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17.245 The Supreme Court, Civil Liberties, and Civil Rights  
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### Discussion 15: Criminal Procedure

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The 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> Amendments apply to the states through their incorporation into the 14<sup>th</sup> Amendment.

Enumerated and unenumerated rights: the 9<sup>th</sup> Amendment: that certain rights are defined explicitly in the Constitution does not preclude the existence of other rights.

#### **Mapp v. Ohio, 1961**

Background:

Mapp was convicted of knowingly possessing "lewd and lascivious books, pictures, and photographs in violation" of Ohio state law. Evidence of possession of these materials was seized during an unlawful search of Mapp's home in which officers broke in without a warrant looking for a bomb suspect and began a search of the home.

Decision:

The Court ruled in *Weeks v. United States* that evidence retrieved through unreasonable search and seizure shall not be used in a federal court. In *Mapp*, it applies the same standard to state court proceedings, using the 14<sup>th</sup> Amendment to apply the 4<sup>th</sup> Amendment's bar on unreasonable searches and seizures to the states. The result is a nationwide institution of the "Exclusionary Rule" in all court proceedings, whereby evidence obtained illegally is excluded from use against a defendant at trial.

Discussion:

4<sup>th</sup> Amendment to the Constitution: "*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.*"

What is a search?

Procurement of any information of which there can be a reasonable expectation that the information be protected or hidden.

What is a seizure?

Anything that captures information, property, persons

What is an unreasonable search and seizure?

An unnecessarily intrusive search or seizure conducted without suspicion.

How is a warrant issued?

Any Article III judge and any magistrate judge can issue a warrant for a search if the party appealing for the warrant can show probable cause that a crime has been committed or is going to occur. Context is crucial for determining probable cause. There are still many questions about what constitutes "probable" (whether it is a statistical or other measure).

The 4<sup>th</sup> Amendment does not make clear whether a warrant is required for every unreasonable search and seizure. *Mapp* assumes that there must be a warrant for every unreasonable search and seizure; however, the two clauses (probable clause and

unreasonable searches/seizures) appear separate, which could mean that a warrant is not a prerequisite to making a search reasonable.

In *Mapp*, though the police claim that they had a warrant, it appears that the police did not actually have one because the prosecutor did not present a copy in the trial. In addition, it appears that the police used unreasonably forceful means.

*[Procedural note: the Supreme Court is not responsible for determining facts, which are found by the trial court or by a jury; the Supreme Court may draw legal conclusions about the application of the facts.]*

The purpose of a warrant is to provide authorization for the police to conduct a search when there would be no other legal way for them to conduct such a search. There is an exception that permits the police to search if there is an imminent risk that a suspect would flee, in which case a search and seizure may reasonably be conducted without a warrant.

The *Weeks* case held that the remedy for an illegal search and seizure is the Exclusionary Rule, which provides that evidence obtained illegally under the Constitution may not be used in trial. According to the conventional view, this rule removes the incentive for the police to conduct illegal searches, and provides a strong incentive for the police to follow appropriate procedures in order for the prosecution to obtain a conviction that will stand on appeal.

Does the 4<sup>th</sup> Amendment implies a right to privacy? It has been construed as reflecting a concept of "ordered liberty" (*Palko*), which is applied to the states via the 14<sup>th</sup> Amendment in *Mapp*.

### **Discussion of Katz v. United States, 1967**

Background:

Katz was transmitting wagering information over a public telephone that had been wire-tapped by the police. Katz was convicted of transmitting wagering information in violation of the federal wire fraud statute, and he challenged the ruling on 4<sup>th</sup> Amendment grounds, claiming that the wiretap was an unreasonable search and seizure.

Decision:

The police say that Katz had no reasonable expectation of privacy because the phone booth had glass windows and so was "open" to the public. The Court concludes that, in fact, what Mr. Katz had intended to exclude was not the eyes of the public, but instead the "intruding ear." Therefore, he had a reasonable expectation of privacy in his speech.

Justice Black says that the 4<sup>th</sup> Amendment only protects tangible things and that if the Framers had intended to prevent eavesdropping, they would have used clearer language. The Court majority takes a broader view of the 4<sup>th</sup> Amendment; that it stands for a more general principle of privacy. A right to privacy should include the right to protect thoughts, speech, information, and anything else personal.

This broader view was expressed in the *Palko* decision, where the Court introduces the concept of "Ordered Liberty." It says that a right to privacy is implicit in the concept of ordered liberty and the spirit of the Bill of Rights, and therefore applies to the states through the 14<sup>th</sup> Amendment.

An argument that there is no reasonable expectation of privacy in this case is that you should *expect* that your conversations are accessible by outside parties. The counter-argument to this is that people should be able to seek and rely on privacy in some way. If technology makes seeking privacy impossible, then there can never be an expectation of privacy and nobody is ever protected.

Are communications related to national security concerns different? Footnote 23 in the majority opinion says that “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.” (*Katz v. United States*)

What does this mean?

Douglas’s concurring opinion disagrees with this footnote. He says that it gives a “wholly unwarranted green light for the Executive Branch to resort to electronic eaves-dropping without a warrant in cases which the Executive Branch itself labels ‘national security’ matters. Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be.” (Douglas, dissenting in *Katz v. United States*)

The court holds that the police was required to have obtained a warrant in order to intercept Katz’s communications.

The 1978 Foreign Intelligence Surveillance Act was enacted to protect citizens in situations involving national security investigations conducted by the executive branch. The Act established the Foreign Intelligence Surveillance Court to determine if a warrant should be issued permitting the Department of Justice to conduct “searches” to intercept communications between American citizens and foreigners. It is now known that there exists today an NSA warrantless wiretapping program that is separate from the FISA and Title III warrant procedures.

Is a warrant required for every kind of search and seizure, or just unreasonable search and seizures?

This is a question left open by the Court, as yet undetermined, and something that has been addressed on a case by case basis.

## **Discussion of Terry v. Ohio, 1968**

Background:

A police officer working an area of downtown Cleveland saw some individuals repeatedly walking back and forth in front of a store window and staring inside. Suspecting they may have been trying to rob the store, the officer rushed in and frisked the suspects, looking for weapons. The suspect was ultimately convicted and challenged the admissibility of the evidence on appeal.

Decision:

The Supreme Court holds that if a police officer finds himself in a situation where he faces a potentially dangerous threat to himself or to public safety, a stop and frisk is not prohibited by the 4<sup>th</sup> Amendment. The Supreme Court in effect finds that the two clauses of the 4<sup>th</sup> Amendment are divisible in some sense. If the police feel that they are threatened, they

can conduct a search, and if they find evidence of illegal activity, then the evidence is admissible in trial. So long as the force used is not unreasonable, the police are free to conduct a search that is limited to the extent necessary to ensure safety even without probable cause. The evidence found under such a search can be used to determine probable cause and is admissible in court.