida Supreme Court held that nonconsensual interception of cordless phone calls without prior judicial approval violates a state statute protecting the privacy of communications. That court declined to reach the constitutional issues in the case, preferring to base its decision on statutory grounds. In 1986 Congress enacted a statute to provide nationwide protection against eavesdropping on cellular phone conversations, and in 1994 the statute was
amended to provide protection for cordless phones as well. Thus Congress provided through legislation protection to individual privacy that federal courts were unable or unwilling to provide via the Fourth Amendment.

The Supreme Court’s Major Decisions in the Area of Electronic Surveillance

The U.S. Supreme Court has rendered only a few decisions affecting the legality of electronic surveillance by police, but these decisions have had a major impact on law enforcement practices. In *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), the Court determined that the employment of a **pen register** is not a search within the meaning of the Fourth Amendment. A pen register is a device that records the phone numbers that are dialed from a particular phone number. Writing for the Court, Justice Harry Blackmun observed that merely by using the phone, the defendant “voluntarily conveyed numerical information to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.” 442 U.S. at 744, 99 S.Ct. at 2582, 61 L.Ed.2d at 229. Blackmun concluded that in so doing, the defendant “assumed the risk that the company would reveal to police the numbers he dialed.” *Ibid.* In a vigorous dissenting opinion, Justice Potter Stewart asserted, “It is simply not enough to say, after *Katz*, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police.” 442 U.S. at 747, 99 S.Ct. at 2583, 61 L.Ed.2d at 231. In another dissenting opinion, Justice Thurgood Marshall observed that “[p]rivacy in placing calls is of value not only to those engaged in criminal activity” and predicted that “[t]he prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide.” 442 U.S. at 751, 99 S.Ct. at 2586, 61 L.Ed.2d at 234.

In *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986), the Supreme Court held that high-altitude photography of a chemical plant was not a search within the meaning of the Fourth Amendment. The Court concluded that the means of surveillance was incapable of revealing intimate activities that would give rise to constitutional concerns. That same year, in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986), the Court upheld a conviction where police, acting on a tip, conducted a low-altitude flight and photographed marijuana plants growing in the defendant’s backyard. The police then used the photos to obtain a warrant and seize the contraband. The police used the photos to obtain a warrant and seize the contraband. In upholding the search, the Court said, “[W]e readily conclude that [the defendant’s] expectation that his garden was protected from [aerial] observation is unreasonable and is not an expectation that society is prepared to honor.” 476 U.S. at 214, 106 S.Ct. at 1813, 90 L.Ed.2d at 217. Dissenting, Justice Powell suggested that the Court’s decision was inconsistent with the broad interpretation of the Fourth Amendment suggested by the Court’s seminal decision in *Katz v. United States*:

Rapidly advancing technology now permits police to conduct surveillance in the home itself, an area where privacy interests are most cherished in our society, without any physical trespass. While the rule in *Katz* was designed to prevent silent and unseen invasions of Fourth Amendment privacy rights in a variety of settings, we have consistently afforded heightened protection to a person’s right to be left alone in the privacy of his house. The Court fails to enforce that right or to give any weight
to the longstanding presumption that warrantless intrusions into the home are unreasonable. 476 U.S. at 226, 106 S.Ct. at 1819, 90 L.Ed.2d at 225.

In the 1980s, police looking for marijuana being grown indoors under artificial light began to use infrared thermal imagers, which detect heat waves. These devices can provide a strong indication of whether marijuana is being grown inside a closed structure. Prior to 2001, most courts that considered this issue ruled that using thermal imaging devices was not a search within the meaning of the Fourth Amendment. See, for example, United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Ford, 34 F.3d 992 (11th Cir. 1994); and United States v. Penny-Feeney, 773 F. Supp. 220 (D.C. Hawaii 1991). A notable exception was State v. Young, 867 P.2d 593 (Wash. 1994), where the Washington Supreme Court held that the use of a thermal imaging device was a search within the meaning of the Washington state constitution. In Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the U.S. Supreme Court adopted the view taken by the Washington Supreme Court. Writing for the Court, Justice Scalia concluded that when “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” 533 U.S. at 40, 121 S.Ct. at 2046, 150 L.Ed.2d at 106.

