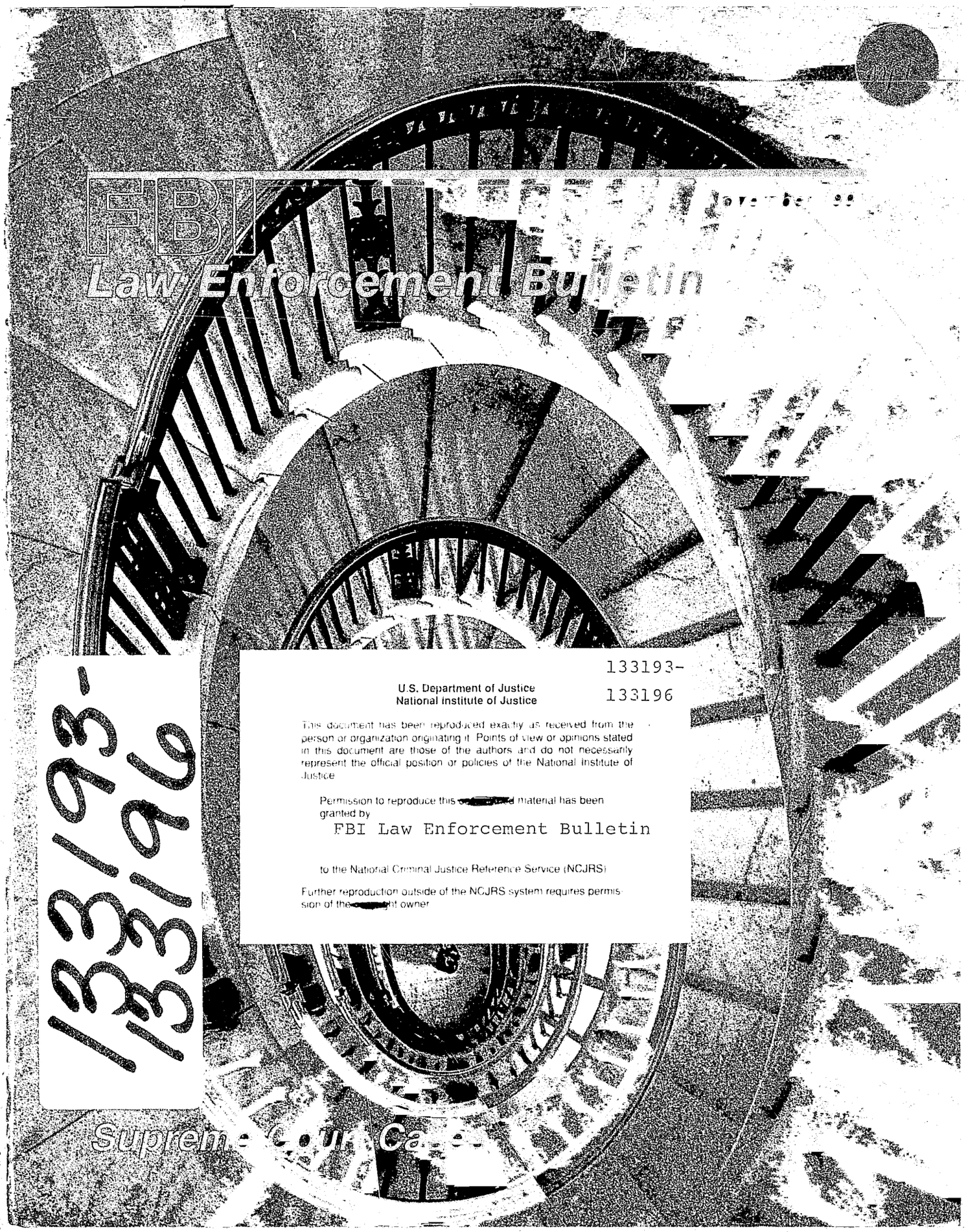

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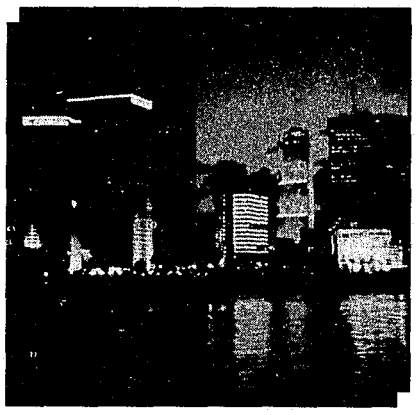

