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A Search by Any Other Name: Fourth Amendment Implications of a Private Citizen's Actions in *State v. Sanders*

A brutal murder was committed in a rural county in western North Carolina in 1981.¹ A seventeen-year-old girl was raped and murdered near her home. Although the local sheriff's department investigator, Hubert Brown, suspected Stanley Sanders,² he lacked sufficient proof to secure a warrant to search Sander's home.³ When a private citizen named Curtis Gardin volunteered his help, Brown provided him with detailed information regarding the case and asked for his assistance in locating important evidence including a topaz ring and gold watch. Following his conversations with the officer Gardin entered the defendant's home and discovered and removed the evidence. Brown used the evidence to secure a search warrant. Sheriff's deputies arrested the defendant during the subsequent search; he confessed to the murder.⁴ A few months later Sanders was convicted of the crime and sentenced to death. The primary issue on appeal was whether the search conducted by the informant Gardin constituted a violation of the defendant's fourth amendment rights:

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 This protection reaches all alike, whether accused of crime or not The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution.⁵

The strictures of the fourth amendment apply only to searches and seizures effected by the government in its sovereign capacity.⁶ Much controversy surrounding the fourth amendment arises from the manner in which courts enforce the amendment's prohibitions against law enforcement authorities. By applying the exclusionary rule, courts prevent prosecutors from employing unconstitutionally obtained evidence. In weighing the merits of a motion to suppress evidence derived from an alleged violation of the fourth amendment, a court faces the grim irony that despite the existence of damning evidence in hand, its ruling might set the accused party free. The fourth amendment is often the so-called

1. Transylvania County, North Carolina has a population of approximately 23,000; 77% of its residents live in rural areas. See generally THE NORTH CAROLINA ALMANAC 244 (J. Crutchfield ed. 1986) (population figures based on the 1980 census).

2. Sanders was a borderline mental retardant with an Intelligence Quotient of 73. Defendant-Appellant's Brief at 17, *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990) (No. 88A85).

3. *Sanders*, 327 N.C. at 328, 395 S.E.2d at 419.

4. *Id.* at 324-35, 395 S.E.2d at 416-17.

5. *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

6. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1920). The heart of the fourth amendment is the recognition that citizens have a right to be free from arbitrary exercises of governmental authority. The writ of assistance, used by British customs officials before the Revolutionary War to search for contraband, was one of the sources of controversy that gave rise to the fourth amendment. See W. LAFAVE, SEARCH AND SEIZURE § 1.1(a), at 4 (2d ed. 1987).

"technicality" that victims' rights groups vilify in their battle cry: "He got off on a technicality!"⁷

Because the fourth amendment applies only to governmental intrusions, a search or seizure by a private citizen generally is not constitutionally proscribed.⁸ It is often unclear, however, whether a search conducted by someone other than a duly appointed officer of the law is "private." When the police encourage a private citizen to aid in the enforcement of the law, the citizen often conducts a search. A court faced with such a situation must decide if the relationship between the citizen and the police rises to the level of agency. If it does, the court must subject the search to fourth amendment scrutiny and the evidence thus obtained to exclusionary rule limitations if a constitutional violation is found. It was against this backdrop that the North Carolina Supreme Court considered the case of *State v. Sanders*.⁹

The defendant in *Sanders* argued that the informant acted as an agent of the state when he seized the evidence that led to Sander's conviction.¹⁰ Since the authorities lacked probable cause or a warrant for the search and seizure, if an agency relationship existed and the fourth amendment was triggered, the exclusionary rule would apply.¹¹ The North Carolina Supreme Court unanimously rejected this argument and held that the informant's actions constituted a private search. It thus upheld the defendant's conviction of first-degree murder, which had been based on evidence seized during the search.

This Note analyzes the *Sanders* court's reasoning in finding a private search. By focusing on the citizen's motive for conducting the search and the

7. The United States Supreme Court has acknowledged that when application of the exclusionary rule leads to criminals going free, it may generate disrespect for the law. Thus the rule should be applied only when the remedial objective of deterrence will be significant. *United States v. Leon*, 468 U.S. 897, 908-09 (1984). Judge Cardozo distilled this quandary in the phrase: "The criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). For further discussion of the "technicality" question, see *infra* note 112 and accompanying text.

8. *Burdeau*, 256 U.S. at 475.

9. 327 N.C. 319, 395 S.E.2d 412 (1990).

10. *Id.* at 331, 395 S.E.2d at 420.

11. The constitutionality of the manner in which the police procured the evidence—the watch and ring—was significant in *Sanders*. Because these items allegedly were stolen from the victim's home on the night of the murder, they provided the authorities with probable cause to arrest the defendant. *Id.* at 338, 395 S.E.2d at 425. Had the court found the watch and ring to be the fruits of an illegal search, the arrest might have been illegal, and the confession obtained pursuant to that arrest might have been subject to the exclusionary rule. Assuming an illegal arrest, exclusion of a resulting confession turns on whether the confession was "obtained by exploitation of the illegality of [the defendant's] arrest." *Brown v. Illinois*, 422 U.S. 590, 600 (1975). The *Brown* Court identified three considerations to determine whether the confession should be suppressed: "[t]he temporal proximity of the arrest and confession, the presence of intervening circumstances, and, in particular, the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citations omitted).

In *Sanders* the arrest and subsequent confession took place on the same day under a continuous chain of custody. Furthermore, the defendant was arrested while the police were searching his home under a warrant obtained with a false affidavit. See *infra* note 19. The burden to show admissibility of such a confession rests on the prosecution. *Brown*, 422 U.S. at 604. In *Sanders* the prosecution, noting that the police had displayed the illegally seized evidence during the interrogation, virtually conceded that the confession would be tainted if those fruits of the private citizen's search were illegally obtained. Supplemental Brief for the State at 7, *Sanders* (No. 88A85). See generally W. RINGEL, SEARCHES & SEIZURES, ARRESTS & CONFESSIONS § 30.4, at 30-19 (2d ed. 1990) (discussing when a confession obtained pursuant to an illegal arrest should be excluded).

nature of the governmental acquiescence or knowledge, the supreme court followed the analysis laid down by other state and federal courts. What the *Sanders* court defined as a private search, however, is broader than the precedent on which the court relied. The use of informants to conduct private searches could become a device by which frustrated law enforcement authorities satisfy hunches and develop probable cause. The Note concludes that courts would better serve the dictates of the fourth amendment if the relevant inquiry were whether the police reasonably should have foreseen that their actions would lead to a private citizen conducting a search that they themselves constitutionally could not undertake. By focusing on identifiable behavior, an objective test for agency would better serve the deterrent purposes of the exclusionary rule.

The trial court in *Sanders* found that the informant, Gardin, voluntarily had approached investigator Brown of the Transylvania County Sheriff's Department and offered his help.¹² His initial motivation was a desire to relieve the "grief of the family" and "do what was just."¹³ Brown confirmed to Gardin that the defendant was his suspect in the murder. He told Gardin how he thought the murder had occurred, and said that he "needed only a little more information to conclude the investigation with the defendant's arrest."¹⁴ Brown showed Gardin sketches of a watch and a topaz ring that he sought, and asked "if he could get into [the defendant's] home to see if the jewelry was there."¹⁵ He instructed Gardin "to 'go into the community and see what you can develop.'"¹⁶ Brown also instructed Gardin to look for other evidence "if nothing was found at the defendant's home."¹⁷ Brown offered reward money but Gardin denied interest in it.

