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INTRODUCTION

It is difficult today to imagine that scarcely thirteen years ago the subject of search and seizure by state police had received scant judicial attention. When these police practices were scrutinized at all it was generally in civil actions instituted by the aggrieved, not in criminal justice administration.[1] There is, in fact, nothing inherent in the fourth amendment[2] which would forecast that its growth and application should occur peculiarly within the sphere of the criminal process. It could have, perhaps with less agonizing, continued to unfold as a tort doctrine. It may turn back in that direction yet.[3]

The advent of the exclusionary rule in *Weeks v. United States*[4] as the enforcement technique of the fourth amendment drew federal police conduct under judicial scrutiny and commenced the experiment which the Warren Court ultimately imposed on the states in *Mapp v. Ohio*.[5] It signalled that search and seizure would henceforth evolve as a "criminal law" concept. Although *Mapp* indicated

* The author expresses grateful acknowledgement to Phillip B. Harrison for his invaluable research assistance and to Wayne R. LaFave whose excellent article, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255 (1966), formed the conscious, and, I am sure, subconscious foundation for this piece.

1. Mapp v. Ohio, 367 U.S. 643, 651 (1961).

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

U.S. CONST. amend. IV.

3. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1970) (Burger, J., dissenting).

4. 232 U.S. 383 (1914).

5. 367 U.S. 643 (1961).

the Court was not reluctant to assume a more active role in state criminal justice matters, the decisions in *Ker v. California*[6] and *Aguilar v. Texas*,[7] holding that the standards of "probable cause" and "reasonableness" developed by federal courts were constitutionally mandated and thus applicable to the states, augured a swift and total federalization of this major aspect of state police practice.

The development of a set of legal principles through the vehicle of criminal cases is usually rapid and tortured—rapid due to the sheer number of such cases and the minimal marginal cost and effort of interposing additional theories of prosecution or defense, and tortured because the freedom of a man and the potential freedom and safety of others is almost always at stake. In the administration of the exclusionary rule, another element adds to the judicial agony—when the rule is successfully invoked it results, of course, in the exclusion of relevant, often crucial, evidence. The theory, clearly, is that the value of the general deterrence exceeds the value of admitting unlawfully seized evidence in any given case. Those who administer the rule, however, do not uniformly assess the wisdom of this trade-off, which is understandable: one result is visible, the other speculative.[8]

Regardless of one's political opinion as to the direction the Warren Court traveled, one must marvel at the distance. And almost before the contours of that development could be assessed, the Burger Court has begun the process of retrenchment. Whether this ultimately remains an encirclement of Warren Court decisions or becomes a disassembling process is speculative, but it seems relatively certain that this Court, no less than the last, will be active in this sphere.

PURPOSE

The thrust of all this is not to trigger an evaluation of past decisions or predictions of the future, but to illustrate why a working knowledge of search and seizure law today is so elusive. The explosive development and uncertain future in the area often intimidates those who seek to learn, to practice or, if confessions are in order,

6. 374 U.S. 23 (1963).
7. 378 U.S. 108 (1964).
8. *See generally* La Fave, *Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255 (1966) [hereinafter cited as LaFave].

to teach in this area. Not only is the case material voluminous, but search and seizure cases have a marked tendency to collide with no apparent injuries. The concepts of "probable cause," "reasonableness," "warrant" or "warrantless" searches seem to present endless permutations. Research in a search and seizure problem too often assumes characteristics of crime investigation in which many auspicious leads untimately prove fruitless.

This piece is intended to serve three limited ends: (1) to summarize the current status of the law of arrest, search and seizure, and to identify potential trends; (2) to offer some of the leading rationales often urged for either side in the continuing tension between the needs for law enforcement and for individual privacy;[9] and (3) to place the law and its rationale within a methodology calculated to render solution of fourth amendment cases more orderly. It is hoped such methodology will enable the reader quickly to isolate the cases and theories apposite to a given fact situation.

Since the main intent is not to argue for any particular position, an attempt has been made to remain objective in reporting the various theories involved. In many cases, however, the attempt has been largely unsuccessful due to hopeless addiction to certain essentially political beliefs.

METHODOLOGY

The method of attack, stated briefly, is a series of questions to be answered or avoided depending on the answers to prior questions. Outlined, the process is as follows:

I. *Does the subject police conduct constitute a search*? If not, there is no fourth amendment violation. If so, proceed to II.
II. *Did "probable cause" for such search exist*? If so, proceed to III. If not, proceed to V.
III. *Was the search conducted pursuant to a valid warrant*? If so, valid search. If not, proceed to IV.
IV. *Does the case fit an exception to the warrant requirement*? If so, valid search. If not, proceed to V.

9. The word "reasonable" in the fourth amendment is crucial as it permits the courts to conduct a balancing process. *See, e.g.*, Camara v. Municipal Court, 378 U.S. 523, 536-37 (1967).

V. *Does the case fit an exception to the probable cause requirement*?[10] If so, valid search. If not, invalid search.

When following this process, two crucial major premises must be kept in mind. First, when any police conduct is based in whole or part on past police conduct, the earlier conduct itself must be valid. For example, assume a police officer views contraband material within a house, incorporates such information into a warrant and pursuant thereto searches the house and seizes the evidence. The search pursuant to the warrant appears to be valid under III. However, since the "probable cause" which underlies the warrant is based on prior police conduct, that conduct itself must first be examined through the same process. If the initial observation constituted an invalid search, its fruits may not form any necessary component of a subsequent search.[11]

Second, although the state must show a lawful basis for the search free from prior unlawful conduct, it need show *only one* such lawful basis. For instance, assume an officer with probable cause to search an automobile obtains a formally defective warrant. The failure of the warrant requires a negative answer to III, and yet the search may be valid under IV pursuant to a well-recognized warrant exception relating to automobiles.[12] This would result even had the officer subjectively relied on the warrant as indispensable to a valid search. A search, therefore, cannot be dismissed as invalid until every possible basis is excluded.

Certain threshold problems are outside the scope of this article. The presence of the requisite state action and the defendant's standing to challenge the subject police action are presumed.[13]

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10. Since the fourth amendment in part provides ". . . no warrants shall issue, but upon probable cause . . . ," it would seem initially that only warrantless searches could qualify under Section V. This is true when "probable cause" is given its traditional meaning as described *infra* in Section II. Recently, however, the Court has found, in the administrative search area, that "probable cause" in a different sense may exist for a search. Camara v. Municipal Court, 387 U.S. 523, 538 (1967). The term "probable cause" in the headings for Sections II and V is employed in its traditional sense. The administrative search cases are an exception to "probable cause" in that sense.

11. *See* United States v. Soviero, 357 F. Supp. 1059 (S.D.N.Y. 1972); Wong Sun v. United States, 371 U.S. 471 (1963).

12. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court, after striking down search warrants, considered whether the searches could be upheld under a warrant exception.

13. On the standing issue, *see* Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); and Jones v. United States, 362 U.S. 257 (1960).