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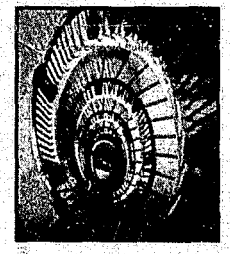

The Cover: *This month's Legal Digest addresses recent Supreme Court decisions of particular importance to law enforcement officers. Featured on the cover is the spiral staircase located in the Supreme Court Building in Washington, DC.*

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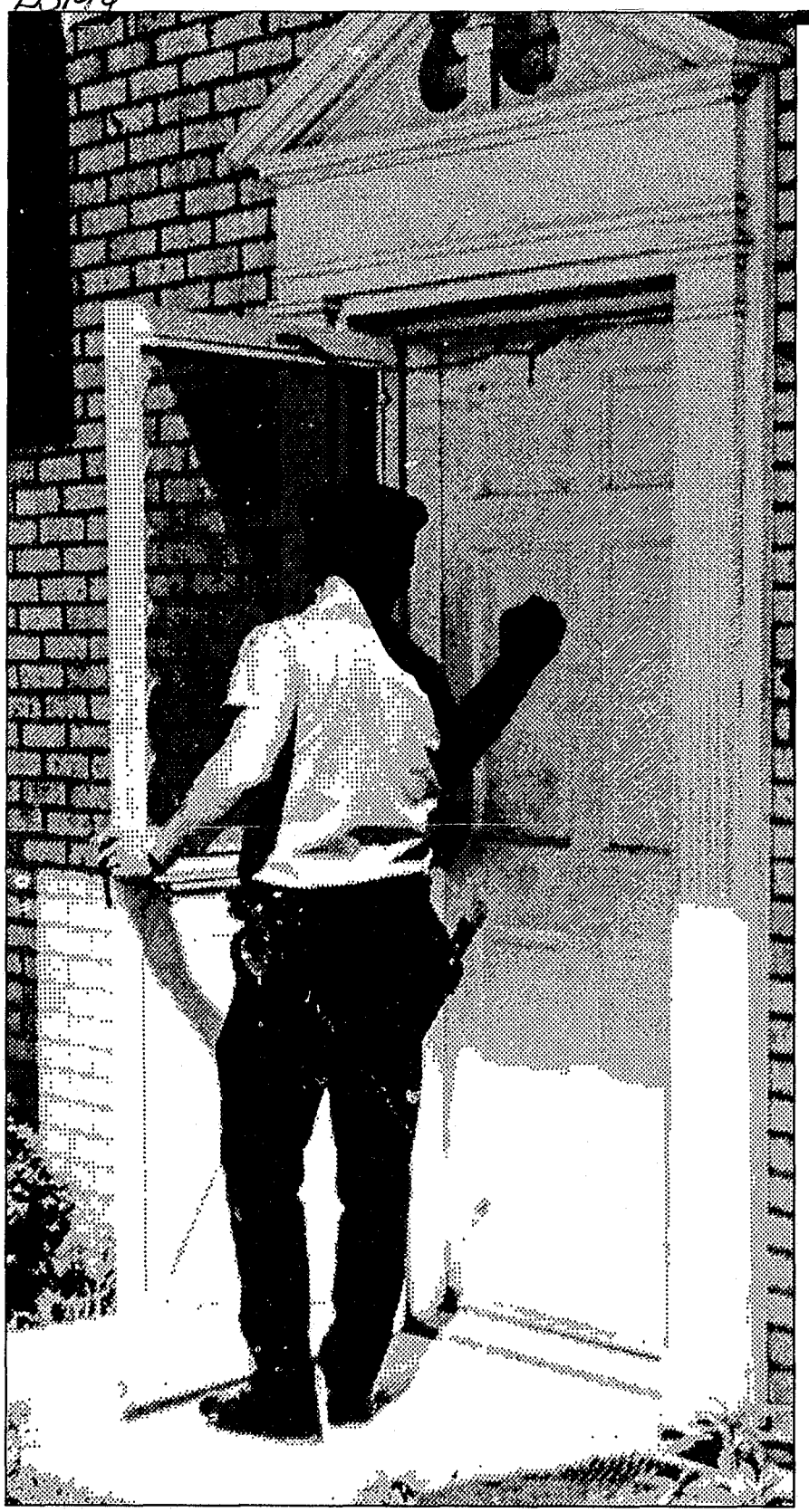


Knock and Talk
Consent Searches and Civil Liberties

By
ROBERT MORGAN, J.D.

Recently, concerns have been raised about consent searches, especially in "knock-and-talk" drug investigations, where law enforcement officers request permission to search a residence without a search warrant.[1] In light of this, I would like to review the socio-legal context and the training priorities that can shape performance in this complex area of law enforcement.