Gardin, under the code name "Blueboy," phoned Brown and told him of a plan to gain entry into the defendant's home.¹⁸ There was no evidence that Brown approved or disapproved the plan. Gardin followed through on this plan but uncovered no evidence. On the following day he returned and spoke with the defendant's sister. Gardin told her that something had been stolen from a friend of his, that her brother was suspected, and that if she would help him find it his friend would not bring charges. She showed Gardin to the defendant's bedroom and the two of them discovered a box in which Gardin found the

12. *Sanders*, 327 N.C. at 328, 321 S.E.2d at 418. The superior court found these facts on remand from the supreme court. The State tried *Sanders* twice for this crime. Following the first conviction in 1982, the supreme court ordered a new trial because the trial transcript was unintelligible and the court was therefore unable to review the record on appeal. *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984). The defendant renewed his motion to suppress before the second trial, offering the informant's testimony about the seizure. The court held that the ruling in the first trial denying the motion was the "law of the case," and declined to hear further testimony. *Sanders*, 327 N.C. at 327, 395 S.E.2d at 418. On the first appeal from the second trial, the supreme court remanded for the sole purpose of hearing all witnesses offering competent testimony on the motion to suppress. The findings of fact in this discussion are taken from that proceeding.

13. *Sanders*, 327 N.C. at 328, 395 S.E.2d at 418.

14. *Id.* at 328, 395 S.E.2d at 419.

15. *Id.*

16. *Id.*

17. *Id.*

18. Gardin planned to go to the home while the defendant was away and ask his mother for an old recipe. *Id.*

watch and ring that Brown had described. He took the two items and gave them to Brown.

Brown then swore out an affidavit asserting that he had probable cause to believe that these two pieces of evidence were at the defendant's home and the magistrate issued a search warrant.¹⁹ The Sheriff's department inventory listed the watch and ring as items seized pursuant to this warrant. Three days after his initial search at the defendant's home, Brown paid Gardin one thousand dollars.²⁰ The lower court concluded that Gardin did not act as an agent of the state.

The supreme court reviewed the trial court's conclusion.²¹ Observing that the fourth amendment applies to a search only "if the private party 'in light of all the circumstances of the case must be regarded as having acted as an "instrument" or agent of the State,'"²² the *Sanders* court noted that some courts have applied a two-part test to determine if the facts rise to the level of a governmental search. These jurisdictions ask: "(1) whether the government *instigated, participated, or acquiesced* in the citizen's conduct; and (2) whether the citizen engaged in the search with the *intent* to further law enforcement efforts."²³

Before analyzing the facts of the case before it, the court reviewed a number of cases in an attempt to clarify the existence of an agency relationship. The

19. Deputy Brown misrepresented the facts in this affidavit in two ways. At the time he sought the warrant, the watch and ring were in his possession, not at the defendant's home. He also swore that "a reliable informant who has proven reliable in the past and given me information which resulted in the arrest and convictions of person [sic] involved in other felony cases" had provided the information for the warrant. Record at 6, *Sanders* (No. 88A85). Gardin had not been an informant prior to this case. *Sanders*, 327 N.C. at 330, 395 S.E.2d at 420. The trial court suppressed the evidence obtained pursuant to this warrant. *Id.*

20. *Sanders*, 327 N.C. at 329, 395 S.E.2d at 419. The Sheriff's Department eventually paid Gardin over seven thousand dollars for his assistance in the case. The supreme court noted that he accepted the money in part because he believed that the black community had ostracized him. *Id.* at 329 n.4, 395 S.E.2d at 419 n.4.

21. *Id.* at 329, 395 S.E.2d at 419. The defendant asserted six other grounds for reversal in this appeal. First, he alleged at both trials that Brown had given false and misleading testimony regarding how he obtained evidence. While acknowledging this fact, the court held the testimony was not material. *Id.* at 337, 395 S.E.2d at 424. Second, *Sanders* maintained that since the lower court had determined on rehearing that the additional evidence seized when the home was searched pursuant to the warrant should have been excluded, a new trial was required. The supreme court held that this evidence was cumulative and its admission was harmless error. *Id.* at 338, 395 S.E.2d at 425. Third, the defendant argued that his arrest was illegal because the arresting officers lacked probable cause, and that his confession therefore should have been suppressed. The court held that this argument failed as well. *Id.* at 339-40, 395 S.E.2d at 425-26; see also *supra* note 11 (discussing exclusion of confessions obtained pursuant to illegal arrests). Fourth, the defendant appealed from the lower court's refusal to hear his fifth alibi witness. The court held that the defendant's failure to include the witness on his master list justified the trial judge's discretionary decision to exclude him. *Sanders*, 327 N.C. at 341, 395 S.E.2d at 426. Fifth, the court dismissed the defendant's contention that the conduct of the prosecutor in closing arguments was grossly improper. *Id.* at 342-43, 395 S.E.2d at 427. On the defendant's sixth ground for appeal, the court held that the death sentence handed down by the jury under pattern instructions constituted a violation of the eighth and fourteenth amendments of the federal Constitution under the holding of *McKoy v. North Carolina*, 110 S. Ct. 1227, 1234 (1990). *Sanders*, 327 N.C. at 344, 395 S.E.2d at 428. Thus, the supreme court upheld the determination of guilt, but remanded the case for a new sentencing proceeding. *Id.* at 345, 395 S.E.2d at 429.

22. *Sanders*, 327 N.C. at 332, 395 S.E.2d at 421 (citing *State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971))).

23. *Id.* (emphasis added).

court began by discussing cases in which the search was held to be "private" and the evidence admissible.²⁴ The opinion referred briefly to an example in which the citizen's motivation was "private."²⁵ The court then cited a number of cases in which police encouragement was found insufficient to examine the searches under the fourth amendment.²⁶ Finally, the opinion cited cases in which the citizen's actions went beyond a private search, with the result that courts invoked the exclusionary rule to suppress the evidence.²⁷ Having surveyed both tiers of the private search test, the court concluded that "[the] determin[ation of] whether a private citizen's search or seizure is attributable to the State and therefore subject to constitutional scrutiny demands a *totality of the circumstances inquiry*."²⁸

Although this language is analogous to that employed by the United States Supreme Court in *Coolidge v. New Hampshire*,²⁹ the North Carolina Supreme Court added a third criterion to the two-part test established by other jurisdic-

24. *Id.*

25. *Id.* at 332-33, 395 S.E.2d at 421 (citing *State v. Peele*, 16 N.C. App. 227, 230, 192 S.E.2d 67, 70 (crime victim conducted search to recover his own property), *cert. denied*, 282 N.C. 429, 192 S.E.2d 838 (1972)).

26. *Id.* at 333, 395 S.E.2d at 421. The three cases the court cited for this proposition are distinguishable from *Sanders* on their facts. In each, the citizen had first notified the authorities of the crime and subsequently conducted a search. *United States v. Snowadski*, 723 F.2d 1427, 1428 (9th Cir. 1984) (co-worker of defendant contacted IRS and reported that defendant was selling used aircraft engine cores and not reporting income); *United States v. Miller*, 688 F.2d 652, 655 (9th Cir. 1982) (victim of trailer theft contacted FBI, saying that he had received an anonymous tip that the stolen trailer was on defendant's property); *People v. Sellars*, 93 Ill. App. 3d 744, 745, 417 N.E.2d 877, 879 (1981) (informants approached police officer and told him that the defendant was in possession of stolen goods from a recent burglary). In *Sanders*, however, the crime was already under investigation and the authorities told the informant about the evidence they sought. *Sanders*, 327 N.C. at 328, 395 S.E.2d at 418. Nonetheless, in some respects the facts of these cases suggested even higher governmental involvement than in *Sanders*. See *id.* (citing *Miller*, 688 F.2d at 655 (FBI agents invited informant to visit the suspect's premises with them); *Sellars*, 93 Ill. App. 3d at 747, 417 N.E.2d at 880 (officers suggested informants get invited inside and report what they observed, but informants broke into suspect's house and stole the evidence)).

27. *Sanders*, 327 N.C. at 333, 395 S.E.2d at 422. In three of the five cases cited, the police actually had participated in the search. *Id.* (citing *Corngold v. United States*, 367 F.2d 1, 2 (9th Cir. 1966) (customs agents informed airline employee that they suspected package contained contraband, asked him if he wanted to open the package, observed him open it, and then assisted in removing the contents); *United States v. Robinson*, 504 F. Supp. 425, 428 (N.D. Ga. 1980) (while questioning suspect with airline employee present, DEA agent failed to secure suspect's consent to search suitcase; airline employee opened the suitcase when DEA agent placed keys in front of him on table); *People v. Barber*, 94 Ill. App. 3d 813, 814, 419 N.E.2d 71, 72 (1981) (police officers approached landlord and, after landlord unlocked the suspect's apartment, entered and searched with landlord)). Thus, the extent of government involvement was very high.