Federal Legislation Governing Interception of Electronic Communications

As noted above, Congress has enacted legislation governing the interception of electronic communications. The cornerstone of this statutory edifice is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C.A. §§ 2510-20. The act prohibits interception of electronic communications without a court order unless one party to the conversation consents. Interception is defined as “aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device.” 18 U.S.C.A. § 2510(4). In 1986 Congress expanded the meaning of “wire communications” to include conversations through “switching stations.” 18 U.S.C.A. § 2510(1). Therefore, the statute now covers cellular telephones.

WIRETAP ORDERS

Title III permits issuance of wiretap orders by federal and state courts on sworn applications authorized by the U.S. Attorney General, a specially designated assistant, or a state official at a similar level. The act expressly preempts state law. Therefore, to permit the use of electronic surveillance, a state must adopt legislation along the lines of the federal act, and many states have done so. See, for example, the New Jersey Wiretapping and Electronic Surveillance Control Act of 1968, N.J. Stat. Ann. § 2A: 156A-(1), et seq.

An application for a wiretap order must contain considerable detailed information along with an explanation of why less intrusive means of investigation will not suffice. 18 U.S.C.A. § 2518(1)(c). The statute requires that normal investigative procedures be employed first. But it does not require an officer to exhaust all possible investigative methods before applying for a wiretap order. Before a court may issue a wiretap order, it must find probable cause that the subject of the wiretap has committed or is committing one of a series of enumerated crimes for which wiretapping is authorized and that conventional modes of investigation will not suffice. 18 U.S.C.A. § 2518(3).
Originally these offenses included narcotics, organized crime, and national security violations. In 1986 the act was amended to include numerous other serious crimes, including interstate transportation of stolen vehicles, bribery in sports contests, weapons of mass destruction threats, sex trafficking of children by force, fraud or coercion, mail fraud, and money laundering. 18 U.S.C.A. § 2516(1)(c).

Court orders permit surveillance for no longer than a thirty-day period. 18 U.S.C.A. § 2518(5). At the period’s expiration, the recordings made of intercepted communications must be delivered to the judge who issued the order. They are then sealed under the judge’s direction. 18 U.S.C.A. § 2518(8)(a).

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C.A. § 2701 et seq., established federal standards for access to e-mail and other electronic communications and to “transactional records,” including subscriber identifying information, call logs, phone bills, and so forth. The law established a high standard for access to the contents of electronic communications but allowed agencies to easily gain access to transactional records. One part of the act, 18 U.S.C.A. § 3121 et seq., governs the use of pen registers and trap and trace devices. It requires judges to issue orders to allow the use of such devices when properly requested by prosecutors. There is no standard of proof that prosecutors have to meet in order to get such orders. The courts have generally taken the position that users of telephones have no reasonable expectations of privacy with regard to numbers associated with incoming or outgoing phone calls. Congress has chosen not to provide significant statutory protection in this area, much to the chagrin of civil libertarians.

THE USA PATRIOT ACT

Many of the measures enacted into law by the USA PATRIOT Act are outside the scope of this chapter; however, Title II, “Enhanced Surveillance Procedures” includes provisions of particular relevance to our discussion of search and seizure. Title II enables law enforcement to access Internet communication and expands the authority for use of pen registers and trap and trace surveillance by including a number of salient features in respect to search and seizure. Listed below are several significant changes, most of which focus on expanding the government’s power to conduct electronic surveillance:

- § 202. Computer fraud and abuse are added to the predicate crimes listed in 18 U.S.C.A. § 2516(1)(c) for seeking authorization for interception of wire, oral, or electronic communications.
- § 203. Rule 6(e)(3)(C), Federal Rules of Criminal Procedure and 18 U.S.C.A. § 2517 are amended to allow intelligence obtained in grand jury proceedings and from wiretaps to be shared with federal law enforcement and national security personnel for use in connection with their official duties.
- § 204. The act amends 18 U.S.C.A. § 2511(2)(f) in regard to interception and disclosure of electronic communications by inserting “wire, oral and electronic” in place of “wire and oral,” thereby broadening the right of government to intercept electronic communications in foreign intelligence matters.
- § 206. The act also amends 18 U.S.C.A. § 1805(c)(2)(B) to authorize federal courts to issue “roving” surveillance orders in connection with foreign intelligence matters, enabling investigators to intercept e-mail and cell phone communications where suspects frequently change their account numbers.
§ 209. The act amends 18 U.S.C.A. § 2510 to authorize law enforcement officers to seize voice-mail messages pursuant to a search warrant instead of a wiretap order.