I. DOES THE SUBJECT POLICE CONDUCT CONSTITUTE A SEARCH?

Anterior to inquiries about the "reasonableness" of, or "probable cause" for, a search is the question of whether the conduct in issue can be characterized as a search at all. Clearly not all police observation or surveillance need be tested against the fourth amendment.

A. THE BASIC TEST—*Katz v. United States*

The fourth amendment guarantees the people's right to be secure in their "persons, houses, papers and effects." This language may be viewed either as establishing a certain broad sense of privacy illustrated by example or as setting forth a finite set of categories within which police cannot intrude. Until 1967, the Court acted primarily on the latter assumption and, since the constitutional words revolved around property concepts, the decisions did likewise.[14]

14. There were, to be sure, cases earlier than *Katz* which dealt in broader terms with the concept of search, e.g., Lanza v. New York, 370 U.S. 139 (1962); yet in *Katz*, for the

While the residence structure itself is clearly covered by the fourth amendment,[15] the Court held that "open fields" were not included in "house" even though such fields formed a portion of the homestead tract owned by defendant.[16] Later decisions held open land to be protected if within the "curtilage" of the dwelling house.[17]

Similarly, the nature of police intrusion was governed by property principles. Placing a listening device in one's home was considered a "search," but if the device were placed outside the subject area to monitor conversations within, there was no "trespass" and hence no "search."[18]

Against this backdrop came *Katz v. United States*.[19] FBI agents, with probable cause to suspect Katz of gambling violations, but without a warrant, placed a "bug" on the top of a public telephone booth from which Katz was placing a call. So completely intertwined with property concepts had search law become, that petitioner formulated the issues to the Supreme Court as follows:

> A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.[20]

The Court expressed surprise at "the misleading way the issues have been formulated" indicating that "the correct solution to Fourth

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first time, the Court espoused a definitive test for searches not based on traditional property concepts.

15. Weeks v. United States, 232 U.S. 383 (1914).

16. Hester v. United States, 265 U.S. 57 (1924).

17. The "curtilage" at common law was that portion of the "mansion house" tract included within a fence, though later it included all portions which would be included within a reasonable fencing. "Curtilage" had significant application in the common law of burglary to define "dwelling house." *See* W. LaFave & A. Scott, Handbook on Criminal Law 712 (1972). Suffice it to say that the word "curtilage" imports an area so closely connected in space and function with a building as to be considered part and parcel thereof.

18. Olmstead v. United States, 277 U.S. 438 (1928).

19. 389 U.S. 347 (1967).

20. *Id.* at 349-50.

Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' "[21] Whether or not the parties were entirely to blame for this incantation, the Court was prepared to announce a radical departure from the property-centered approach to the demarcation of the outer periphery of "searching." The Court in *Katz* began to read the fourth amendment as importing only a sense of what conduct is prohibited, and declared "the Fourth Amendment protects people, not places."[22] In discounting the necessity of trespass, the Court held that the government had intruded upon the privacy on which Katz "justifiably relied."[23] This test, often phrased as a "reasonable expectation of privacy,"[24] today constitutes the central inquiry in determining whether police conduct is a "search." Mr. Justice Harlan's concurring opinion immediately challenged the workability of the majority's test.

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place."[25]

He then acknowledged that the majority had propounded a two-fold requirement—that the expectation of privacy be (1) "actual" (subjective) and (2) "reasonable" when measured against contemporary societal values (objective).[26] Stated another way, there must *be* an expectation, and the expectation must be justifiable.

Although *Katz* does not obviate the necessity to evaluate a "place," it does broaden the inquiry to places not expressly stated in the fourth amendment. Indeed, the fluid approach in *Katz* may justify the substitution of "context" for "place."

Katz introduces another variable into the formula for delineating the outer limits of the fourth amendment. The government argued that since the telephone booth was made of glass, petitioner

21. *Id.* at 350.
22. *Id.* at 351.
23. *Id.* at 353.
24. *Id.* at 360 (Harlan, J., concurring).
25. *Id.* at 361 (Harlan, J., concurring).
26. *Id.* (Harlan, J., concurring). Since "society's" evaluation of "reasonableness" is difficult to ascertain, this requirement will ultimately depend on the courts' evaluation of "reasonableness."

should not have considered it a private place. The Court recognized that Katz had "sought to exclude" not the "intruding eye" but the "uninvited ear."[27] The implication is that visual observation of Katz in the phone booth was not a "search" since he entertained no justifiable expectation not to be *viewed*, but only from being *overheard*.[28]

One should firmly keep in mind that a finding of "justifiable expectation of privacy" in a given place at a given time does not mean that the police may not invade such place. It means only that if they do they are conducting a "search" and *all* searches must be reasonable. Conversely, if the subject police conduct is not a search, it is irrelevant to fourth amendment concerns that such conduct is unreasonable.

B. Justifiable Expectation

Katz, then, suggests that courts should assess fact situations in this area by reference to:

1) the "place" or context into which the police intrude;
2) the nature of the actual intrusion;
3) the defendant's subjective expectation of privacy in *such* place from *such* intrusion;
4) the reasonableness of such expectation in accordance with societal norms.

Several post-*Katz* cases in state and lower federal courts have dealt with situations in which the defendant exhibited a surrender of his expectation of privacy and several have turned on the type of intrusion involved where the intrusion was unforeseeable, or even bizarre.[29] Most, however, focus on elements (1) and (2). The threshold question, then, is: In a given place, does a person have a justifiable expectation of privacy? The primary organizing focus is still "places."

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27. *Id.* at 352.

28. What if a policeman, watching Katz, had read his lips? It would seem since the intrusion is visual, it should not be considered a search. Perhaps the case of seeing what one says is similar to hearing what one does, as where an officer hears sounds emanating from a dwelling indicating that evidence is being destroyed. In those cases even though the officer may not have been initially permitted to enter, when he obtains a "plain hear" prior to physical intrusion, such may not be considered a search.

29. *See* subsections I C and I D *infra*.

1. *"Houses," the "Curtilage," "Open Fields"*

It is indisputable that absent unusual circumstances physical intrusion into the home is a search, just as it was prior to *Katz*.[30] So strong is the protection in this area that one court holds it to survive substantial destruction of the home by fire.[31] The only decision treating police entry into a house as less than a "search" involved a delinquent tenant who, the Court held, had abandoned the house's protection notwithstanding some residual rights under state property law.[32]

The "open-field" doctrine of *Hester v. United States*[33] has, surprisingly, retained vitality in the wake of *Katz*. In *Saiken v. Bensinger*[34] the police, acting on a tip, dug up several sections of defendant's twenty-acre farm looking for a buried body. The Seventh Circuit remanded for a determination of "distances between the various structures and the location of the body, the occupancy of buildings and trailers"[35] evidencing a clear adhesion to the "curtilage" concept. Similarly, the Fourth Circuit held the entrance of AFT officers onto defendant's land on an investigatory mission not a search, stating:

> [I]t is a bit disquieting that we must countenance federal snooping around farmers' barns as a legitimate investigative technique. There must surely be a better way than *Hester*-type trespass but it is not readily discerned in light of the strict standards for the issuance of search warrants . . . .[36]

This apologetic application of *Hester* imports a tacit assumption that it survived *Katz* intact. It is curious that the Court did not inquire as to whether society sympathizes with one's expectation of privacy to his entire homestead tract without reference to the "curtilage."