In the other two cases the citizen was a regular informant for the authorities. The courts in those two cases had found this fact dispositive on the issue of the citizen's motive. *Sanders*, 327 N.C. at 333, 395 S.E.2d at 422 (citing *United States v. Walther*, 652 F.2d 788, 790 (1981) (regular informant for the DEA had as sole motivation for the search the expectation of reward money); *State v. Boynton*, 58 Haw. 530, 539, 574 P.2d 1330, 1335 (1978) (the regular informant did not "seem to have had a reason for being at the [suspect's] residence or for searching the area . . . which [was] not inexorably linked to police concerns")).

28. *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422 (emphasis added). The same language has been used by a number of other courts. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) ("whether . . . in light of all the circumstances of the case [the citizen] must be regarded as having acted as an 'instrument' or agent of the state").

29. *Coolidge*, 403 U.S. at 487; see *supra* note 22 and accompanying text.

tions:³⁰ "Factors to be given special consideration include the citizen's motivation for the search or seizure, the degree of governmental involvement, such as advice, encouragement, [or] knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police."³¹ Though the facts in *Sanders* suggested a high degree of police encouragement, the scope of the search Deputy Brown authorized, as well as its legality, were of critical importance.³²

The court concluded that Gardin's primary motive for the search was to console the grieving family.³³ It reasoned that even though he based his actions on information provided by the authorities, the fact that he repeatedly asked others whether he should help the family indicated that his motives were independent from the interests of the state.³⁴ The court dealt summarily with Brown's encouragement of Gardin.

The extent of Brown's recruitment of Gardin was to advise him that defendant was under suspicion, describe certain evidence that might link defendant to the crime, and to ask Gardin if he could gain entry into defendant's house or locate defendant and talk with him. Brown mentioned a reward fund The meeting ended up with Brown . . . giving Gardin a code name.³⁵

While acknowledging that these facts might give rise to an agency relationship, the court derailed the fourth amendment challenge to the seizure of the victim's watch and ring. The court stated that because Gardin exceeded the putative authority given by Brown and searched the bedroom by misrepresenting Sanders' criminal liability to his sister, that action was not subject to constitutional scrutiny.³⁶ Having discussed one plan to enter the defendant's home, the court held, Gardin's deviation from that plan severed any connection between official conduct and the search.

The doctrine of agency search as it has developed since 1920 leaves ample room for the *Sanders* court's conclusion that the search was private. The United States Supreme Court first distinguished searches and seizures by private citizens

30. See *supra* note 23 and accompanying text.

31. *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422 (emphasis added). The inclusion of this "legality" factor as an express part of the test is without precedent. When police have encouraged the citizen's search, other courts have noted legality as merely one consideration among many. See *United States v. Miller*, 688 F.2d 652, 657 (1982); *People v. Sellars*, 93 Ill. App. 3d 744, 748, 417 N.E.2d 877, 881 (1981). See generally *W. LAFAYETTE*, *supra* note 6, § 1.8(b), at 190-91 (police have no duty to prevent a private citizen from making a legal search that they could not conduct themselves). In identifying "legality" as a distinct factor in a tripartite test, the North Carolina Supreme Court implied that it should be given greater weight than other factors reflecting the nature of police involvement. It is unclear whether the court intended this emphasis. See *infra* note 57.

32. *Sanders*, 327 N.C. at 335, 395 S.E.2d at 423. The court held that even if Gardin's visit to defendant's home after his conversation with Brown was an agency search, when he exceeded the scope of the plan he discussed with Brown and proceeded with what was arguably an illegal search, there was no longer official knowledge or acquiescence. *Id.*

33. *Id.* at 334, 395 S.E.2d at 422.

34. Indeed, Gardin's own testimony suggested prompting from a higher authority than the police: "Jesus placed this task in front of me." *Id.*

35. *Id.* at 335, 395 S.E.2d at 422-23.

36. *Id.* at 335, 395 S.E.2d at 423.

from those by the government in the landmark case of *Burdeau v. McDowell*.³⁷ McDowell, a utility company executive, was discharged for fraudulent conduct in the course of business. After his departure, agents of his former employer forced open two safes and his desk and removed papers belonging to him. The company later made those papers available to the government and they were introduced against him in a prosecution for fraudulent use of the mails. McDowell moved to have the evidence returned to him. Though he made no allegation that officers of the United States had committed an unlawful act, McDowell alleged that the fourth amendment precluded them from using the fruits of an illegal search. The Court held that the fourth amendment did not apply to these facts because the provision was "intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."³⁸

The *Burdeau* dissent, while acknowledging the absence of any constitutional prohibition, asserted that the state's use of such stolen property was unconscionable. In a brief opinion Justice Brandeis noted the basic judicial aversion to allowing the government to use such evidence by exempting private searches from the fourth amendment. "Respect for the law will not be advanced by resort . . . to means which shock the common man's sense of decency and fair play."³⁹

For many years the courts applied the *Burdeau* rule without specifically identifying the considerations to be taken into account in applying the private search exemption. The only modern Supreme Court decision to address the issue was *Coolidge v. New Hampshire*.⁴⁰ While authorities were interrogating the defendant murder suspect at the police station, two officers visited Mrs. Coolidge at the Coolidges' home. When they asked whether Mr. Coolidge owned any guns, Mrs. Coolidge produced the weapons and asked if the officers wanted to take them. They did. The defendant argued that when his wife brought out the guns, she was acting as an agent of the government, "complying with a 'demand.'"⁴¹ Although the majority reiterated that the question should be examined in light of all the circumstances, their analysis focused on two factors. On the one hand, the Court found that Mrs. Coolidge's natural desire to vindicate her husband had motivated her to assist the police in their investigation.⁴² The Court grappled with the question of whether her choice to act as she did was real:

[T]here no doubt always exist forces pushing the spouse to coop-

37. 256 U.S. 465 (1920).

38. *Id.* at 475.

39. *Id.* at 477 (Brandeis, J., dissenting). One commentator called the approach taken from this quandary "ratified intent"; that is, "where the evidence is taken to aid the Government, and when the Government uses the evidence, the taint of that illegal action is transferred to the Government so as to make the use unlawful." Comment, 44 N.Y.U. L. REV. 206, 209 (1969). See generally W. LAFAVE, *supra* note 6, § 1.8(e), at 208-11 (discussing jurisprudential treatment of the use of illegally obtained evidence).

40. 403 U.S. 443 (1971).

41. *Id.* at 487.

42. *Id.* at 487-89.

erate with the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse. . . . But there is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure or active cooperation with police.⁴³

The Supreme Court held that such a private motive to conduct a search militates against invoking the fourth amendment under the agency doctrine.⁴⁴ The second factor the *Coolidge* Court addressed was the extent of government involvement in initiating the citizen's actions. The majority noted that "[t]here is not the slightest implication of an attempt on [the officers'] part to coerce or dominate her, or, for that matter, to direct her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these."⁴⁵

Coolidge is susceptible of a narrow interpretation: when the citizen's motive exists independently from the goals of the police, a court should find a private search.⁴⁶ In other words, when the police do nothing to influence the citizen, despite using "more subtle techniques of suggestion," there is no fourth amendment protection. But this interpretation has not carried the day.⁴⁷ Cases following *Coolidge* have defined "private search" more broadly, suggesting that a citizen may act with substantial motivation to further law enforcement ends and, without warrant, probable cause, or exigent circumstances, law enforcement authorities may substantially encourage the citizen to conduct a search.⁴⁸

Contemporary cases applying this broad construction often cite the United States Court of Appeals for the Ninth Circuit's opinion in *United States v. Walther*.⁴⁹ In *Walther*, the Ninth Circuit described a two-part test: "two of the critical factors in the 'instrument or agent' analysis are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search."⁵⁰ Even before *Walther*, these two factors had dominated most judicial discussion of the private search.⁵¹ Under this test, what actions by the authorities rise to the level of a police-instigated search, and what motives of the citizen constitute a desire to assist law enforcement? These threshold questions cause tremendous confusion.