Understandably, increased drug abuse and a rise in violent crimes frighten the American public. Over the past couple of years, new laws and court rulings have enhanced law enforcement's power to deal with these social problems. Some rulings and legislation have raised civil liberties concerns. At the same time, many law enforcement professionals note that increased police power, which might reduce personal freedoms, can still fail to reduce crime.

Strengthening the hand of the police, however, seems to offer an easy way to "get tough" on drug crime. Opinion polls even indicate a growing willingness to trade some rights derived from the fourth

amendment guarantee against unreasonable search and seizure for public order. In a nationwide telephone poll, "[when] asked to choose between taking 'any step necessary' to stop drug use, or to protect civil liberties, 71% chose taking 'any step necessary.' "[2] Respondents to this poll approved such tactics as "police sweeping through drug-infested neighborhoods, questioning passengers on buses and trains, and annually seizing hundreds of millions of dollars worth of assets allegedly linked to criminal activity, [even] before the owners are convicted."[3]

Without a doubt, law enforcement's primary responsibilities are to uphold the law *and* to protect civil liberties. However, in doing so, this Nation's drug enforcement commitment must include recognizing the concerns expressed by U.S. District Judge Stanley Sporkin: "We cannot become so obsessed with this drug scourge to permit it to dismember the Constitution....In this 'anything goes' war on drugs, random knocks on the doors of our citizens seeking 'consent' to search can't be far away."[4]

Citizen Rights in the American Legal System

The consent search is a law enforcement tool that should be used very carefully by officers who have a clear understanding of citizens' rights, who are well-trained, and who are sensitive to citizens' sense of intrusion and to the potential for abuse of police power. Carelessness in conducting consent searches both endangers civil liberties and risks the loss of a valuable investigative tool.

Therefore, it is important for law enforcement officers to understand the meaning of "rights" in the American legal system. Rights are usually thought of as allowing us to do one of two things. We can use rights to make someone or some institution do something or we can use rights to make someone or some institution stop doing something to us. We can think of the second kind of right as allowing us to draw a circle around ourselves and our property and to stop others from trespassing.

Our rights can be defeated, but only by due process of law. The greater the expectation of privacy, the harder it is for someone, i.e., the government, to enter our circle.[5] However, expectations vary by location and context.

When I am in my home, I have a much stronger expectation of privacy than when I am traveling on an airplane. Airline personnel can look into my baggage as I board an airplane as a matter of course. But, in most cases, a search warrant is required before someone can enter my home without my permission.

We have also developed a similarly strong expectation of privacy when using a telephone In North Carolina, for example, law enforcement officers cannot even get a court order to tap a telephone. Any such intrusion can only be authorized under Federal jurisdiction. (Interestingly, the courts have observed that we can have no such expectation when using a cordless phone, a much less private form of communication.)

Individual Choice

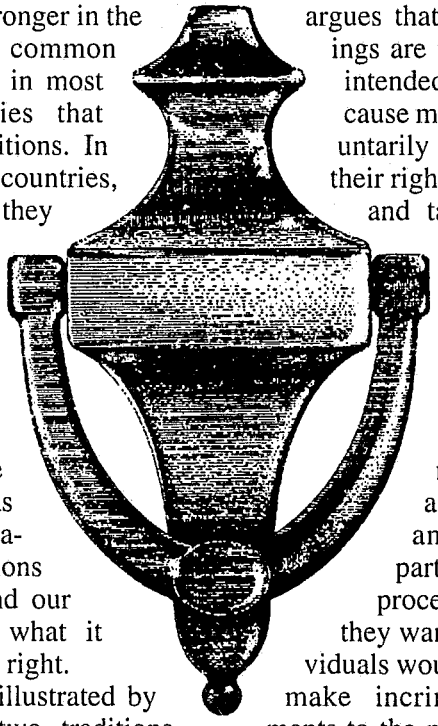
Another aspect of the American theory of rights has to do with individual choice. This Nation's theory of law and government assumes that in the end, each of us is the best judge of our own self-interest. Citizens can chose when, how, and where to exercise their rights. In

> ***"...a consent search is a useful tool when there is some reason to suspect unlawful conduct, but not enough to justify a warrant."***

Mr. Morgan, a former Attorney General of the State of North Carolina and U.S. Senator, recently retired as the Director of the North Carolina State Bureau of Investigation in Raleigh, North Carolina.

the American tradition, these rights are not self-executing. That is, my right to freedom of speech does not compel me to speak. Likewise, my right to the free exercise of religion does not compel me to pray on the Sabbath.