§ 210. The act amends 18 U.S.C.A. § 2703(c) to allow law enforcement officers to obtain by subpoena subscriber records of local and long distance telephone connection records, “records of session times and durations,” and means of payment including credit card numbers from Internet Service Providers (ISPs).

§ 212. ISPs are allowed to reveal data concerning their customers without first notifying them if the ISP reasonably believes that “death or serious physical injury to any person” requires such disclosure without delay.

§ 214. The government only has to certify that the information that it obtains would be relevant to an “ongoing investigation” to secure a pen register or trap and trace order. Formerly, under 50 U.S.C.A. § 1842(c)(3), the government had to certify that it had reason to believe that surveillance was being conducted on a line or device that is or was used in “communications with” someone involved in international terrorism or intelligence activities that may violate U.S. criminal law, or a foreign power or its agent whose communication is believed to concern terrorism or intelligence activities that violate U.S. law.

§ 215. Among the very controversial provisions of the act is an amendment to the Foreign Intelligence Security Act (FISA), 50 U.S.C.A. § 1861 et seq., which removes the limitations on the FBI’s ability to obtain business records pursuant to an ex parte court order and grants the FBI the power in terrorism investigations to obtain records and other “tangible things” from entities that include libraries and Internet providers. The act forbids those served such orders from disclosing such fact to other than official sources (nondisclosure orders). (Section 215 became the focus of the first direct constitutional assault on the act in a suit filed by the American Civil Liberties Union and other organizations in July of 2003.) (See amendments to the act in the topic that follows on the 2006 Reauthorization Act.)

§ 216. Sections of the Electronic Communications Privacy Act (ECPA), 18 U.S.C.A. §§ 3121, 3123 (previously discussed), are amended to add the terms “routing” and “addressing” to the phrase “dialing and signaling information,” thus expanding the federal government’s authority to monitor Internet activities, as well as telephone conversations, by using systems similar to pen registers and trap and trace devices. This enables a U.S. Attorney, acting at the behest of the FBI, to obtain a court order allowing use of technology that records e-mail addresses and URLs of Web sites being accessed from a particular computer.

§ 219. The act also permits federal magistrate judges in any district in which terrorism-related activities may have occurred to issue search warrants for searches within or outside the district. This greatly facilitates the issuance of nationwide warrants for investigations involving terrorism.
As Americans come to rely more extensively on computers, e-mail, and the Internet, many see these new measures of exposing their Internet communications as a necessary evil in pursuit of a greater good, namely, the war on terrorism. Others find their constitutional rights being substantially diminished. While acknowledging that effective legislation is essential to protect the national security of the United States, they believe that greatly expanding the government’s right to eavesdrop on e-mail and other Internet communications increases the potential for official mischief and diminishes individual liberty and privacy. Many Americans also see the right of law enforcement to share information revealed to a grand jury with intelligence-gathering agencies as unfairly impeding on the privacy of persons under investigation, many of whom are never indicted.

Although recognizing the imperatives of national security, many Americans would ask courts, legislatures, and their fellow citizens to heed the words of Justice Louis Brandeis written in a dissenting opinion more than seventy-five years ago:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment. 


THE 2006 REAUTHORIZATION ACT

Soon after the hasty adoption of the USA PATRIOT Act in October 2001, controversy erupted about the necessity and constitutionality of several provisions of the act. Congress engaged in serious arguments concerning the act in general, and especially in respect to particular provisions. Some of the most significant complaints were lodged by libraries (section 215) that could be directed to turn over records to the FBI and that those served with section 215 orders were prohibited from disclosing that fact to anyone. Finally, Congress enacted—and on March 9, 2006, President George W. Bush signed—the Reauthorizing Amendments Act of 2006.