Cases addressing the first issue, the level of governmental involvement nec-

43. *Id.* at 487-88.

44. *Id.* at 488.

45. *Id.* at 489.

46. In the closing sentence of the majority opinion, Justice Stewart characterized Mrs. Coolidge's actions as a "spontaneous, good-faith effort by his wife to clear him of suspicion." *Id.* at 490.

47. The Supreme Court has not reviewed a "private search" case in the twenty years since *Coolidge*.

48. See *infra* notes 68-70 and accompanying text.

49. 652 F.2d 788 (9th Cir. 1981).

50. *Id.* at 792. The *Walther* court did not assert that these were the exclusive factors to be considered. It held only that those were "the factors which [had] generated most of the controversy" on that particular appeal. *Id.* Nonetheless, several courts have cited *Walther* and treated these factors as exclusive criteria. See, e.g., *United States v. Bazan*, 807 F.2d 1200, 1202-03 (5th Cir. 1986); *United States v. Snowadzki*, 723 F.2d 1427, 1429 (9th Cir. 1984).

51. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 487-89 (1971).

essary to transform a search by a private citizen into a governmental search by proxy, vary widely. At one extreme are fact patterns in which there is no contact between the citizen and any governmental officer until after the citizen has completed the private search. No court can subject such a search to the fourth amendment under *Burdeau*. For example, in *United States v. Sherwin*,⁵² a trucking terminal manager came upon an open carton addressed to the "Talk of the Town Adult Book Store" in Las Vegas. On examining the contents, the manager discovered obscene material and reported it to the FBI. The Ninth Circuit rejected the defendant's challenge to the seizure. The court acknowledged that the *Coolidge* language, which requires a court to look at the issue in light of all the circumstances, "frequently require[s] a careful factual analysis,"⁵³ but the court asserted that no such care was needed in *Sherwin*: "[T]here is little difficulty in holding the fourth amendment inapplicable to the instant case because prior or contemporaneous governmental involvement in the search was totally absent."⁵⁴

Sherwin suggests that the minimum level of governmental involvement is some degree of prior knowledge of and acquiescence in the citizen's actions.⁵⁵ Judge (now Justice) Kennedy noted that at the other end of the spectrum are those cases in which the "governmental involvement in a search is so pervasive that . . . the fourth amendment is applicable to such a 'joint venture' because of the intrusive actions of the officials themselves."⁵⁶ In the middle lie the cases in which the government officials undertake no part in the searches, but in which their prior involvement serves as a catalyst.

The lowest threshold would seem to be official involvement comporting with the minimum standard implied by the language to "know" and "acquiesce." Thus, if by any means law enforcement authorities come to know of a private citizen's intent to conduct a search of another citizen's property and make no effort to prevent it, these facts would establish bare knowledge and acquiescence. It seems clear, however, that simple knowledge or acquiescence is insufficient for fourth amendment protection to attach.⁵⁷

52. 539 F.2d 1 (9th Cir. 1976).

53. *Id.* at 6.

54. *Id.*; see also *United States v. Goldstein*, 532 F.2d 1305, 1311 (9th Cir. 1976) (fourth amendment restricts government action, rather than the actions of private individuals); *United States v. Clegg*, 509 F.2d 605, 609 (5th Cir. 1975) (same); *United States v. Harless*, 464 F.2d 953, 956-57 (9th Cir. 1972) (same).

55. *Sherwin*, 539 F.2d at 6; see also *United States v. Miller*, 688 F.2d 652, 656-57 (9th Cir. 1982) (citing *Walther* test and analyzing knowledge and acquiescence factors).

56. *Sherwin*, 539 F.2d at 6 n.5.

57. See, e.g., *Gundlach v. Janing*, 401 F. Supp. 1089, 1093 (D. Neb. 1975) (mere knowledge on the part of police that a citizen will conduct a search, and an absence of any deterrent action by police, is not sufficient to establish agency), *aff'd per curiam*, 536 F.2d 754 (8th Cir. 1976). This is true at least when the search is not illegal (i.e., not burglary or larceny). *Miller*, 688 F.2d at 657. But see *Gundlach*, 401 F. Supp. at 1093 (in the context of fourth amendment agency analysis, the illegality of a search does not place a greater burden on police to prevent the citizen from conducting it).

Even if a search were illegal, it is unclear what difference this would make regarding the protections of the fourth amendment. If the government instigated the search, then the constitutional protections attach whether or not the search would amount to illegal conduct on the part of a private individual. It is another matter to consider whether, in standing by and allowing one citizen to

At least one court has expressed the two-part test in different terms, removing the ambiguity of the phrase "knowledge or acquiescence." In *United States v. Lambert*,⁵⁸ the United States Court of Appeals for the Sixth Circuit asserted that "the police must have instigated, encouraged, or participated in the search."⁵⁹ The positive actions these terms represent suggest that a court, to find agency, should require an *affirmative* role on the part of the authorities. The private citizen in *Lambert* was the defendant's housekeeper. She contacted the FBI when she became suspicious that there was drug activity in the house. In holding that there was no agency, the court noted that far from taking any active part in removing the evidence from the house, the officers specifically had told her not to do so.⁶⁰

The general rule is that "other pre-search contacts between a government official and private citizen, whether or not apparently intended by the former to prompt the latter to render some type of assistance, are not deemed sufficient to make a search by a private citizen other than a 'private' search."⁶¹ This general rule does not reveal, however, how far the police may go in instigating a search before the exclusionary rule attaches. Professor LaFave suggested that a policeman may not ask a citizen to conduct a particular search.⁶² Thus, when the police instigated a search by asking a landlord to enter his tenant's room, the Illinois Court of Appeals held the search to be governmental.⁶³ Although it was important that the police later entered the room, the court held that the private citizen's earlier entrance "[did] not negate the conclusion that he was acting as their agent."⁶⁴

Even when officers do not request a specific search, some courts have held that pervasive prior contact between an officer and the citizen, as between a detective and his "snitch," brings any search by that citizen to the level of an agency search.⁶⁵ More often than not, however, a court will hold prior contact between an officer and a citizen insufficient to render later searches subject to constitutional protection. In one case, a former law enforcement officer noticed suspicious activity on his neighbor's land and informed the Drug Enforcement Administration (DEA).⁶⁶ At their second meeting, the DEA told him to report if he saw trucks entering the ranch and then to "get out of there."⁶⁷ When the informant trespassed to secure further information, the court found the DEA's instructions and the nature of their involvement with the citizen "far too vague

commit a crime against another, the police expose themselves to some civil liability for failure to perform their executory duty of preventing a crime.

58. 771 F.2d 83 (6th Cir. 1985).

59. *Id.* at 89.

60. *Id.*

61. W. LAFAVE, *supra* note 6, § 1.8(b), at 192.

62. *Id.*

63. *People v. Barber*, 94 Ill. App. 3d 813, 814, 419 N.E.2d 71, 72 (1981).

64. *Id.* at 815, 419 N.E.2d at 73.

65. *See State v. Boynton*, 58 Haw. 530, 539, 574 P.2d 1330, 1335 (1978).

66. *United States v. Bazan*, 807 F.2d 1200, 1202 (5th Cir. 1986).