The assumption that each of us is the best judge of our own self-interest is much stronger in the Anglo-American common law tradition than in most European countries that have civil law traditions. In some European countries, people are fined if they do not vote. Although it is regrettable that so few Americans exercise the right to vote, suggesting that people be compelled to vote is usually seen as contradicting the basic political traditions of this country and our understanding of what it means to have this right.



This is best illustrated by looking at how two traditions understand the right to a trial. In the United States and Great Britain, a defendant has a right to a trial, and an individual can waive this right by pleading guilty. However, in most civil law systems, there is no guilty plea as we understand it in the United States. Even if someone admits guilt, there is still a trial, with the judge making sure the defendant's rights are protected. The "right to a trial" in civil law systems means that no matter how harmful you may understand it to be, your "right" means that you cannot avoid the expense, delays, exposure, and embarrassment of a public trial when you are indicted for a crime.

The question of whether individuals should be able to exercise their rights can also be seen in recent controversy over *Miranda* warnings. Charles J. Ogeltree argues that *Miranda* warnings are not serving their intended functions because most arrestees voluntarily choose to waive their right to remain silent and talk to an attorney.[6] Ogeltree suggests that we should remove the right to remain silent and the right to talk to an attorney from the arena of rights and make them part of basic arrest procedures. Whether they want to or not, individuals would not be able to make incriminating statements to the police and would have to see a lawyer soon after arrest. Ogeltree would transform the rights guaranteed by *Miranda* into criminal procedures.

Fourth Amendment Right to Refuse Entry

In October 1989, the Drug Enforcement Administration (DEA), in conjunction with local law enforcement agencies around the country, conducted Operation Green Merchant, which focused on indoor marijuana production. For some observers, this operation raised the question of whether citizens can be expected to exercise their fourth amendment right to refuse entry to law enforcement officers conducting a knock-and-talk investigation.

Now, a consent search is a useful tool when there is some reason to suspect unlawful conduct, but not enough to justify a warrant. Certainly, in conducting any investigation, consent accompanied by probable cause provides the best possible case. Often, when investigators have established probable cause and have obtained a warrant, they may choose to conduct a less-intrusive consent search for evidence in plain view.[7] Some of the consent searches conducted during Operation Green Merchant fit this pattern, with officers choosing the least-intrusive option available to them.

It is important for law enforcement officers to understand the distinctions between consent searches and searches requiring a warrant, so that they may uphold a high standard of professionalism in conducting all searches. In instances where information concerning the possible commission of a crime is less than sufficient to meet the probable cause standards for a search warrant, however, it may still be appropriate to conduct a consent search, although several variables apply. Specifically, officers do not want to abuse standards for a warrant, they do not want to conduct an invasive search unnecessarily, and they do want to preserve law enforcement's fundamental commitment to protect civil liberties.

Consent Searches

Many knock-and-talk residential searches evolve from repeated citizen complaints. While it is important to follow up on credible citizen concerns, bad warrants make for bad law enforcement. Yet, we cannot tell "good citizens" that there is nothing the police can do to investigate their suspicions. So, a consent search provides a minimally disruptive way to check the validity of community suspicions.

The issue then turns to the practice of consent searches and how they are conducted. Speaking for my department, few agents of the State Bureau of Investigation (SBI) conduct consent searches. They are much more likely to use warrants. However, when called for, carefully trained agents do conduct consent searches, and they are required to handle themselves appropriately. That is, they establish an individual's right to give consent to a search, they show identification, and they state the purpose of their visit and ask for permission to enter the premises. At all times, they must be polite, act in a low-key, non-authoritarian manner, respond to questions honestly, and above all, accept "no" for an answer after asking a person to cooperate.

This approach maintains the department's credibility with the courts and does not degrade the effectiveness of consent searches as investigative tools. These patient step-by-step techniques keep agents constantly aware of the limitations of the process, so that errors that do occur will be on the side of protecting civil rights.

Training and Procedures

The North Carolina SBI strives to maintain high standards of professionalism in conducting consent searches, and this commitment is continually stressed in all facets of training. Agents are trained to conduct consent searches in stages. They can only take a cursory look for obvious signs of illegality "in plain view." At each step, room by room, they must ask for permission to proceed. Nothing is opened without permission, and a search in progress must be discontinued upon request, unless evidence is noted in plain view. No coercion is permitted, and agents emphasize that the individual asked to consent to a search is not under arrest. The training and established procedures are calculated to ensure SBI agents do not violate the guidelines.