It is interesting to note that courts have generally been careful

30. United States v. Matlock, 94 S. Ct. 988 (1974); Coolidge v. New Hampshire, 403 U.S. 443 (1971).
31. People v. Dajnowicz, 43 Mich. App. 465, 204 N.W.2d 281 (1973).
32. United States v. Wilson, 472 F.2d 901 (9th Cir. 1973).
33. 265 U.S. 57 (1924).
34. 489 F.2d 865 (7th Cir. 1973).
35. *Id.* at 868-69.
36. United States v. Brown, 487 F.2d 208, 210 (4th Cir. 1973).

to apply the *Katz* analysis to "places" which, because of the strict reading of the fourth amendment prior to *Katz*, had never been thought of as private, but at the same time to adhere closely to pre-*Katz* decisions which defined "house" at a time when that definition was considered crucial.

2. *Other "Private" Places*

In addition to homes, offices[37] and hotel rooms[38] are places where one's expectation of privacy is clearly justifiable. Automobiles, except where the intrusion amounts to no more than looking through windows or examining the exterior for identification purposes,[39] are likewise given protection in this sphere.[40]

Certain areas are within the fourth amendment's protection because they are inherently private. Thus, intrusion into a woman's purse has been deemed a search,[41] presumably both because it is an extension of the person and because, like a man's pocket, it is a traditional receptacle for highly personal items. Similarly, the California Supreme Court recently held a public restroom stall to be a place "which is ordinarily understood to afford personal privacy to individual occupants."[42] Testimony indicated that police had often secreted themselves in the plumbing access room to view suspected criminal activity within stalls. The court expressed shock that "private parts and bodily functions are being exposed to the gaze of the law"[43] on mere suspicion. While hallways and semi-public buildings such as office buildings or apartments are generally not "protected places," the actual pattern of usage may render them so.[44]

37. Marron v. United States, 275 U.S. 192 (1927).

38. Stoner v. California, 376 U.S. 483 (1964). Likewise as to a room in a boarding house, McDonald v. United States, 335 U.S. 451 (1948).

39. United States v. Powers, 439 F.2d 373 (4th Cir. 1971); United States v. Polk, 433 F.2d 644 (5th Cir. 1970); United States v. Johnson, 413 F.2d 1396 (5th Cir. 1969), *aff'd*, 431 F.2d 441 (5th Cir. 1970).

40. *See* cases collected in United States v. Powers, 439 F.2d 373 (4th Cir. 1971).

41. State v. Hough, ___ Mont. ___, 516 P.2d 613 (1973).

42. People v. Triggs, 8 Cal. 2d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973).

43. *Id.* at ___, 506 P.2d at 238, 106 Cal. Rptr. at 414.

44. Thus, in State v. DiBartelo, ___ La. ___, 376 So.2d 291 (1973), the Louisiana Supreme Court held that the hallways of an apartment building were protected since all tenants were issued keys to an outside door which was kept locked and since the hallways were used to gain access to common bathroom facilities.

Other "places," however, generate closer questions of societally authorized expectations of privacy. Three state supreme courts have addressed the issue of whether one retains a reasonable expectation of privacy in materials discarded in trash containers. Arizona refused such protection declaring that the action of discarding material constitutes an abandonment.[45] Alaska reached the same result but there were indications in that case that defendant had evidenced a total lack of subjective expectation of privacy.[46] Only California has recognized a justifiable expectation of privacy in trash "at least . . . until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere."[47] While this decision rested in part on the ground the trash can was within the "curtilage," language in the opinion and a more recent case[48] make it clear that an expectation of privacy in trash stands on its own. Even though discarding trash may be an abandonment of property rights, such fact is not, since *Katz*, dispositive of the privacy issue. It is not at all inconsistent to suggest that an individual may no longer desire to possess property yet desire also that others do not rummage through what he discards.

Several cases have held that it is not reasonable for a prisoner to consider his cell private. In *Lanza v. New York*, decided prior to *Katz*, the Supreme Court said:

> [I]t is obvious that a jail shares none of the attributes of privacy of a house, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.[49]

This language would appear to survive *Katz*, and one circuit has so held.[50]

C. The Nature of the Intrusion

Katz suggests that the "reasonable expectation" issue may depend in certain instances on the intrusion actually suffered. As police activity moves from casual observation toward elaborate

45. State v. Fassler, 108 Ariz. 586, 503 P.2d 807 (1972).
46. Smith v. State, 510 P.2d 793 (Alaska 1973).
47. People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).
48. People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
49. 370 U.S. 139 (1962).
50. United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972).

prying, society becomes more sensitive to matters of privacy. This principle has been recognized both in visual observation and auditory intrusion.

1. *Visual Searches*

In determining whether visual observation constitutes a search, courts have looked to two variables as organizing principles—(1) the extent of police effort and ingenuity necessary to obtaining the desired view and (2) the presence or absence of artificial devices to aid in observation.

It must be recognized initially, however, that the range of cases in which such considerations become necessary is narrow. In certain areas the most elaborate kind of investigation is not a search, and in others, the most casual glance is. For example, digging large sections of earth in an attempt to locate a buried body certainly seems to be "searching." When the entire process occurs in an "open field," however, it is not so considered—not because "looking" and "digging" is not "searching," but because the place is not entitled to fourth amendment protection.[51] On the other hand, a policeman in a private home who casually observes contraband in "plain view" on a tabletop is engaged in a search—not because an inadvertent glance is necessarily searching, but because both the policeman and the contraband are within a clearly protected area.[52] It is, then, only in that range of cases in which the expectation of privacy is neither clearly reasonable nor clearly unreasonable that the form of intrusion may be significant. The most prevalent type of such situation involves a policeman standing in an "unprotected area" looking into a "protected area."

In *United States v. Hanahan*,[53] police officers, investigating a tip that a garage was being used for a "cut-shop," and standing either on a public alley or an adjacent unfenced apron, observed through the open service door window the defendant disassembling an automobile. The court noted that "the interior of the garage was clearly visible through the open overhead door from the outside of

51. *See* note 34 *supra*.

52. The validity of this "plain view" observation will depend on whether the policeman has violated the defendant's fourth amendment rights by being in the house in the first place. *See* Section V G *infra* for discussion of the "plain view" doctrine.