67. *Id.* at 1203.

and general to constitute" sufficient governmental involvement.⁶⁸ In a more dramatic example of how much government involvement courts will tolerate, an individual contacted the Internal Revenue Service (IRS) and stated that a co-worker was defrauding the government of taxes on his sale of used aircraft engine cores.⁶⁹ The informant asked if records of the sales would be helpful and inquired about a reward. The Ninth Circuit held that, because the IRS had not prompted or encouraged the citizen to seize the evidence, the act was a private search.⁷⁰

The cases invite courts to overstep the fourth amendment⁷¹ by providing no objective criteria for agency.⁷² In *United States v. Coleman*,⁷³ although the police were present when the citizen, who had previously notified them of his intent to repossess it, searched the defendant's car, the court held that their presence was nothing more than "benign attendance."⁷⁴ That court expressed the standard as requiring that the police "actually compel[]" the intrusion.⁷⁵ In this pronouncement, the *Coleman* court overstated the requisite level of governmental involvement.⁷⁶

The other oft-cited consideration in the two-part analysis for determining

68. *Id.* In *Bazan*, it may also have been important that in trespassing, the informant exceeded the scope of the official request. The *Bazan* court did not focus on the illegality of the informant's entry onto the defendant's land. The Court of Appeals for the Fifth Circuit found that the DEA's total lack of knowledge that the informant intended a search at all was important. *Id.* at 1204. In *Sanders*, the Supreme Court of North Carolina found such overstepping important in holding that Gardin was not acting as an agent of the law enforcement authorities. *Sanders*, 327 N.C. at 335, 395 S.E.2d at 423. The court went so far as to characterize Gardin's search of the defendant's bedroom as a "private, unsolicited, unsupervised act." *Id.*; see *supra* note 32 and accompanying text.

69. *United States v. Snowadzki*, 723 F.2d 1427, 1428 (9th Cir. 1984).

70. *Id.*

71. See *infra* text following note 125.

72. See, e.g., *United States v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) ("[We] decline to announce a definite standard for findings that a private citizen has acted as an 'agent' of the government."). The *Walther* court stated that "[w]hile a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimis* or incidental contacts between the citizen and law enforcement agents . . . will not subject the search to fourth amendment scrutiny." *Id.* Though there are no objective criteria for the requisite level of governmental involvement, many of the courts that find agency also find significant private motivation for the search. See, e.g., *Bazan*, 807 F.2d at 1204 (informant was quite concerned about illegal activity on his neighbor's land); *Snowadzki*, 723 F.2d at 1430 (informant was interested in reward, but IRS had not encouraged him to act to secure it).

73. 628 F.2d 961 (6th Cir. 1980).

74. *Id.* at 964.

75. *Id.* (citing *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978)). *Coleman* is a good example of how the lack of a more objective test for agency can lead courts to confuse the standard. *Flagg Bros.* was an action under 42 U.S.C. § 1983 against a landlord who sold a delinquent tenant's personal property pursuant to New York law. The plaintiff alleged that this was a fourteenth amendment due process violation carried out "under color of state law." *Flagg Bros.*, 436 U.S. at 156. The Court held that the landlord's action would not be attributed to the state since the state law did not compel the sale. *Id.* at 165. Thus the *Flagg Bros.* Court required actual compulsion in order to hold that a private citizen's action was under color of state law for stating a claim under 42 U.S.C. § 1983, not to find that a private citizen's search was attributable to the state for fourth amendment purposes. Compare *Coleman*, 628 F.2d at 965 (government must compel intrusion) with *United States v. Robinson*, 504 F. Supp. 425, 431 (N.D. Ga. 1980) (Although DEA agent never ordered airline employee to open defendant's suitcase and never suggested he do so, airline employee was acting at the unspoken encouragement of DEA; but for the DEA's ancillary acts and statements, the search would not have taken place and thus was attributable to the government.).

76. See *supra* text accompanying notes 56 and 65.

whether a court should attribute a search to the government is the private citizen's motivation for conducting it. In *Walther*, an airline employee who had served as a confidential informant in the past and had been paid for information on many occasions searched a parcel shipped by his employer airline.⁷⁷ The court held that the employee acted as a government agent.⁷⁸ The facts were sufficient to support the trial court's finding that the employee had opened the package with the expectation of a probable reward from the DEA,⁷⁹ and that this was the requisite state of mind of a governmental agent.⁸⁰ Thus one circumstance that consistently points toward agency is money paid in return for information, particularly when there is a long-standing relationship involving payments for information.⁸¹ But payment is not dispositive.⁸²

A private motive generally is indicated when the victim of the crime conducts the search.⁸³ Thus, a victim's search conducted in an attempt to recover the stolen property has been held to be a private search.⁸⁴ Likewise, when an airline searches luggage or parcels on board its planes, the airline usually has a private purpose.⁸⁵ Courts often hold that these common carrier cases stand on different ground than ordinary private search cases. The right of the airline to guard against shipping contraband or dangerous freight, for example, often is established by tariff law.⁸⁶

If the foregoing considerations are not significant, the inquiry into the citizen's motive becomes more subjective. As with governmental involvement, some nominal prior contact probably is necessary.⁸⁷ It is simplistic to say that the citizen must be moved to conduct the search by a desire to assist law enforcement authorities for a court to conclude that the citizen is a government agent. The object of the official investigation is to curtail the illegal activity.

77. *United States v. Walther*, 652 F.2d 788, 790 (9th Cir. 1981).

78. *Id.* at 793.

79. *Id.* at 791.

80. *Id.*

81. *Id.* at 793; *see also* *State v. Boynton*, 58 Haw. 530, 537, 574 P.2d 1330, 1333 (1978) (Payment made by government is to be considered along with other facts as indicative of a governmental search.).

82. *See, e.g., United States v. Valen*, 479 F.2d 467, 469 (3d Cir. 1973) (prior contacts between customs agents and informant, including reward payments, did not establish prima facie case of agency).

83. *Sanders*, 327 N.C. at 332-33, 395 S.E.2d at 421; *see also* *United States v. Miller*, 688 F.2d 652, 657 (1982) (holding that the citizen was motivated by a desire to recover his stolen property).

84. *Gundlach v. Janing*, 401 F. Supp. 1089, 1093 (D. Neb. 1975), *aff'd per curiam*, 536 F.2d 754 (8th Cir. 1976). As is true of most cases decided under the two-part analysis, motive was not the dispositive factor in *Gundlach*. The motive of the employer to recover property stolen by the employee was private, but the court also analyzed the extent of the governmental involvement. In *Gundlach* there was no official influence or encouragement to conduct the search; these two considerations led the court to conclude that no fourth amendment intrusion had occurred. *Id.* at 1094.

85. *E.g., United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981); *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967).

86. *Jennings*, 653 F.2d at 110. In addition to the existence of statutory authority to conduct the search, the *Jennings* court noted that "the purposes of the airline are served by free communication of information between law enforcement agents and the agents of an airline whose duties involve the detection of dangerous or illegal cargo." *Id.*

87. *See* *Burdeau v. McDowell*, 256 U.S. 465, 475 (1920); *United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976); *State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985).

Thus, if a citizen wishes to rid himself or society of the wrongdoer, he can serve that personal goal only by helping the police "get their man." This circular relationship contributes to the disparity of judicial results.

The problem is that these are "mixed motive" cases. In *United States v. Bazan*,⁸⁸ for example, the defendant's neighbor searched the adjoining property when the neighbor suspected illegal drug activity. The United States Court of Appeals for the Fifth Circuit held that the neighbor lacked the intent necessary to establish agency, finding that his motivation was a "concern[] about the illegal activity nearby."⁸⁹ *United States v. Lambert*⁹⁰ yielded a contrary result. The defendant's housekeeper became suspicious about her employer's activities. She went to the FBI with information about his activities and later searched and seized many items over a period of weeks.⁹¹ Even though her motive was her concern about the effect of drugs on children, the United States Court of Appeals for the Sixth Circuit found "it was clear that [the housekeeper] acted with the requisite intent" of an agent.⁹²

A court faced with the issue of a citizen's search must weigh a broad array of subjective factors. When a police officer explicitly directs an individual to conduct a search, and the individual does so solely to reap a reward, courts have little trouble in attributing that action to the government and applying the fourth amendment. In reality the facts are rarely so straightforward. Though payment may be involved, the citizen may have other motives, such as a desire to rid her neighborhood of crime. Though the officer may have discussed the search with a citizen, the idea to conduct a specific search may have originated with the individual. It is not surprising that the results of such balancing are difficult to predict.