> ***"Carelessness in conducting consent searches both endangers civil liberties and risks the loss of a valuable investigative tool."***

Lessons To Be Learned

It is crucial for law enforcement officers to understand the inherent intimidation they convey. Psychologically, letting any unexpected "guest" into one's home can represent a kind of intrusion. As one law professor commented, "For most people, a consent search is preferable. [However,] very few people would be able to resist a law enforcement request for a search. It's astonishing the number of times people who have contraband in their possession consent to a search."[8]

Consent searches neither technically nor actually erode the fourth amendment's protection against unreasonable search and seizure. Even so, officers should inform citizens of their right to refuse a search, although they are not required to do so.[9] There is no advantage gained by threatening to get a warrant and "come back in a bad mood." Such a threat would be disrespectful and unlawful. And, speaking practically, why use a threat that would invalidate a subsequent consent?

In determining the meaning of voluntary consent, however, law enforcement must accommodate two competing concerns—the legitimate need for consent searches and the requirement of ensuring the absence of coercion. For example, during Operation Green Merchant, consent searches were conducted to look for large objects in plain view. If sufficient evidence was noted in such a cursory search, officers would then seek a warrant to search more carefully. This action conformed to the standards of reasonableness required by the legal

system, and the consent searches allowed officers to check the validity of articulable suspicion in the least intrusive or disruptive way. With a consent search, if nothing suggesting illegality is in plain view, law enforcement's investigative interests are satisfied.

Conclusion

Drugs have taken over the American political agenda. Law enforcement must operate in a complex legal and social environment now further complicated by the national desire to resolve the drug problem easily and quickly. But, civil liberties should not be compromised to mollify those demanding increased drug arrests. As Supreme Court Justice Thurgood Marshall warns, "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[10]

Law enforcement, therefore, must continue to follow the clearly established procedures that have earned it the respect and trust of the public. We are expected to safeguard everyone's rights, and we know better than to try to find shortcuts to justice.[11] We must take this responsibility seriously. We must behave as true professionals. One way to do this is to underscore the importance of conducting consent searches in a careful and sophisticated manner.

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Footnotes

[1] *See* "When The Cops Knock," *The Raleigh News and Observer*, October 31, 1989.

[2] "Drug War Tactics Favored," *Charlotte Observer*, February 28, 1990.

[3] Aaron Epstein, "Worried Public Backs Court Restrictions On Personal Freedoms," *The Raleigh News and Observer*, June 3, 1990.

[4] Ibid.

[5] *See, e.g.*, John Gales Sauls, "Curtilage: The Fourth Amendment in the Garden," *FBI Law Enforcement Bulletin*, vol. 59, No. 5, May 1990, pp. 26-31.

[6] Charles J. Ogeltree, "Are Confessions Really Good For the Soul? A Proposal to Mirandize Miranda," *Harvard Law Review*, vol. 100:1826, 1987.

[7] Under such circumstances, officers are cautioned to keep the existence of the warrant to themselves so that it will not taint the consent. *See Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

[8] Barry Nakell, law professor at the University of North Carolina at Chapel Hill, quoted in *The Raleigh News and Observer*, October 31, 1989.

[9] *See Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). In an opinion by Justice Stewart, expressing the views of six members of the Court, it was held that the question whether consent to a search was voluntary was to be determined from the totality of all the circumstances; that it was unnecessary for the State to establish that the person who consented to the search knew that he had a right to refuse such consent; and that the requirement of a knowing and intelligent waiver of constitutional rights, while applicable to constitutional guarantees involving the preservation of a fair trial for a criminal defendant, was not applicable to the fourth amendment guarantee against unreasonable searches and seizures.

Justice Brennan dissented on the grounds that a person cannot effectively waive his fourth amendment right to be secure against an otherwise unreasonable search, where he is unaware that in the absence of his consent, such an invasion of his privacy would be constitutionally prohibited. Justice Marshall dissented on the grounds that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent and that any fair allocation of the burden of proof would require that the prosecution show that the subject knew of his rights.

[10] Seth Mydans, "The Drug War and Civil Liberties," *The Raleigh News and Observer*, October 22, 1989.

[11] *See Mapp* v. *Ohio*, 367 U.S. 643 (1961). "However much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves the tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."

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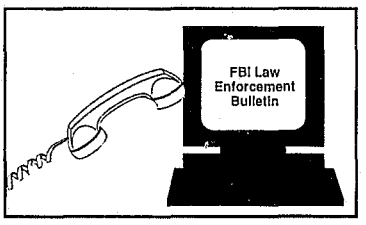

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