The Fourth Amendment

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

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I. OVERVIEW: Analytical Structure of all Fourth Amendment Claims

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

Step #1. Does the Fourth Amendment apply?

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

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

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

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

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

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

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

**Seizures of persons.** The Supreme Court’s attempts to define a seizure of a person are of surprisingly recent vintage. Only in 1968 did it confront the issue directly for the first time. That case, *Terry v. Ohio*,\(^6\) remains viable today as a basic source of understanding what the concept of a seizure means. In *Terry*, Officer McFadden was walking his beat when he observed three men whom he believed were planning to rob a store. He approached them, identified himself as a police officer, and asked their names. When one of the men, Terry, “mumbled something” in reply, the officer grabbed Terry and patted down the outside of his clothing, ultimately recovering a pistol. Recognizing that the Fourth Amendment applied when the officer took hold of Terry and patted down the outer surfaces of his clothing, the Court provided a broadly-stated view of a seizure: “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”

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

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

In 1991, in *California v. Hodari D.*,\(^7\) the Supreme Court redefined the concept of a seizure.

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\(^6\) 392 U.S. 1 (1968).

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

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

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

*If the individual does not have a protected interest, actions that might otherwise be labeled a search or seizure do not implicate the Fourth Amendment. If a person has a protected interest, then the applicability question turns on whether the governmental techniques used to obtain tangible*

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

things or information are considered searches or seizures. The Supreme Court has identified three
interests protected by the Amendment: liberty; possession; and privacy. A seizure implicates a
person’s liberty or possessory interests; a search implicates a person’s reasonable expectation of
privacy.

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

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

The Supreme Court initially grounded Fourth Amendment protections in common law
property concepts. Pursuant to that property–based analysis, the Court created a hierarchy of
property rights and restricted the ability of the government to search and seize to only those
situations where the government had a superior property right. It also used property concepts to limit
the protections of the Amendment to the physical aspects of the four objects listed in the
Amendment, dividing the world into areas that were constitutionally protected and those that were

10 Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349,


not. Those property–based theories were repudiated by the Court in *Warden v. Hayden*\(^\text{14}\) and *Katz v. United States*.\(^\text{15}\)

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

As the reasonable expectation of privacy test has demonstrated its limitations, the Court has sometimes looked beyond that approach to find other values that animate the right to be secure. Now, the Court recognizes that the Amendment protects certain property interests as such, as well as possessory and liberty interests. Hence, although the Court in adopting the expectations test emphatically rejected a property–based analysis, that ground has regained viability. The home has a special status as a protected place,\(^\text{16}\) even when the owner is not present.\(^\text{17}\) Indeed, the physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed.”\(^\text{18}\)

As to the person’s right to be secure from an unreasonable seizure, that interest has been variously described as the right to be left alone,\(^\text{19}\) individual freedom,\(^\text{20}\) the “inviolability of the

\(^{14}\) 387 U.S. 294, 315 (1967).

\(^{15}\) 389 U.S. 347 (1967).


\(^{19}\) *See, e.g.*, *Wilson v. Schnettler*, 365 U.S. 381, 394 (1961) (Douglas, J., dissenting) (“Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone . . . .”). *But see Katz v. United States*, 389 U.S. 347 (1967) (the Fourth Amendment is not coextensive with any right to be left alone).

\(^{20}\) *See, e.g.*, *Ker v. California*, 374 U.S. 23, 32 (1963) (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom.”).
person,“21 and the right of free movement.22 In Terry v. Ohio,23 which involved the stop and frisk of a person, the Court emphasized the words chosen by the Framers to define the nature of the interest protected, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” Indeed, the Court said: “‘No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.’”

As to effects, the Court has clearly distinguished one other protected interest in addition to privacy, that is, the individual’s possessory interest in an object.24 This has occurred in the context of distinguishing between searches and seizures: although a search implicates privacy concerns, a seizure implicates the person’s interest in retaining possession of his or her property.25

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

The Fourth Amendment provides that the right of the people to be secure against unreasonable searches and seizures applies to four specified objects—persons, houses, papers, and effects. The government can intrude into any non-protected item at will because the Fourth Amendment is inapplicable.26 Interpreting the Amendment literally, the Court in Olmstead v. United

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

26 E.g., Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that open fields are not protected by the Fourth Amendment); Hester v. United States, 265 U.S. 57, 59 (1924) (same).
States\textsuperscript{27} and its progeny divided the country into areas that were constitutionally protected and locations that were not. Several decades later, after some significant erosion of that approach, the Court in \textit{Katz v. United States}\textsuperscript{28} explicitly rejected \textit{Olmstead} and the concept of “constitutionally protected areas,” stating that the Amendment protected people, not places. The Court ultimately adopted Justice Harlan’s concurring view in \textit{Katz}, establishing that the Amendment protects reasonable expectations of privacy. That test defines the \textit{quality} protected—at least in part—but does not define what objects are protected. The reasonable expectation of privacy test generally has been used as an overlay to determine whether a person has a reasonable expectation of privacy—a protected interest—in the items listed in the Amendment. Hence, despite the sweeping possibilities implicit in \textit{Katz}’s approach, the four items listed in the Amendment as the protected objects remain central to understanding the scope of what the Amendment protects.\textsuperscript{29}