Given this state of private search jurisprudence, the North Carolina Supreme Court's reasoning in *Sanders* is understandable. The court upheld the trial court's finding that Gardin's primary motive was to aid the grieving family.⁹³ Though the court found that Gardin received more than seven thousand dollars for his assistance, this fact was insufficient to establish a dispositive motive to assist the criminal investigation.⁹⁴

88. 807 F.2d 1200 (5th Cir. 1986).

89. *Id.* at 1204.

90. 771 F.2d 83 (6th Cir. 1985).

91. *Id.* at 86.

92. *Id.* at 89. The court went on to hold that though the informant satisfied the motive test of agency, the FBI's involvement was insufficient to make the search governmental for purposes of the fourth amendment. *Id.*; see *supra* text accompanying notes 58-60. In another case, the court dismissed the government's "private motive" argument when in opening a passenger's bag, an airline employee was trying merely to discover the owner. *United States v. Robinson*, 504 F. Supp. 425, 431 (N.D. Ga. 1980). The passenger was with the airline representative when he unlocked the bag. The court found that the airline employee was motivated by the presence of a DEA agent and his repeated requests of the passenger for consent to search. *Id.*

93. *Sanders*, 327 N.C. at 334, 395 S.E.2d at 418. The determination of citizen's motive is an issue of fact to be determined by the trial court and is not subject to close review on appeal.

94. Brown testified at trial that he never paid Gardin anything. *Id.* at 336, 395 S.E.2d at 423. The supreme court noted that "[b]oth Brown's and Gardin's versions of this incident were before the jury." *Id.* Though the conclusion that this contradictory testimony did not prejudice the defendant is justifiable, it arguably suggests that Brown himself subjectively believed there was some reason to

The *Sanders* court analyzed the extent of governmental involvement under the terms "advice, encouragement, [or] knowledge."⁹⁵ This suggests that the court weighed the facts based on both a benign, passive "knowledge" standard,⁹⁶ and a more active "encouragement" standard.⁹⁷ *Sanders* borrows clichés from the full panoply of precedent and arrives at a result that gives little weight to those considerations. Regarding Gardin's search of the defendant's house in general, Brown *advised* him of the identity of the suspect, his theory of how the crime was committed, and exactly what evidence the authorities sought. Brown *encouraged* Gardin to conduct a search for that evidence when he asked him if he could "gain entry into defendant's house" and look for it.⁹⁸ Brown had knowledge of Gardin's general intent to conduct a search when the informant called him and told him of his plan to use a ruse to get in.

By focusing on the specific search that yielded the evidence (the second attempt, which Gardin did not discuss with Brown) the court found that any agency that might have been established by the foregoing facts did not exist when the evidence was recovered.⁹⁹ While acknowledging that Gardin's actions until the time he deviated from the plan discussed with Brown might have been an "agency search,"¹⁰⁰ the court concluded that once he did something not expressly discussed with the officer, Gardin extinguished the putative agency.¹⁰¹ The court also gratuitously noted that "[a]t no time did any law enforcement officer tell Gardin to do anything illegal."¹⁰²

Although the result in *Sanders* is justifiable from a reading of the cases, it is counterintuitive to those not familiar with the development of fourth amendment agency jurisprudence. The police did not have probable cause to search or arrest, but there was specific evidence for which, were it not for the strictures of the fourth amendment, they would search. By a fortuity, a private citizen who happened to know both the victim's and the suspect's families came forward and inquired how he might help. The officer then provided him with all the information that left the police short of probable cause, expressly asked him to do what the police could not do themselves, and offered to reward him for it. When the citizen followed through on a plan discussed with the authorities, and was unsuccessful, he tried a second time. Still attempting to accomplish the task the police had given him, and possibly under the impression that the authorities had sanctioned his actions, he found and seized the evidence. With this evidence and

misrepresent this fact. One explanation is that payment would be evidence tending to show that Gardin was acting as his agent and it was not in Brown's interest that the court find agency. See *supra* notes 81-82 and accompanying text.

95. *Sanders*, 327 N.C. at 334, 395 S.E.2d at 422.

96. See *supra* note 57 and accompanying text.

97. See *supra* text accompanying notes 58-60.

98. *Sanders*, 327 N.C. at 335, 395 S.E.2d at 423.

99. *Id.*

100. *Id.*

101. *Id.* The Court characterized the second search as "Gardin's private, unsolicited, unsupervised act of seizing evidence." *Id.* Describing the search as unsolicited and unsupervised implies total ignorance of those actions. Brown had asked his informant to conduct a search and Gardin had consulted with Brown in planning it.

102. *Id.*; see *supra* note 57.

the attendant search warrant, the police concluded in a single day an investigation that had languished for weeks.¹⁰³ *Sanders* suggests that the competing interests of effective law enforcement and fourth amendment restrictions on gathering evidence are in marked conflict under the agency-search jurisprudence developed since *Burdeau* and *Coolidge*.

In analyzing why courts look to the private individual's motive to conduct a search, it is useful to consider the purposes of the fourth amendment and the exclusionary rule. By excluding evidence obtained through unreasonable searches, the courts act to deter such intrusions.¹⁰⁴ The exclusionary rule is based primarily on the "necessity for an effective deterrent to illegal police action."¹⁰⁵ In the context of private searches, application of the exclusionary rule should focus on deterring police action that leads to the private search. In deciding whether there has been a government search by proxy, there should be definite behavior on the part of the authorities that gives rise to the search. It is this definable behavior that the exclusionary rule may then act to discourage.¹⁰⁶

If a court's determination of whether a search by a citizen was private or governmental does not focus on the objective nature of the police interaction with the citizen, police may be responsible for instigating searches that they could not conduct themselves. Judicial decisions that allow police broad scope in what they can say and do to assist a private citizen in searching for evidence indirectly undermines the probable cause and warrant requirements that are normally a component of such searches. Clearly, the law cannot tolerate an unspoken understanding that law enforcement officers intentionally may instigate a search by a private party in order to sidestep the fourth amendment.¹⁰⁷

Yet such sidestepping, in a subtle form, is what took place in *Sanders*. Investigator Brown requested a search and provided detailed information regarding the object of that search. In connection with the same investigation and evidence, Brown lied on the sworn affidavit with which he secured a warrant for the follow-up search.¹⁰⁸ Brown also gave the same false testimony at both tri-

103. *Sanders*, 327 N.C. at 330, 395 S.E.2d at 420.

104. W. LAFAVE, *supra* note 6, § 1.1(e), at 16.

105. *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965) (emphasis added); see also *Burdeau v. McDowell*, 256 U.S. 465, 475 (1920) (The fourth amendment "was intended as a restraint upon the activities of sovereign authority.").

106. Objectively definable behavior is a prerequisite because the exclusionary rule is not provided as an after-the-fact remedy for the citizen who is subjected to the search *sub judice*. "[T]he rule's primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." *United States v. Calandra*, 414 U.S. 338, 347 (1974); see also *United States v. Leon*, 468 U.S. 897, 918 (1984) (if exclusion is to deter, it must alter police behavior).

107. *United States v. Jennings*, 653 F.2d 107, 110 (1981) ("A governmental agent may not avoid constitutional restraints upon his conduct by procuring a private individual to perform a forbidden act for him."); see also *Burkoff, Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 640 (1981) ("The most significant deterrent effect of applying an exclusionary rule in this setting may well be to discourage law enforcement agents from encouraging or entering into unlawful, *sub rosa*, compacts with private actors."); Note, *Evidence Illegally Obtained by Private Persons Held Inadmissible in State Civil Action*, 63 COLUM. L. REV. 168, 174 (1963) ("[A] grave danger exists that the general admissibility of such evidence may create an atmosphere encouraging government officials to act in clandestine concert with private persons, while concerted activity would undoubtedly taint such evidence and require its exclusion.").