The new legislation contains a number of technical revisions of the original USA PATRIOT Act. Many are designed to clarify that individuals who receive Foreign Intelligence Service Act (FISA) orders can challenge nondisclosure requirements. Specifically, recipients of a section 215 order (often libraries) are granted the right to petition a FISA judge to modify or quash the nondisclosure requirement of such an order. The new act removes the requirement that recipients of section 215 orders or National Security Letters (NSLs) provide the FBI with the name of the attorney they consulted. Finally, it clarifies that libraries, whose services include offering patrons access to the Internet, are not subject to NSLs unless they are functioning as electronic communication service providers.

The Exclusionary Rule

The exclusionary rule is a judicially created rule that prohibits the use of illegally obtained evidence in a criminal prosecution of the person whose rights were violated by the police in obtaining that evidence. In 1914 the U.S. Supreme Court first held that evidence obtained through an unlawful search and seizure could not be used to convict a person of a federal crime. *Weeks v. United States*, supra. The rationale for the rule is to deter illegal searches and seizures by police and thereby enforce the constitutional requirements. In 1949, in *Wolf v. Colorado*, supra, the Supreme Court refused to require the states to follow the exclusionary rule, saying that it was not an essential element of Fourth Amendment protection. But in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), the Court held that there was no other effective means of enforcing the protections of the Fourth Amendment. The Court reasoned that if the Fourth Amendment was applicable to the states under the Fourteenth Amendment, then the exclusionary rule was also because it was the only effective means of enforcing the Fourth Amendment against overzealous police officers. The *Mapp* decision had an immediate impact. In New York City, for example, in the year preceding *Mapp*, police officers had not bothered to obtain a single search warrant. In the year following *Mapp*, they obtained more than eight hundred.

The Fruit of the Poisonous Tree Doctrine

The fruit of the poisonous tree doctrine holds that evidence derived from other evidence that is obtained through an illegal search or seizure is itself inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The general rule is that where there has been an illegal seizure of property, such property cannot be introduced into evidence and no testimony may be given relative to any facts surrounding the seizure. However, the Fourth Amendment does not require evidence to be excluded, even if it was initially discovered during an illegal search of private property, if that evidence is later discovered during a valid search that is wholly independent of the initial illegal activity. *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The Supreme Court has also held that evidence obtained through a search guided by information obtained from an inadmissible confession is inadmissible unless the search would inevitably have recovered the evidence in the absence of the tainted information. *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984).

The Erosion of the Exclusionary Rule

The exclusionary rule is justified by the need to deter police misconduct, but it exacts a high price to society in that “the criminal is to go free because the constable has blundered.” As crime rates rose dramatically during the 1960s and 1970s, the exclusionary rule came under attack from critics who argued that the social cost of allowing guilty persons to avoid prosecution outweighed the benefit of deterring police from violating the Fourth Amendment. During the 1970s the Supreme Court used this sort of cost-benefit analysis in curtailing the scope of the exclusionary rule in a series of controversial decisions. In *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), the Court held that illegally obtained evidence could be
used to obtain grand jury indictments. In *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), the Court allowed the use of evidence obtained through a search incident to arrest pursuant to a law that was later ruled unconstitutional. But the most significant erosions of the rule came in the 1980s.

### The Good-Faith Exception

In the most significant exclusionary rule cases decided in the 1980s, the Supreme Court held that evidence obtained on the basis of a search warrant that is later held to be invalid may be admitted as evidence at trial if the police officer who conducted the search relied on the warrant in “good faith.” *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). In *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the Court held that the **good-faith exception** to the exclusionary rule permits the introduction of evidence obtained by an officer in reliance upon a statute authorizing warrantless administrative searches where the statute is later determined to be unconstitutional. It must be noted that the good-faith exception to the exclusionary rule, as it has been developed thus far by the Supreme Court, applies only to cases where police officers rely on warrants that are later held to be invalid; it does not apply to warrantless searches.