\textbf{Step #2. If the Amendment applies, is it satisfied?}

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

\textit{The reasonableness command}. The first clause of the Fourth Amendment requires that a search or seizure not be “unreasonable.” This is the “fundamental command”\textsuperscript{30} of the Amendment and this “imprecise and flexible term” reflects the Framers’ recognition “that searches and seizures were too valuable to law enforcement to prohibit them entirely” but that “they should be slowed down.”\textsuperscript{31} Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions.\textsuperscript{32}

The wide scope of the Amendment’s applicability continually creates new and unprecedented challenges to traditional notions of reasonableness. In the face of such challenges, the reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court’s view of what constitutes a reasonable search or seizure. For some time, the Court created substantive restrictions on the government’s ability to search and seize, that is,

\begin{itemize}
\item \textsuperscript{27} 277 U.S. 438 (1928), \textit{overruled by} \textit{Katz v. United States}, 389 U.S. 347 (1967).
\item \textsuperscript{28} 389 U.S. 347 (1967).
\item \textsuperscript{29} \textit{E.g.}, \textit{Kyllo v. United States}, 533 U.S. 27, 34 (2001).
\item \textsuperscript{31} \textit{Berger v. New York}, 388 U.S. 41, 75 (1967) (Black, J., dissenting).
\item \textsuperscript{32} \textit{E.g.}, \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 341 (1985); \textit{Terry v. Ohio}, 392 U.S. 1, 20 (1968).
\end{itemize}
there were categories of papers that could not be the target of a search or seizure. Those substantive restrictions were rejected in the latter part of the twentieth century and reasonableness is viewed as a procedural mechanism that regulates the circumstances when the government can intrude and the scope of that intrusion.

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

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

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

The chief enforcement mechanism to insure compliance with the Fourth Amendment is the exclusionary rule, which prohibits the introduction of illegally obtained evidence in the government’s case-in-chief. Although the rule was for some time considered constitutionally mandated, the Court now believes that the exclusionary sanction is a judicially created remedy designed to deter future police misconduct. It is not “‘a personal constitutional right of the party aggrieved’” and it “is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’” Where appropriate, the remedy of exclusion extends to direct and indirect products of illegal intrusions, that is, “any ‘fruits’ of a constitutional violation—whether such evidence be

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

34 *E.g.*, Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention,\(^{36}\) and to testimony concerning knowledge acquired during an unlawful intrusion.\(^{37}\)

An overriding consideration in contemporary exclusionary rule cases is the Court’s use of a cost-benefit test to decide whether the rule ought to be applied. According to the Court, exclusion of evidence “exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case”\(^{38}\) and permits “some guilty defendants \[to\] go free or receive reduced sentences as a result of favorable plea bargains.”\(^{39}\) Thus, the Court has restricted application of the exclusionary rule to instances where its “remedial objectives are thought most efficaciously served.”\(^{40}\) Where the exclusionary rule does not result in appreciable deterrence of future police misconduct, the Court views its use as unwarranted.\(^{41}\) Deterrence is now the rule’s sole purpose, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.

The debate over application of the exclusionary rule often has been accompanied by references to the efficacy of alternative remedies, with a chief alternative being civil suits for damages. Other considerations include administrative sanctions against police officers and training programs to increase compliance with Fourth Amendment requirements. Traditionally, the Court has been skeptical about such alternatives—at least in the criminal trial context. Recently, however, a majority of the Court in *Hudson v. Michigan*\(^{42}\) pointed to the availability of such alternatives and higher levels of police professionalism and training in the context of creating a *per se* exception to the exclusionary rule for knock and announce violations. The breadth of the majority’s opinion puts in doubt the continued existence of the exclusionary rule. Nonetheless, *Hudson* may be just another of a long line of inconsistent Supreme Court opinions. Indeed, the Court has candidly noted that the “debate” within the Court concerning the rule has always been a warm one and “the evolution of the


exclusionary rule has been marked by sharp divisions in the Court.\textsuperscript{43}

This brings us to \textit{United States v. Herring}.\textsuperscript{44} \textit{Herring} is summarized in detail in the \textit{summary of cases discussed infra}. That case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. \textit{Herring}, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language employed in \textit{Herring} prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

My purpose here is not to argue the merits of \textit{Herring} but simply to predict that, if its broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after \textit{Herring} becomes a quest to ascertain police culpability: was there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers as in \textit{Herring}—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.\textsuperscript{45} Based on a broad reading of \textit{Herring}, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

In \textit{Pearson v. Callahan},\textsuperscript{46} the Court in the 2008 term changed the manner in which courts must address qualified immunity analysis in civil cases. \textit{That case is summarized in detail in the summary of cases discussed infra}. Prior to \textit{Pearson}, the Court required lower courts to address the merits of the Fourth Amendment claim in each case. It now permits courts the discretion to skip the preliminary step of establishing whether the Fourth Amendment has been violated. It takes little insight to observe that that mode of analysis will result in fewer courts developing Fourth


\textsuperscript{45} \textit{E.g.}, Moore v. State, 986 So. 2d 928, 934-35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).