108. *Sanders*, 327 N.C. at 330, 395 S.E.2d at 420; see *supra* note 19. After Gardin had given the

als.¹⁰⁹ Neither the trial court nor the supreme court considered whether Brown might have believed that there was a problem with Gardin's search.¹¹⁰ If the investigating officer finds it necessary to misrepresent the facts surrounding his involvement and encouragement of a search conducted by a private citizen, the police subjectively may believe that they were responsible for the search. In addition, the likely result of a finding that the fruits of Gardin's search were subject to the exclusionary rule may have moved the supreme court to uphold the trial court in *Sanders*. Had the court found that Gardin was an agent, it probably would have suppressed the confession.¹¹¹ If the state had been forced to try *Sanders* without the best physical evidence linking him with the crime and without his confession, the jury undoubtedly would have returned an acquittal. This result would have been tantamount to "letting him off on a technicality."¹¹²

Nonetheless, the concern of courts and commentators that the jurisprudence of private searches leaves too much latitude may have come home in *Sanders*. Two aspects of the case deserve scrutiny. First, in light of the primary goal of the exclusionary rule—to deter some modes of police practice—judicial analysis of the citizen's motive for conducting a search is misplaced. The citizen's motive for becoming involved in a particular case can have no effect on

watch and ring he had seized during his search to Deputy Brown, the officer swore that "a reliable informant who has proven reliable in the past and given me information which resulted in the arrest and convictions of [other felons] . . . observed jewelry with the same description and type known to have been stolen from the [victim]" at the defendant's residence. *Sanders*, 327 N.C. at 330, 395 S.E.2d at 420. The informant, Gardin, had never before provided Brown with information. At the time Brown swore out the affidavit, he himself was in possession of the evidence. It was no longer at the defendant's residence because Gardin had taken it.

109. See *supra* note 11 (noting flagrancy of the official misconduct as a consideration in deciding whether to suppress fruits of an illegal search).

110. The issue of suppressing the evidence aside, the supreme court acknowledged in its opinion that a law enforcement officer had given false testimony in a capital murder trial. *Sanders*, 327 N.C. at 337, 395 S.E.2d at 424. The absence of any reproach for these acts is conspicuous. The supreme court's benign acceptance of the facts of this case is the very signal that will make such behavior more likely in the future.

111. See *supra* note 11.

112. See *supra* note 7 and accompanying text. The state pointed out this problem to the court in its final brief.

The ultimate resolution of this specific issue is of paramount importance. . . . A determination that the watch and ring were seized by a governmental . . . search will have profound and far reaching implications for both the state and the defendant. . . . [R]esolution of this search question is of great importance to the continued vitality of the confession. If both the watch and ring and the confession are suppressed, it is unlikely that there would remain sufficient evidence to support any prosecution.

Supplemental Brief for the State at 7, *Sanders* (No. 88A85). Indeed, the United States Supreme Court has endorsed the concept that courts should weigh such concerns in applying the exclusionary rule. "[W]hen law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." *United States v. Leon*, 468 U.S. 897, 908 (1983). Commentators and courts also have noted that a secondary purpose of the fourth amendment is to protect the integrity of the judiciary by insulating it from the taint of illegally gotten evidence. *W. LAFAVE*, *supra* note 6, § 1.1(e), at 16-17; see also *Elkins v. United States*, 364 U.S. 206, 223 (1960) ("[T]he federal courts should not be accomplices in the willful disobedience of a Constitution they are sworn to uphold."). This goal of maintaining judicial integrity arguably is harmed if the public perceives that unbending application of the rules of criminal procedure have the effect of freeing heinous criminals.

what the police do. The Supreme Court's 1971 opinion in *Coolidge*¹¹³ speaks directly to this point:

[T]here is nothing constitutionally suspect in the existence, without more, of these incentives to full disclosure of active cooperation with the police. The exclusionary rules were fashioned "to prevent, not to repair," and their target is official misconduct. . . . [I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.¹¹⁴

To the extent that a court can determine the subjective motives of a private searcher, those motives may be circumstantial evidence of *what the law enforcement officers did* in regard to procuring the search. Thus a citizen's motive to secure a reward is probative of the manner in which the police acted to get the citizen's cooperation.¹¹⁵ The emphasis on motive in the popular two-part test, however, is misplaced.¹¹⁶ The deterrent purposes of the exclusionary rule would be better served by subsuming consideration of the citizen's motive under the essential question of what the government has done that may have led to a search.

The basic question should be: "What did the law enforcement officer *do* to instigate the search?" The cases make it clear that if the police do not execute the search and the search would likely have occurred without their instigation, there is essentially no police behavior to deter. In the context of explicit police requests, one commentator has suggested that the individual's action should be attributed to the police "whenever the acts . . . would not have occurred *but for* the police request."¹¹⁷ The courts should apply the same test for any action—advice, encouragement, or instigation—that may have induced a citizen to conduct a search.

The court in *United States v. Robinson*¹¹⁸ used a but-for analysis. The DEA suspected an airline passenger of carrying drugs. A DEA agent questioned the passenger in a private room with an employee of the airline present. The agent repeatedly asked the suspect for his consent to open his suitcase. The defendant refused to give his consent. The DEA agent took the suitcase keys, which he had gotten from the suspect, and placed them on the table near the suitcase and in front of the airline employee. The airline employee then unlocked and opened the suitcase and found that it contained marijuana.¹¹⁹ The court sought to determine the DEA agent's involvement in the "total enterprise."¹²⁰

113. 403 U.S. 443 (1971).

114. *Id.* at 488 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)) (citation omitted).

115. *Cf.* Comment, *Police Bulletins and Private Searches*, 119 U. PA. L. REV. 162, 168 (1970) (In finding that the employer of the individual who conducted the search had no private motive, "it may be presumed that the actions were *induced by the police request.*") (emphasis added).

116. *See supra* notes 77-92 and accompanying text.

117. Comment, *supra* note 115, at 167 (emphasis added).

118. 504 F. Supp. 425 (N.D. Ga. 1980).

119. *Id.* at 427-28.

120. *Id.* at 431.

Had he not requested Delta employees to locate defendant's two checked suitcases, they would have been transferred . . . ; had he not placed the keys to the blue suitcase on a desk in front of the Delta agent and told the defendant in the Delta agent's presence that the keys appeared to fit the lock on the suitcase, the Delta agent would not have had access . . . ; and had he not continued to request defendant to consent to a search of the suitcase in the Delta agent's presence the Delta agent may never have learned that a law enforcement officer wished to have the suitcase opened. . . . [T]he Delta agent opened the bag at the unspoken, but real, encouragement of [the DEA].¹²¹

Robinson's but-for analysis flowed directly from the Ninth Circuit Court of Appeal's recognition that by simply categorizing the acts of a law enforcement officer as minimal forms of encouragement, the fourth amendment's safeguards inadvertently could be undercut.¹²²

The but-for inquiry should still embody a search for those elements of official involvement on which the cases currently focus. Governmental encouragement, instigation, and participation comprise definable acts that courts should scrutinize to determine if the police were responsible for the search. The result of a subjective analysis of these acts, however, may fall short of achieving the goal of deterrence. The standard should be more objective: whether the search would not have taken place but for the police involvement, and whether the authorities reasonably could have foreseen that their actions would cause the citizen to conduct a search.¹²³ In *Walther*, the Ninth Circuit Court of Appeals applied such reasoning to the DEA's involvement with an informant airline employee to hold that the latter had acted as an agent of the government.¹²⁴ "The DEA either knew or should have known that [the informant] had made it a practice to inspect [parcels], and had acquiesced in that practice."¹²⁵ The court did not require a subjective, fact-specific inquiry into the motives of the law enforcement officers in order to attribute the actions of their informant to the state. By applying the fourth amendment to *objectively foreseeable* intrusions such as that in *Walther*, courts will send a message that will deter police action that is tantamount to the intrusions the fourth amendment's framers sought to proscribe.