In *United States v. Leon*, supra, the Supreme Court identified four situations involving police reliance on a warrant where the good-faith exception to the exclusionary rule does not apply:

1. If the magistrate was misled by an affidavit that the affiant knew was false or would have known was false except for reckless disregard for the truth;
2. If the magistrate wholly abandons his or her judicial role;
3. If the affidavit is so lacking in indicia of probable cause as to render belief in its existence unreasonable;
4. If the warrant is so facially deficient that the executing officer cannot reasonably presume its validity.
THE GOOD-FAITH EXCEPTION UNDER STATE CONSTITUTIONAL LAW

As previously noted, the Fourth Amendment sets a minimal national standard. Most states have adopted the good-faith exception. As pointed out, state courts are free to provide greater levels of protection under the search and seizure sections of state constitutions. This latter approach was followed by the New Jersey Supreme Court in *State v. Novembrino*, 519 A.2d 820 (N.J. 1987), where it refused to follow the good-faith exception to the exclusionary rule as a matter of state law. The court observed that the exclusionary rule was firmly embedded in its own jurisprudence and that a good-faith exception would “ultimately reduce respect for and compliance with the probable cause standard.” 519 A.2d 854.

Standing to Invoke the Exclusionary Rule

A person who seeks the benefits of the exclusionary rule must have standing to invoke the rule. The concept of standing limits the class of defendants who may challenge an allegedly illegal search and seizure. In *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), the Supreme Court granted automatic standing to anyone who was legitimately on the premises searched. In *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), however, the Court restricted the *Jones* doctrine by refusing to allow passengers of an automobile to challenge the search of the vehicle in which they were riding.

When police stop an automobile, the driver of the car is “seized” within the meaning of the Fourth Amendment. Therefore the driver has standing to challenge the constitutionality of the stop and everything that transpires during the stop. In *Brendlin v. California*, 551 U.S. ___, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), the Supreme Court held that a passenger is seized as well and so has standing to challenge the constitutionality of the stop. However, under *Rakas v. Illinois*, supra, passengers have standing to challenge only searches and seizures of things in which they have a property interest. Therefore, while the passenger can challenge the validity of the automobile stop, he or she may not be able to challenge everything that transpires during the stop.

In *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), the Court took the final step in overruling the automatic-standing rule of *Jones v. United States*. Salvucci was charged with possession of stolen mail. The evidence was recovered by police in a search of an apartment that belonged to the mother of Salvucci’s accomplice. The federal district court granted Salvucci’s motion to suppress the evidence, relying on the automatic-standing doctrine. The Supreme Court reversed, holding that Salvucci was not automatically entitled to challenge the search of another person’s apartment. Justice William H. Rehnquist explained the Court’s more conservative stance on the issue of standing:

> We are convinced that the automatic standing rule … has outlived its usefulness in this Court’s Fourth Amendment jurisprudence. The doctrine now serves only to afford a windfall to defendants whose Fourth Amendment rights have not been violated. 448 U.S. at 95, 100 S.Ct. at 2554, 65 L.Ed.2d at 630.

The Court’s current approach is to grant standing only to those persons who have a possessory or legitimate privacy interest in the place that was searched. Thus, a casual visitor to an apartment has no legitimate expectation of privacy in an apartment hallway that would grant standing to contest a search of those premises. *United States v. Burnett*, 890 F.2d 1233 (D.C. Cir. 1989). To successfully invoke the exclusionary...
rule now, a defendant must show that a legitimate expectation of privacy was violated.

In United States v. Edwards, 242 F.3d 928 (10th Cir. 2001), the court held the defendant lacked standing to challenge the search of a rented car because it was rented in another person’s name and he was not an authorized driver of the vehicle, whereas in United States v. Walker, 237 F.3d 845 (7th Cir. 2001), the defendant had standing to challenge the search of a rental car because he was listed on the rental agreement as an authorized driver.

In 1983 the Pennsylvania Supreme Court determined that under its state constitution a defendant accused of a possessory crime who seeks to challenge a search and seizure must be accorded automatic standing notwithstanding the more restrictive view announced by the U.S. Supreme Court. Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983). Of course, states may still grant automatic standing to challenge seized evidence. For example, “under Louisiana jurisprudence, any defendant against whom evidence is acquired as a result of an allegedly unreasonable search and seizure, whether or not it was obtained in violation of his rights, has standing to challenge the constitutionality of the search or seizure.” State v. Dakin, 495 So.2d 344, 346 (La. 1986). Likewise, in Commonwealth v. Amendola, 550 N.E.2d 121, 126 (Mass. 1990), the court refused to abandon the automatic-standing rule: “When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence.” Courts in Michigan, New Hampshire, New Jersey, and Vermont have reached similar conclusions.