53. 442 F.2d 649 (7th Cir. 1971).

the building"[54] and concluded that any expectation of privacy would thus be unreasonable. *Lorenzana v. Superior Court*[55] involved a police officer standing on a strip of land not open to the public, peering into defendant's home through a two-inch gap between the window shade and sill. The officer testified that he could see nothing until he pressed to within "five or six inches" of the window. The Court held such activity a "search," noting that nothing in the topography or function of the area would "lead the public to within six inches of the window."[56] More important, however, the Court characterized the police action as "spying" since it required such precise positioning and concluded:

> Surely our state and federal Constitution and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box. The shadow of 1984 has fortunately not yet fallen upon us.[57]

This language suggests that the same result may be reached even were the window located on a public sidewalk. Although it is foreseeable that the public would pass the window, the expectation that no one would go through the requisite gyrations in order to see in is arguably justifiable. In *Cohen v. Superior Court*,[58] a police officer looked into defendant's fourth-floor apartment from the fire escape. The Court remanded for a consideration of "the customary use or non-use of the fire-escape platforms for purposes other than emergency escape," indicating that such facts bore heavily on the reasonableness of any expectation of privacy.[59]

The use of artificial devices to aid in observation tends to elevate the intrusiveness of police observation. The use of a flashlight, telescope or binoculars in a borderline situation may be crucial. However, courts have not consistently treated such artificial means as relevant. For example, in connection with flashlights, the Fifth Circuit has stated categorically that "the use of a flashlight does not

54. *Id.* at 653.
55. 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973).
56. *Id.* at ___, 511 P.2d at 36, 108 Cal.Rptr. at 588.
57. *Id.* at ___, 511 P.2d at 41, 108 Cal. Rptr. at 593.
58. 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970).
59. *Id.* at ___, 85 Cal. Rptr. at 358.

transmute what would be plain view in daytime to a search."[60] Conversely, Judge Skelley Wright has observed, "certainly a flashlight is not standard equipment for 'any curious passerby' . . . ."[61]

Because *Katz* essentially posits a balancing test, which leaves courts somewhat free to assign varying weights to the components to be balanced, the decisions in this sphere are often difficult to reconcile. For example, a federal court has held that officers viewing and photographing marijuana growing in defendant's yard from a neighbor's porch were not conducting a search notwithstanding evidence indicating that the officer had to stand on his toes or a box or lean "around the side of the partition" to see the marijuana growing "in plain view" behind a stake fence "approximately six feet in height and overgrown with vines and bushes."[62] A California court, however, has held that an officer who squeezed between defendant's fence and an acquiescing neighbor's garage to view growing marijuana was conducting an unreasonable search without the necessity of reaching the added fact that the police used a telescope.[63]

The endless possibilities of such factual settings and varying reactions of courts makes it difficult to evaluate the status of the law in this area in any way other than highlighting the types of factors the court may include in the balance. To say that a person entertains a reasonable expectation of privacy compels the question: "From whom?" At the extremes, case law demonstrates a citizen must protect himself from the inadvertent gaze of the policeman just "passing by" but not from one whose activities would pierce all but the "light-tight air-proof box." Perhaps it is not too cavalier to suggest that one need protect his privacy from the reasonably zealous policeman.

2. *Auditory Searches*

Although the rule of *Katz* applies to all types of intrusive conduct, the fact that it involved a listening and recording device gave it a more concrete impact in the "auditory search" sphere, seriously calling into question a number of prior court decisions.

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60. Marshall v. United States, 422 F.2d 185 (5th Cir. 1970).

61. *See* L. HALL, Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 54 (Supp. 1973).

62. United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972).

63. People v. Fly, ___ Cal. App. 3d ___, 110 Cal. Rptr. 158 (1973).

a. The "Misplaced Belief" Cases

The decision in *Katz* called into question the continued validity of three earlier cases dealing with auditory intrusion—*Hoffa v. United States*,[64] *Lopez v. United States*[65] and *On Lee v. United States*.[66]

In *Hoffa*, Partin, a government agent, had managed to become a trusted associate of defendant and was therefore privy to a number of incriminating statements made during those conversations by Hoffa and others. The Court held that even though some of these conversations took place in a "protected place" (hotel room), the agent's listening did not constitute a search. Defendant, said the Court, "was not relying on the security of his hotel suite" vis-à-vis Partin, but on a "misplaced belief" that Partin would not reveal the statements.[67] Quoting an earlier decision, the Court concluded:

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the condition of human society. It is the kind of risk we assume whenever we speak.[68]

In *Lopez*, decided before *Hoffa*, the government agent in which defendant misplaced reliance was wearing a device which recorded defendant's incriminating statements. The Court held the use of such device was not "eavesdropping" or a "search" since it did not permit the government to hear anything it "could not otherwise have heard."[69]

In *On Lee* a government agent and former employee of defendant spoke with him at his laundry. The agent wore a microphone which transmitted the conversation to another agent, Lawrence Lee, stationed outside the laundry. Lee testified to what he had heard. The Court noted that defendant was "talking confidentially and indiscreetly with one he trusted, and . . . was overheard."[70] The

64. 385 U.S. 293 (1966).
65. 373 U.S. 427 (1963).
66. 343 U.S. 747 (1952).
67. 385 U.S. 293, 302 (1966).
68. *Id.* at 303.
69. 373 U.S. 427, 440 (1963).
70. 343 U.S. 747, 753-54 (1952).

case is substantially different from *Hoffa*, since the crucial intrusion was not committed by the "trusted" person, but by another in whose discretion defendant placed no trust. The Court, notwithstanding a constructive trespass by Lee through the device, reasoned that the use of the device had "the same effect on [defendant's] privacy as if [agent Lee] had been eavesdropping outside an open window."[71] The Court analogized use of listening devices to sight-aiding devices and concluded: "The use of bifocals, field glasses or the telescope to magnify the object of a witness's vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions."[72] Finally, the Court held that labelling eavesdropping a "search" was a "farfetched analogy."[73]

One could reasonably have inferred after *Katz* that *On Lee* and *Lopez* had no vitality and that *Hoffa* was questionable authority. However, in *United States v. White*,[74] the Court held that *all* had survived *Katz*.

> *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.[75]

Having thus reaffirmed the basic underpinning of *Hoffa*, the Court continued:

> If the law gives no protection to the wrongdoers whose trusted accomplice is or becomes a police agent, neither should it protect him when the same agent has recorded or transmitted the conversations . . . .[76]

The results of *On Lee* and *Lopez* were therefore reaffirmed. Now, however, they do not rest on the nontrespassory nature of the intrusion, since *Katz* clearly buried that distinction, but rest instead on

71. *Id.* at 754.
72. *Id.*
73. *Id.*
74. 401 U.S. 745 (1971).
75. *Id.* at 749.
76. *Id.* at 752.

the "misplaced belief" rationale of *Hoffa*.

In one sense this reasoning is at odds with *Katz*'s recognition that an expectation of privacy in a given place may be reasonable vis-à-vis one intrusion but not another. Had *Katz* been overheard by a policeman standing outside the phone booth, rather than by a "bug," or if the case turned on what someone saw inside the glass phone booth, the considerations would have been much different.