\textsuperscript{46} 555 U.S. __ (2009).
Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds.\textsuperscript{47} What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, “[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.”\textsuperscript{48} Those standards will not be further clarified if courts address only the second question. Indeed, \textit{Pearson} itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the “consent–once–removed” doctrine, which has been recognized by some courts, permitted the warrantless intrusion.\textsuperscript{49} The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of \textit{Pearson} may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

\textit{Pearson}'s new battle order–and the result in \textit{Pearson}–is likely to make the avoidance of difficult Fourth Amendment questions the norm in cases where a defense of qualified immunity is available. Hence, many civil cases will no longer be decided by the lower courts on the merits of the Fourth Amendment claims and, therefore, there will be less cases worthy of review by the Supreme Court. The end result is that the Court will not take as many cases for review because it

\textsuperscript{47} The standard for qualified immunity is equivalent to the good faith exception to the exclusionary rule. Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004). In \textit{United States v. Leon}, 468 U.S. 897 (1984), the Court established that evidence seized pursuant to a judicial warrant should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. \textit{Id.} at 922-23. The Court explained that lower courts had “considerable discretion” either to “guide future action by law enforcement officers and magistrates” by deciding the substantive Fourth Amendment question “before turning to the good-faith issue” or to “reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers’ good faith.” \textit{Id.} at 924-25. In light of that discretion, many courts opt to dispose of cases on the basis of good faith, without first considering whether there was a Fourth Amendment violation. \textit{E.g.}, \textit{United States v. Proell}, 485 F.3d 427, 430 (8th Cir. 2007).

\textsuperscript{48} \textit{Saucier}, 533 U.S. at 209.

\textsuperscript{49} The "consent-once-removed" doctrine has been applied by some courts when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. \textit{United States v. Pollard}, 215 F.3d 643, 648 (6th Cir. 2000); \textit{United States v. Diaz}, 814 F.2d 454, 459 (7th Cir. 1987); \textit{United States v. Bramble}, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. \textit{See United States v. Paul}, 808 F.2d 645, 648 (7th Cir. 1986); \textit{United States v. Yoon}, 398 F.3d 802, 807 (6th Cir. 2005).
can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.


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 warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

Analytical Framework:

The analysis of the Wyoming Constitution also follows the three steps set out above. The Wyoming Supreme Court sometimes departs from Fourth Amendment jurisprudence.

Analytical Framework for determining when to depart:

1. The Wyoming Supreme Court utilizes the Washington Supreme Court’s "Gunwall factors" to ascertain when to depart from Fourth Amendment analysis. They are: *(1) the textual language; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."* See, e.g., *Feeney v. State*, 208 P.3d 50 (Wyo. 2009); *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring) (“I recommend this analytical technique to our practicing bar.”). But see *Callaway v. State*, 954 P.2d 1365, 170 (Wyo. 1998) ("[O]ur approach to the search and seizure area usually has implied the reading of the state and federal constitutions together and treating the scope of the state provision as the same as that of the federal provision.").


Significant Departures:

1. Search Incident to Arrest. Rejecting per se rule of searches incident to all arrests under state constitution for *vehicles* and requiring fact specific justification in each case. *Pierce v. State*, 171
Generally, the court requires actual facts that support either 1) concealment or destruction of evidence or 2) danger to the officer or others. But Wyoming permits probable cause based searches of vehicles without a warrant.


3. **Questions During Stops.** Courts are now more likely to afford police officers latitude in the questions asked, so long as the questions occur during the course of a permissible stop. Recent U.S. Supreme Court precedent allows great leeway for questioning so long as it is within the permitted time frame for the detention. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 6.4.2.6. (Carolina Academic Press 2008). Wyoming case law appears somewhat more restrictive. *Compare Frazier v. State*, 236 P.3d 295, 299 n.1 (Wyo. 2010) (finding questions related to travel permissible during traffic stop); *Lovato v. State*, 228 P.3d 55, 60-61 (Wyo. 2010) ("there are limits to the questions that may be asked the detained driver"); *Negrette v. State*, 158 P.3d 679, 684 (Wyo. 2007) (can ask questions related to travel plans “to the extent necessary to put the traffic violation in context” but cannot asked questions "unrelated to the stop").

**Selected cases appearing to follow standard Fourth Amendment analysis:**