CONCLUSION

The constitutional protection against unreasonable searches and seizures is a fundamental right, yet determining the precise scope and meaning of the right is not easy. The constitutional law governing search and seizure is extremely complex. Moreover, it is highly dynamic, as courts decide countless cases in this area each year. Figure 3.3 provides an overview of search and seizure law—actually, a decision tree that highlights the important questions that courts must answer in determining whether a particular search or seizure was lawful.

The threshold question in evaluating a given search or seizure is whether the Fourth Amendment is applicable. Certain searches, including those conducted by private individuals where the government does not take part and searches of open fields or abandoned property, are beyond the pale of the Fourth Amendment. In a nutshell, the Fourth Amendment protects persons from unreasonable intrusions where they have a reasonable expectation of privacy. To guard against unreasonable intrusions of privacy, police are normally required to obtain a warrant before engaging in a search and seizure. Courts rigorously enforce the Fourth Amendment requirement that search warrants be issued only “upon probable cause, supported by Oath or affirmation” and are specific as to “the place to be searched and the persons or things to be seized.” U.S. Const., Amend. 4. In addition to searches based on consent or those conducted incident to a lawful arrest, a number of exceptions to the warrant requirement are based on the doctrine of exigent circumstances. Hot pursuit, evanescent evidence, and certain emergencies qualify as exigent circumstances allowing warrantless searches.

Normally, police must have probable cause before conducting a search. Here, too, there are exceptions—the so-called stop-and-frisk situation, the airport search,
and the school search—where police may conduct searches on the basis of a less stringent standard of reasonableness.

One of the most controversial Fourth Amendment issues is how to deter law enforcement officials from conducting improper searches and seizures. The Supreme Court has fashioned a rule excluding illegally obtained evidence from criminal trials. Here again, there are exceptions to the rule, such as the limited good-faith exception announced in the Leon case and the issue of whether a defendant has standing to contest an illegal search or seizure.

Although technological advances have afforded law enforcement new means to ferret out crime, the use of helicopters and such high-tech devices as infrared sensors, supersensitive microphones, and miniature radio transmitters challenges the traditional right of privacy enjoyed by citizens in a free country. The current war on terrorism creates new demands for law enforcement agencies to conduct surveillance as well as considerable pressures on courts to allow such activities. Most Americans recognize the need to allow intelligence and law enforcement agencies additional authorities to combat terrorism. Thus, there is broad support for the USA PATRIOT Act despite its significant incursions into rights of privacy.

FIGURE 3.3 Fourth Amendment Decision Tree. The decision tree depicted here is based on general principles of federal law and may not correctly portray applicable laws in all states.
The Fourth Amendment has applicability beyond the seizure of evidence. Because the arrest of a suspect is considered a “seizure,” the Fourth Amendment applies to arrests and various lesser police-citizen encounters, as well as to the use of force by police in making arrests. We examine these issues, along with police interrogation and identification procedures, in the next chapter.

**KEY TERMS**

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**WEB-BASED RESEARCH ACTIVITY**

Go to http://www.findlaw.com/casecode/supreme.html. Locate the Supreme Court’s decision in *United States v. Ramirez*, decided March 4, 1998. Read the decision. Write a brief summary of the decision in which you describe the key facts, the issue before the Supreme Court, the Court’s holding, and the rationale for its decision. In your opinion, did the Court make the correct decision? Why or why not?

**QUESTIONS FOR THOUGHT AND DISCUSSION**

1. Today many security personnel are “private police,” yet Fourth Amendment protection has been extended only to those searches conducted by government officials. What arguments can be made for and against expanding the prohibitions of the Fourth Amendment to include security personnel?

2. What rationale supports the “search incident to arrest” exception to the warrant requirement? What limitations do the courts impose on such searches?
3. Should one have a reasonable expectation of privacy from infrared detectors and other high-tech devices that enable law enforcement officers to “see” heat emanating from a person’s home? Why or why not?

4. Does a person using a public restroom in a government office building have a reasonable expectation of privacy from television security surveillance?