It is possible, though, that the nature of the intrusion is deemed important only when it bears on the *extent* of intrusion. The extent of intrusion in *White* is greater than that in *Hoffa* only in the sense that the conversation is memorialized in a more trustworthy way. The agent listening to the transmissions hears no more than the agent physically present. The same would not be true of a device which magnifies a sound the naked governmental ear cannot hear. To analogize to visual searches, binoculars, telescopes and flashlights all augment the ability to see and therefore intrude more than the naked eye. A camera does not—it merely makes permanent the scene visible by the naked eye. Mr. Justice Harlan, dissenting in *White*, however, felt it was this very infallibility of recording devices which increased the intrusiveness of the government's activities:

> Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.[77]

The Ninth Circuit has extended the *White* rationale to a nonwarrant wiretap with the consent of one party to the conversation.[78]

These extensions of *Hoffa* appear to wrench it off its base. *Hoffa* rests on the proposition that the risk of placing confidence in the wrong persons is one "we necessarily assume whenever we speak."[79] Thus, an expectation that he will not later report such conversation is not justifiable. These later cases are built on a premise, if only tacit, that persons have no justifiable expectation that any given conversation is not being recorded or intercepted. It is hoped that our society has not reached the point where such risks are "necessarily assumed whenever we speak."

77. United States v. White, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting).
78. Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973).
79. 385 U.S. 293, 303 (1966).

b. Eavesdropping

Less frequently, cases arise in which no party to a conversation is participating in any way for the police, but such conversation is "overheard."[80] The relevant considerations in such cases should be essentially the same as those in the visual search area. In *United States v. Fisch*,[81] agents checked into a motel room adjoining the defendant's and listened at the connecting door. In holding such activity was not a search, the Ninth Circuit pointed out that the conversation became "loud and heated" and could be heard from the middle of the adjoining room. The court held that any expectation, even if actually entertained, is outweighed by the "public interest in law enforcement," and therefore not justifiable.[82] Finally, the court advanced a "total atmosphere" approach in which the following factors are to be considered:

1) the place
2) the presence or absence of "trespass"
3) the presence or absence of artificial means of probing
4) the gravity of the offense[83]
5) the type of information received from the surveillance.[84]

Thus, "reasonable expectation" is the most prevalent factor in the *Katz* inquiry, although other factors have played a major role as well.

D. Subjective Expectation

There have been very few post-*Katz* cases decided on the absence of actual or subjective expectation of privacy, though courts have occasionally urged such as alternative grounds.[85] This lack of

80. It is clear that electronic eavesdropping, in the absence of consent which may trigger the "misplaced belief" exception, is a "search" and therefore subject to the fourth amendment. Katz v. United States, 389 U.S. 347 (1967); United States v. Kahn, 94 S. Ct. 977 (1974). To be "reasonable" such searches must be conducted only upon probable cause and, with few exceptions, pursuant to search warrant or court order.

81. 474 F.2d 1071 (9th Cir. 1973).

82. *Id.* at 1077.

83. *See* Section I E 1 *infra* criticizing the inclusion of this factor in any *Katz* inquiry.

84. The Supreme Court has repeatedly stressed that the fruits of a search cannot be used to justify the search. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963). It follows that the fruits of police conduct should not be referred to in determining whether conduct is a "search."

85. *See, e.g.*, Smith v. State, 510 P.2d 793 (Alaska 1973).

case law is understandable both because most people depend on privacy and because the absence of an expectation which society deems reasonable is very much like a waiver since the individual *has* a right to privacy yet surrenders it. Without clearly so expressing, courts appear to indulge the *presumption* that an individual may expect privacy in any context in which society would deem that expectation reasonable. It would seem that evidence of affirmative surrender should be required. Since the reported cases all deal, of course, with an individual who "had something to hide," it is not surprising that such surrender cannot normally be demonstrated.

E. The Overlap of *Katz* and Other Issues

Courts have tended to confuse the *Katz* issue with several other search and seizure concepts which are referable to different interests. All of these conflicts present conceptual difficulties, but one in particular, which is dealt with first, by focusing on irrelevant considerations, tends to yield improper results.

1. *Degree of Suspicion*

Several courts have considered the degree of suspicion an important variable in the expectation issue.[86] This reasoning misplaces the emphasis. Degree of suspicion, more particularly concepts of "probable cause," "reasonable suspicion," "clear indication" and others, is often relevant in assessing the *reasonableness* of a search. The need to intrude increases with the probability of criminal enterprise and thus becomes more reasonable. Most search and seizure cases therefore focus on police conduct. *Katz* does not. It deals with a question wholly from the standpoint of the defendant—what was his *expectation* of privacy and was it justifiable. One's expectation of privacy is not a function of his innocence and to suggest that society's recognition of his expectation depends on his suspiciousness is very much like saying that certain rights should not be extended to "guilty" persons. Even insofar as *Katz* suggests examination of the nature of the intrusion, it does not suggest that the *reasonableness* of such intrusion is relevant but only its foreseeability—again an approach through the eyes of the defendant. The confusion that must result from confusing the "rea-

86. United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973); People v. Dumas, 9 Cal. 2d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).

sonableness" of a search with the existence of a search is amply demonstrated in *People v. Dumas*, in which the Court states: "Still other sites [referring to "open fields"] are regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency."[87] The choice of the noun "search" is illustrative of the problem.

Similarly, the Ninth Circuit has suggested that the gravity of the offense should be considered.[88] It seems elementary that one's right to privacy cannot depend on what it is he keeps private.[89]

2. *Third-Party Consent*

The Illinois Supreme Court has recently held that the validity of third-party consent to police intrusion should be judged by reference to the reasonable expectation of the defendant that such consent would not be given.[90] This application of *Katz* appears to be superfluous and misleading. Theories of third-party consent,[91] whether based on agency or control theories, revolve primarily around issues of societally recognized expectations—*e.g.*, one should expect an agent to act in his absence, or one should expect that persons with joint control may consent to certain intrusions. The issue of a reasonable expectation of no consent is conceptually inseparable from the validity of such consent. In addition to being no more helpful in solving problems than traditional consent rules, the use of *Katz* in this context presents an additional problem. For example, assume a wife permitted the police to enter a closet she shared with her husband. Under consent theories, this may be a valid consent to a "search," but to argue that if the expectation of nonconsent is unreasonable, there is no "search" being conducted stretches that constitutional term beyond recognition.

3. *Plain View*

Casual observation by police in a public place has often been upheld under the "plain view" doctrine.[92] There certainly is no need

87. 9 Cal. 2d 871, ___, 512 P.2d 1208, 1216, 109 Cal. Rptr. 304, 312 (1973).

88. United States v. Fisch, 474 F.2d 1071, 1078 (9th Cir. 1973).

89. In some situations, the "reasonableness" of a search may bear some relation to the gravity of the offense being investigated. It is quite different, though, to suggest that one's reasonable expectation of privacy depends on what he does in a "private place."

90. People v. Nunn, ___ Ill. 2d ___, 304 N.E.2d 81 (1973).

91. *See* Section V B *infra*.

92. *See* Section V G *infra*.

for a "doctrine" to explain the validity of such activity. "Plain view" traditionally has arisen when the officer has *already* entered a protected area. Such cases then turn on the validity of the officers' presence in such place. If an officer sees contraband in "plain view" on a bedroom nightstand, the validity of such discovery depends primarily on the validity of his presence in the bedroom. If the entry were unlawful, the fruits of such entry are excluded. When a policeman opens a dresser drawer, the contents may be said to be in "plain view," and yet this is hardly of the same mold as observing the color or license number of an automobile on the street. Since the "plain view" doctrine does nothing more than affirm that the use of fruits of a search depend on its validity, it has no applicability in a setting where no search is being conducted. In short, if a policeman sees something in "plain view" in a public area, he has no need of the "plain view" doctrine.