Objective tests in the context of the fourth amendment are not without precedent. The United States Supreme Court has promulgated an objective standard for the determination of whether a brief stop of a citizen by an officer rises

121. *Id.*

122. *United States v. Davis*, 482 F.2d 893, 904 (9th Cir. 1973). The court in *Davis* stated that: [e]ven if the governmental involvement at some point in the period could be characterized accurately as mere encouragement . . . that involvement would nevertheless be "significant" for purposes of the Fourth Amendment. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "private" persons or entities that is prohibited to the government itself.

Id.

123. Comment, *supra* note 115, at 170.

124. 652 F.2d 788, 793 (9th Cir. 1981).

125. *Id.*

to the level of a fourth amendment seizure. In *United States v. Mendenhall*,¹²⁶ Justice Stewart wrote that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."¹²⁷ The Court later explained the advantages of such a test in *Michigan v. Chesternut*.¹²⁸

The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. . . . This "reasonable person" standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual.¹²⁹

The same virtues inhere in an objective test of agency in the context of a private citizen search.

In *United States v. Leon*¹³⁰ the Court applied an objective test to determine if the exclusionary rule was an appropriate remedy to a fourth amendment violation and held that the rule should not apply when officers have acted in objective good faith on a warrant which is later found to be invalid.¹³¹ The Court reasoned that "the magnitude of the benefit conferred on such guilty defendants [by suppressing the evidence] offends basic concepts of the criminal justice system."¹³² In applying the proposed objective test to determine if the police should have known that their actions would cause an individual to be subjected to a search, a court would be judging the more fundamental question of whether a constitutional violation had occurred in the first place. Surely it is no less offensive that the police should be allowed to instigate a proscribed search through subterfuge¹³³ than that courts should exclude admittedly unconstitutionally obtained evidence where exclusion would have no deterrent utility.¹³⁴

126. 446 U.S. 544 (1979).

127. *Id.* at 554. Justice Stewart was joined only by Justice Rehnquist in this portion of his opinion. The objective test was later adopted by a majority of the Court. See *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991); *Michigan v. Chesternut*, 486 U.S. 567, 573-74 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984).

128. 486 U.S. 567 (1988).

129. *Id.* at 574 (citing 3 W. LAFAVE, *supra* note 6, § 9.2(h), at 407-08 (2d ed. 1987 & Supp. 1988)).

130. 468 U.S. 897 (1984).

131. *Id.* at 907.

132. *Id.* at 908 (citing *Stone v. Powell*, 428 U.S. 465, 490 (1976)). Scholars have thoroughly debated the merits of the *Leon* good-faith exception. Compare Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986) (concluding that the good-faith exception is entirely consistent with the fourth amendment) with Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986) (arguing that the good-faith exception to suppressing evidence obtained through an invalid search warrant constitutes an important, incremental step to "gutting" the exclusionary rule).

133. See *supra* note 107 and accompanying text.

134. In *Leon* the Court asserted that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919 (emphasis added). A corollary to this statement is that it *should* be used to deter objectively unreasonable police activity. To do so in the agency context, however, a court first must determine objectively if the fourth amendment has been violated. Thus the subtle, subjective test for agency should be abandoned to maintain consistency with the *Leon* Court's fourth amendment jurisprudence.

The Supreme Court also has applied an objective standard on police practices in the area of interrogation. In *Rhode Island v. Innis*,¹³⁵ the issue was what words or actions constitute "interrogation" for the purposes of applying *Miranda v. Arizona*.¹³⁶ The Court held that, short of express questions asked of the suspect, "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response" are interrogation.¹³⁷ Therefore, statements so induced are subject to the exclusionary rule under the fifth amendment. As in the application of the fourth amendment, the Court in *Innis* used exclusion to deter proscribed police practices.¹³⁸ Identifying a strength of the objective standard, the Court pointed out that the test provides a measure of protection against coercive police practices without regard to proofs of underlying intent.¹³⁹

The advantages of such an approach in characterizing interrogation practices also exist in characterizing the roots of a search. If a court determines that an officer could not in good faith have been oblivious to the likelihood that her actions would cause an intrusion upon a citizen, it should attribute the search so caused to the officer herself.

It must be acknowledged that the tenor of the *Leon* decision indicates there would be little judicial receptiveness to this suggestion. The Supreme Court applied the rationale in *Leon* specifically to *limit* the use of the exclusionary rule for the very reason that when those perceived as criminals go free, there is significant damage to the credibility of the law.¹⁴⁰ Yet *Sanders* will be cited often in

135. 446 U.S. 291, 293 (1980).

136. 384 U.S. 436, 444-45 (1967) (once a suspect has been taken into custody, statements made in response to interrogation prior to her being advised of her fifth amendment right against self-incrimination are inadmissible against her).

137. *Innis*, 446 U.S. at 301.

138. *Id.* at 299. The analogy between use of the exclusionary rule under fourth and fifth amendment principles is rooted in the close nexus between the two amendments. *Cf. Brown v. Illinois*, 422 U.S. 590, 601 (1974) (the fourth and fifth amendments are in "intimate relation," and frequently rights under the two amendments coalesce) (citing *Boyd v. United States*, 116 U.S. 616, 633 (1886)).

It has been convincingly argued that the exclusionary rule has different purposes in the fourth and fifth amendment contexts. See Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1987). In search and seizure cases the exclusionary rule should be invoked to deter police practice that violates an individual's substantive fourth amendment right not to be searched or seized unreasonably. *Id.* at 908-09. In contrast, the fifth amendment does not proscribe the act of obtaining the suspect's statement, only its use against him in criminal proceedings. When the exclusionary rule is invoked to suppress evidence gained in violation of *Miranda* (a presumptive fifth amendment violation), the court should be directly enforcing a procedural right, not acting to deter the police practices. *Id.* at 916-17.

Under this reasoning, the analogy drawn here between the proposed objective test for agency in fourth amendment cases and the good-faith test set forth in *Innis* is invalid. Courts do not recognize consistently the foregoing distinction, however. *Id.* at 916. The Supreme Court in *Innis* stated that its focus in formulating the good-faith test was to give effect to the *Miranda* safeguards which "vest[ed] a suspect in custody with an added measure of protection against coercive police practices." *Innis*, 446 U.S. at 301 (emphasis added). Thus, in deciding whether to apply the exclusionary rule, the *Innis* Court created an objective test to accomplish a deterrent purpose.

139. *Innis*, 446 U.S. at 301.

140. See *supra* note 112. The Court also applied objective tests in both *Mendenhall* and *Innis* with the result that the challenged evidence was admitted. In *Mendenhall*, the Court held that a woman, who upon disembarking from a plane had been asked by officers for her ticket and identification, had no objective reason to believe she was not free to go; therefore no seizure occurred. *United*

briefs opposing defendants' motions to suppress the fruits of a citizen's search as an example of how far a court may go in finding no agency. One need only recite the facts and note that the abhorrence of letting the defendant off on a "technicality" ran so deep that the court ignored Brown's perjury before the fact finder.

Courts need not deviate from settled precedent to apply the objective standard. They should continue to apply the test in which they look to official encouragement and the citizen's motivation. In determining whether those elements amount to a governmental search, however, actions such as requesting a search of some limited scope, offering to pay money, or providing detailed information to facilitate the search should weigh more heavily toward an affirmative finding. A police officer who engages in a pattern of such inducements should reasonably foresee that his actions will be the cause of a search. If the officer himself could not conduct that same foreseeable search, the courts should not sanction the search by admitting the evidence just because the officer was able to induce a private individual to do what he constitutionally could not.

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States v. Mendenhall, 446 U.S. 544, 555 (1979). In *Innis*, two officers accompanying their suspect to the police station lamented the possibility that children might find a shotgun used in the crime under investigation. The Court held that the suspect's ensuing statement as to the location of the weapon was admissible, since the interchange between the officers was not interrogation under the objective test. *Innis*, 446 U.S. at 302-03; see *supra* note 139 and accompanying text.