5. In *New Jersey v. T.L.O.* (1985), the Supreme Court adopted a reasonableness standard for public school searches. Should this standard be applied to searches of students in public colleges and universities? What about private colleges? Does it make a difference if the search is conducted in a public setting or in the student’s dormitory room?

6. What is the rationale for excluding from trial evidence obtained in violation of the Fourth Amendment? Is this a compelling justification for the exclusion of criminal evidence from the trial of a defendant accused of a serious felony such as aggravated battery?

7. What alternatives to the exclusionary rule might be adopted to enforce the protections of the Fourth Amendment? How effective are such alternatives likely to be?

8. The Supreme Court has created a “good-faith” exception to the exclusionary rule where police rely on a search warrant that is later held to be invalid because the magistrate erred in finding probable cause for a search. Should the good-faith exception be extended to cases where police acting in good faith conduct warrantless searches that are later held to be unlawful?

9. What is meant by the “fruit of the poisonous tree doctrine” in relation to searches and seizures?

10. What is the “standing” requirement in the law of search and seizure? What is its purpose?

11. In 2006 in *Hudson v. Michigan*, Justice Scalia, writing for a sharply divided Supreme Court, concluded that when it comes to knock-and-announce violations, “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.” Writing for the four dissenters, Justice Breyer contended that the decision “destroys the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement.” Evaluate these opposing views.

12. In *United States v. Salvucci* (1980), the U.S. Supreme Court concluded that “the automatic standing rule … has outlived its usefulness in this Court’s Fourth Amendment jurisprudence.” Yet, several state courts have held that under their state constitutions a defendant accused of a possessory crime who challenges a search and seizure must be accorded automatic standing. What are the merits of states, based on their own constitutions, affording defendants more protection in this area than required by the Supreme Court?

**Problems for Discussion and Solution**

1. Police observed an automobile traveling at a high rate of speed and swerving on the road. They gave pursuit and stopped the vehicle after a five-minute chase. The driver, later identified as Jerome Johnson, emerged from the car and began to verbally abuse and threaten the officers. Johnson appeared intoxicated but refused to take any of the standard field sobriety tests. Under state law, refusal to perform a sobriety test results in the loss of a driver’s license for a period of one year. The law does not authorize police to force suspects to perform any so-
briety tests against their will. Johnson was arrested and transported to a local hospital, where he was forcibly restrained and asked to submit to a blood-alcohol test. Johnson refused, saying “I’d rather lose my license than let you stick me with that needle.” The test was administered over Johnson’s objection, and the results indicated that Johnson’s blood-alcohol level was substantially above the legal limit. Johnson was charged with driving under the influence of alcohol. Before trial, Johnson’s attorney moved to suppress the results of the blood-alcohol test, arguing that it was taken without Johnson’s consent, without probable cause, and in violation of the state’s implied consent law. If you were the judge in this case, how would you be inclined to rule on the admissibility of this evidence? What additional information would you need to render your decision?

2. Acting without a search warrant, police arrive at a home after receiving an anonymous tip that a man has been making illegal explosives in his workshop. The officers find that the man is not at home. Can the man’s wife consent to a warrantless search of her husband’s workshop, or must police wait until the husband returns to obtain his consent?

3. The sheriff’s department in a rural north Georgia county receives an anonymous letter stating that there is a “meth lab” being operated in a trailer home belonging to Danny Dawgnire and that children living in the trailer are being exposed to methamphetamine and other toxic chemicals. Without obtaining a warrant, deputies drive to the trailer home, where they detect strong chemical odors associated with the production of methamphetamines. The deputies knock and announce their presence, but no one answers. They then forcibly enter the trailer, where they discover large quantities of methamphetamine and associated equipment, paraphernalia, and supplies. No children are found in the trailer. The deputies call a hazardous materials disposal unit to the scene. Two hours later, as the meth lab is being cleaned up and evidence secured, Dawgnire arrives at the scene in his pick-up truck and is promptly arrested and charged with manufacture of and possession with intent to distribute a controlled substance. In a pre-trial motion, Dawgnire’s attorney moves to suppress the evidence on the ground that no warrant had been obtained to authorize the search. The attorney claims that Dawgnire, who is unmarried, lives in the trailer alone and that at no time had any children been inside the trailer. How would the state likely counter the motion? How would the judge likely rule on the motion to suppress?