II. IS THERE PROBABLE CAUSE FOR SUCH SEARCH?

If the subject police conduct is not a "search," further scrutiny is unnecessary for fourth amendment purposes. Once a "search" is established, the next inquiry is into "probable cause." This is not to say that the existence of probable cause is crucial to a valid search; however, resolution of the probable cause question at this stage will eliminate subsequent inquiry into irrelevant areas. For example, if no probable cause exists, examining the formal requirements of any warrant, or searching for exceptions to the warrant requirement would be fruitless—one need then only examine those areas where probable cause is not essential to the validity of a search.

The question "when does probable cause exist?" compels at least three sub-questions.

A. WHAT MUST BE PROBABLE?

As a leading writer points out, the question of whether something is probable requires the anterior determination of what that something is.[93] While the quantum and nature of components necessary to make "probable cause" for arrest or search are nearly the same, a given set of facts may render "probable cause" for one and not the other. Basically the arrest question is "Has a crime been

93. LaFave, *supra* note 8, at 260-61.

committed and has the arrestee committed it?" For a search, however, the question becomes, "Are the particular items sought sufficiently connected with criminal activity, and are they to be found in a particular place?" It must be noted that the latter inquiry does not require identifying any particular person as the suspected offender.[94]

B. How Much Cause to Believe is "Probable Cause" to Believe?

Just as "reasonable men cannot agree on what is a reasonable search,"[95] neither can they propound a working definition of "probable" in probable cause. No cases, no attempted definitions, define it; they only give a sense of what it is, helping us *find* it, but never knowing exactly what it is we have found. The Supreme Court has said that it exists when "facts and circumstances . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that . . . ."[96] This indicates the type of person to whom a thing must be probable, and as such is helpful, yet does nothing to quantitate "probable." Nor do mathematical concepts such as "more probable than not" or "50% or more probable" really explain case results. Nothing indicates that "probable" is a word of art at all—in fact, what one of "reasonable caution" in every day living treats as "probable" may ultimately be the best explanation, with one caveat. People tend to shade how "probable" is "probable enough" in accordance with the consequences both good and bad which are to follow from the determination. To drive downtown believing a particular movie is "probably" showing differs from putting one's hand on a transformer which is "probably" inoperative both because the potential detriment is small in the one and final in the other and because the utility in being entertained is less than the utility of repairing essential equipment.[97] Thus "probable cause" is ultimately referable to the competition of the individual's interest in being free of intrusion and society's interest in law en-

94. United States v. Kahn, 94 S. Ct. 977 (1974).

95. LaFave, *supra* note 8, at 255, quoting Thompson, *Illinois Search and Seizure Law, The New Treatise*, 11 DePaul L. Rev. 27, 27 (1961).

96. Carroll v. United States, 267 U.S. 132, 162 (1925).

97. It may be argued that "probable" is the wrong word in the transformer case, that "certain" would be more appropriate. Yet "certainty" in common usage is an amphibian as well—we talk of things being "more" or "less" certain than others, indicating that the amount of information we demand depends on what we plan to do with it.

forcement and crime prevention, a competition which forms the basis for the entire fourth amendment field.

Recognizing that these competing interests are at work influencing "probable cause" lends understanding of why certain factors, not really relating to "probability" in the strict sense, are deemed relevant variables in determining "probable cause." Occassionally courts refer to the relative gravity of an offense in determining the existence of probable cause.[98] In addition, there are sound indications that the intensity or duration of intrusion may bear on the probable cause question. It is well settled that these types of factors are to be utilized to determine "reasonableness"[99]—but whether articulated or not, they bear at least to some extent on the probable cause question as well.

C. WHAT "FACTS" AND INFERENCES MAY BE USED TO SHOW PROBABLE CAUSE?

Theoretically, when application for a search warrant is made, the magistrate, from facts contained in the affidavit or given to him orally, makes the probable cause judgment. In situations where no warrant is obtained, the police make such judgment. In either case the decision is reviewable through a motion to suppress. Such decision can be made only on (1) facts and (2) rational inferences therefrom.[100] "Conclusions" are improper unless based on facts known to the decision-maker. The Supreme Court has held, for example the statement that defendant was a "known bookmaker" cannot be used in determining probable cause absent a showing of the facts which make such status "known."[101] However, an assertion that an individual has been convicted before, or has a police record are "facts" and may properly be used, in connection with other facts, to establish probable cause.

The Supreme Court has demonstrated a very liberal attitude as to the requirements of factual components which are examined in

98. *See, e.g.*, People v. Morales, 22 N.Y.2d 55, 238 N.E.2d 307 (1968), *rev'd and rem'd*, Morales v. New York, 396 U.S. 102 (1969).

99. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968), discussed in Section V F *infra*, and Camara v. Municipal Court, 387 U.S. 523 (1967), discussed in Section V D *infra*.

100. LaFave, *supra* note 8, at 259 n.40, quoting People v. Lavendowski, 329 Ill. 223, 160 N.E. 582 (1928).

101. Spinelli v. United States, 394 U.S. 410 (1969).

connection with the probable cause question:

> In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[102]

There seem to be only two types of facts which cannot be employed: (1) facts having no probative value and (2) facts constituting fruits of prior illegal police activity.[103]

Any untainted fact, then, which has any tendency to prove the required conclusion may be used. The net effect of all such facts must render the necessary conclusion "probable." It has been held, for example, that reactions to police presence, such as fleeing or "freezing," while certainly not enough in themselves, may, when added to other facts, constitute probable cause for a search or arrest.[104] In addition, a policeman's expertise in making certain judgments—such as smelling marijuana—is itself a conclusion and must be based on facts, such as special schooling or extensive experience in drug detection.[105] Certain types of facts, however, deserve special consideration.

1. *Hearsay*

It is well settled that the police officer or magistrate may act on evidence which would, at a trial, be inadmissible hearsay.[106] Nor does the confrontation clause prohibit this.[107] However, in accepting a hearsay statement, facts must appear (and in the case of warrant applications, facts must be given to the magistrate) establishing a

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102. Brinegar v. United States, 338 U.S. 160, 175 (1948).

103. Wong Sun v. United States, 371 U.S. 471 (1963).

104. *See, e.g.*, Commonwealth v. Santiago, 220 Pa. Super. 111, 283 A.2d 709 (1971); McWilliams v. United States, 293 A.2d 33 (D.C. Ct. App. 1972); Sibron v. New York, 392 U.S. 40, 66 (1968); United States v. Peep, 490 F.2d 903 (8th Cir. 1974).

105. People v. Parisi, 46 Mich. App. 322, 208 N.W.2d 70 (1973).

106. Spinelli v. United States, 394 U.S. 410 (1969); Draper v. United States, 358 U.S. 307 (1959); United States v. Harris, 403 U.S. 573 (1971).

107. Confrontation need not occur at every point in the criminal process at which evidence is utilized. It need occur, of course, at some point prior to conviction. *See* California v. Green, 399 U.S. 149 (1970). Also, certain hearsay exceptions may obviate the need for confrontation at any point. Dutton v. Evans, 400 U.S. 74 (1970).

foundation for the declarant's competency.[108] These facts may come from other sources or the declarant himself. So if A tells the police, "D possesses heroin," the statement contains no facts indicating A's competency; but if A says "I saw D place heroin in his pocket," competency, for this purpose, is shown. In certain situations hearsay-on-hearsay has been accepted when the competency of both declarants is shown.[109] A tells police, "B told me that he saw D place heroin in his pocket." B is competent to state such because he viewed it; A is competent to report B's statement because he heard it. Recently, the Fifth Circuit accepted triple hearsay to aid in a probable cause determination.[110]

2. *Prior Police Record*

It is well accepted that one who has committed crimes in the past is more likely than one without a record to commit a crime in the future. Yet evidence of past criminal conduct, even convictions, is generally inadmissible at trial.[111] This is not due to a feeling that it is not probative, but that its probative value is small compared to the likelihood of prejudicial effect and misuse by the trier of fact. Simply stated, while both hearsay and evidence of prior criminal conduct have probative significance, jurors (and some judges) tend to amplify that significance (1) by ignoring those factors which diminish trustworthiness and (2) by drawing inferences which, because they spring largely from emotion, are often illogical.

Why, then, may such information form the basis for probable cause? Why is probable cause more like "practical considerations of everyday life" than considerations which involve "legal technicians?" The following factors, taken cumulatively, may explain this attitude.

First, hearsay and prior police conduct are more dangerous in a jury's hands than in a judge's. This clearly cannot suffice as the sole basis since there is no general exception to hearsay testimony at bench trials, although as a practical matter, much hearsay is

108. This is an outgrowth of the requirement of stating facts, not conclusions. The prosecution must show a factual foundation for the belief that such statements are trustworthy.

109. *E.g.*, Commonwealth v. Eilers, 503 S.W.2d 724 (Ky. 1973).

110. United States v. Romano, 482 F.2d 1183 (5th Cir. 1973).

111. United States v. Harris, 403 U.S. 572, 582 (1971).

admitted at bench trials. The fact that a *judge*, and not a jury, must ultimately decide the existence of probable cause based on given facts diminishes possibilities of abuse. It is true that police, in non-warrant cases, make the probable cause determination initially, and that police officers may tend to overweigh such facts; however, since their judgment is subject to review by a judge, such a tendency seems to argue more for the necessity of a warrant than for elimination of these types of facts in the probable cause determination.

Second, a primary objection to hearsay is the inability of the defendant adequately to cross-examine a statement. In many states, the defendant has no right to test *any* fact used in determining probable cause or even directly to disprove them.[112] Hearsay in such context presents no special deprivation as it does at trial.

Third, when hearsay or prior police records are introduced at trial, there is a danger, notwithstanding limiting instructions, that the jury (or judge) will include misuse of such information in finding guilt "beyond a reasonable doubt." In such cases the defendant has been deprived of the constitutional right to force the prosecution through admissible evidence to carry its burden. In the case of hearsay, the right to confrontation may be denied as well.[113] Evidence utilized in determining probable cause, however, is not used to aid "proof beyond a reasonable doubt," but only to search for evidence which may in turn aid in the prosecution's burden. The Supreme Court has held that the Constitution does not require a separate jury determination of the constitutionality of police actions resulting in obtaining evidence.[114] The defendant is entitled to demand only that a jury find *every element* of a crime "beyond a reasonable doubt," and police conduct leading to evidence is not seen as such an element, but only a preliminary step which does not form a part of the prosecution's "case." In the same respect, a person tendering information used to make out probable cause is not a "witness against" the defendant since the testimony is not used directly to prove the case but only indirectly. Similarly, hearsay and even unconstitutionally seized evidence, are admissible before a grand jury and a judge at a preliminary hearing, since they lead to findings of proba-

112. *See* Section III B 4 *infra*.

113. Dutton v. Evans, 400 U.S. 74 (1970).

114. *See* Lego v. Twomey, 404 U.S. 477, 488 (1971). *See also* United States v. Matlock, 94 S. Ct. 988 (1974).

ble cause but do not directly influence the trial.[115]

3. *The Unnamed Informant*

A large segment of Supreme Court involvement with probable cause has centered on the unnamed police informant. Many perceptive recent articles have examined this complex area;[116] it is dealt with here only briefly and only because it forms an important part of the overall picture.

The Court has held that the interest in vigorous law enforcement permits the prosecution, in most cases, to withhold the identity of one who supplies evidence used in reaching probable cause.[117] This privilege prevents the "drying up" of police sources and insulates the informant from feared retaliation, thus further motivating disclosures. In a few cases, usually involving an informant who allegedly made a narcotics "buy," courts have held that due process requires either disclosure *at trial* or dismissal.[118] Recognizing the wide application of the privilege, the Court in *Aguilar v. Texas*,[119] set forth guidelines for scrutinizing such "tips" in determining probable cause. Simply stated, the affidavit must set forth facts tending to show that the informant is (1) competent to make the statements and (2) credible. The competency requirement is not peculiar to informants—the value of any hearsay statement depends in part on demonstrating a foundation. The informant is clearly competent if he testifies to personal observation or to statements of the suspect heard (or overheard) by him. Statements, other than by the suspect, made to the informant are admissible only if facts indicate the declarant, too, is competent and, if an unnamed informant himself, credible.

The requisite credibility can be demonstrated in numerous ways. By far the most common is the inclusion of the "fact" that the informant has given information in the past which has proved accurate.[120] Statements have been held credible if against the in-

115. Costello v. United States, 350 U.S. 359 (1956) (grand juries). *See also* Lawn v. United States, 355 U.S. 339 (1958) and United States v. Blue, 384 U.S. 251 (1966) (preliminary hearings).

116. *See, e.g.*, 28 BROOKLYN L. REV. 232 (1971) and 37 MISSOURI L. REV. 538 (1972).

117. McCray v. Illinois, 386 U.S. 300 (1967).

118. Roviaro v. United States, 353 U.S. 53 (1957). *See also* Commonwealth v. Ennis, 301 N.E.2d 589 (Mass. Ct. App. 1973).

119. 378 U.S. 108 (1964).

120. The words "I have received information from an informant who has on many

formant's penal interest,[121] or if the magistrate personally recollects his past truthfulness.[122] Of course, use of any statement by the informant to the effect that he is trustworthy would be bootstrapping at its worst.

An informant's tip satisfying the dual requirements of *Aguilar* can, by itself, produce probable cause, provided of course the substance of the tip renders the required conclusion "probable." A tip which taken independently falls short of *Aguilar*, however, may be buttressed by independent corroborative facts which render it as trustworthy as the uncorroborated tip which satisfies *Aguilar*. Such corroborative facts may be used to buttress either the competency or credibility requirements or both. These corroborative facts usually take one of the following forms: (1) the police have verified collateral statements by the informant;[123] (2) the special circumstance of the informant indicates he is credible (*e.g.*, the Court in *United States v. Harris*[124] seemed to attach some significance to the fact that the informant expressed fear for his life); (3) facts known to the police square with the informant's information, even though they do not verify it. In *Harris*, for example, an unnamed informant was clearly competent (personal observation) but his credibility was in question. The informant had made statements against his penal interest, but the Court did not treat this as dispositive. Other facts included in the warrant, however, demonstrated prior illegal conduct of the same character by the defendant. The Court held that this tended to make the informant more credible.[125] When, in "everyday life," one hears a statement which fits with information already in his possession, the statement at least *seems* more trustworthy. Recently the Virginia Supreme Court held that tips from two informants, each failing the *Aguilar* test, corroborated each other's credibility under circumstances tending to show they were unknown to each other.[126]

The separate credibility requirement for unnamed informants

occasions supplied information which has proved to be accurate," or words to the same effect, have become the litany of warrant affidavits.

121. *See* United States v. Harris, 403 U.S. 573 (1971).
122. United States v. Marihart, 472 F.2d 809 (8th Cir. 1972).
123. Draper v. United States, 358 U.S. 307 (1959).
124. 403 U.S. 573 (1971).
125. *Id.* at 584.
126. Huff v. Commonwealth, 213 Va. 710, 194 S.W.2d 690 (1973).

arises partly because they remain anonymous but also because such persons are often themselves from the "criminal milieu."[127] Courts, therefore, have often relaxed the credibility requirement for so-called "good citizen" informants who wish to remain anonymous. The Seventh Circuit recently stated:

> Various federal and state courts have distinguished the government informant considered in *Aguilar* and *Spinelli* from the eyewitness, victim of a crime or a citizen who provides information of a crime. These courts, while not overruling the guidelines of *Aguilar*, have dispensed with specific allegations of reliability or past reliable contact with the informant, and inferred that reliability may be deducted from the content of the complaint. The rationale of these holdings is that the concomitant danger of self-interest does not inure as easily as it would to a government informant.[128]

In a recent case, police heard "mumbling" from a crowd, which indicated defendant was the perpetrator of a shooting incident which had just taken place. Although police could not later identify the declarants, the utterances, "hard on the heels of an excited situation" contained the indicia of reliability traditionally recognized in the res gestae exception to the hearsay rule and the declarations were, therefore, held credible.[129]

Use of an informant's tip can occur in searches with or without a warrant. In either case, police misuse of the "informant's privilege" (including complete fabrication of the informer) is possible. When a warrant is involved, however, there are at least two natural checks to this misuse: (1) the magistrate may refuse to issue the warrant; (2) since the warrant procedure brings the matter to the attention of many others in the criminal justice machinery (magistrate, police department officials, prosecutor's staff and others) a police officer who conducts too many searches which produce nothing may lose credibility and favor with those he depends on.

When an exception to the warrant requirement exists, however, the possibilities of abuse are almost boundless. A policeman searches someone whom he "suspects" of possessing a firearm or

127. W. LaFave and A. Scott, Handbook on Criminal Law 255 (1972).
128. United States v. Unger, 469 F.2d 1283 (7th Cir. 1972).
129. United States v. Petterson, ___ F.2d ___ (D.C. Cir. 1974).

narcotics or, at the extreme, he searches at random. If nothing is found, the "suspect" and the policeman immediately go their separate ways. The transaction is of extremely "low visibility." In the rare case in which such suspect complains officially about the intrusion, and in all cases where evidence is found, the search is defended by stating an informant (who need not be named) "who has given reliable information in the past said he saw heroin (or a pistol) in the suspect's possession." None of this is to suggest that this happens frequently (though it undoubtedly happens), but only that it is nearly impossible to determine when it has. And the suggestion that the warrant requirement should be stringently (even strictly) required in all "tip" cases runs headlong into the reality that such cases normally arise in the most explosive type of situations—where firearms and impending criminal activity are suspected.[130] It is in situations such as this where one fully appreciates Justice Traynor's characterization of the exclusionary rule as the most "tormenting" of the "two-faced problems in the law."[131]

4. *"Staleness" and Counterindication*

The probable cause necessary to most searches and arrests not only must exist, but must exist at two crucial periods—(1) the time of the issuance of the warrant if the warrant is necessary to validate the search or arrest and (2) the time the arrest or search is effected whether or not pursuant to a warrant. A conclusion once "probable" may become improbable either by the introduction of counterindicative information (which may either directly challenge prior information or do so indirectly by creating contrary inferences)[132] or by going "stale" by the mere passage of time.[133]

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130. *See also* Adams v. Williams, 407 U.S. 143 (1972) (use of an unnamed informant to validate a warrantless "stop and frisk").

131. LaFave, *supra* note 8 at 255.

132. The problem of counterindication is separable from another problem to be discussed *infra* in Section III B 4 whether the defense can challenge the "facts" used to show probable cause by demonstrating they were untrue or prejudiced. Counterindication in the present context means facts coming to the attention of the officer *before* he searches which remove probable cause which once existed. It is not surprising that case authority is virtually non-existent in this area because if the police obtain strong counterindicative facts, they will not arrest or search, or if they do, they may only report those facts tending to validate their decision.

133. LaFave, *supra* note 8, at 264-66. *See also* Commonwealth v. Ezer, ___ Pa. 2d ___, 312 A.2d 398 (1973) (probable cause in connection with an illegal lottery was held stale after 61 days).

Counterindicating facts may remove probable cause either in arrest or search cases, but "staleness" is almost exclusively search-connected. Once it becomes probable that a particular person committed a crime, the *mere* running of time does not detract from such probability. However, as a search warrant depends in part on the probable *location* of items, experience dictates that over a period of time most items (especially crime-connected items) are moved.[134]

Courts have looked to a number of considerations in resolving the staleness problem: (1) the length of time from the last observation to the search warrant application or to the search itself; (2) the number of observations and the intervals between each; and (3) the nature of the items and of the suspected crime. As to the latter, fruits of a theft crime, for example, can be expected to move faster than unlawfully possessed weapons in which the offense is characterized as "continuing."[135] Likewise, narcotics held for sale and evidence of gambling can be expected to move rapidly, whereas evidence of schemes carried out in connection with lawful commercial enterprises would be comparatively stationary.[136] In one recent case an informant's tip indicated that persons "frequented" a place to obtain controlled drugs. This was held a sufficient indication that the possessory offense was a continuing one, and, therefore, had not become stale.[137]

While the length of time from observation to search is the most crucial question (indeed, the threshold question), there appear to be no magic numbers. Six days has been held unreasonably long (evidence of gambling) and forty-nine days reasonable (counterfeit cigarette tax stamps).[138]

Statutes or rules of court requiring execution of warrants within specified periods are not necessarily related to "staleness." For example, rule 41(d) of the Federal Rules of Criminal Procedure requires execution and return of search warrants within ten days. However, probable cause could become stale *within* the ten days, and, conversely, a search beyond the ten days on *another* warrant

134. LaFave, *supra* note 8, at 264.

135. Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1974); Huff v. Commonwealth, 213 Va. 710, 194 S.E.2d 690 (Va. 1973).

136. LaFave, *supra* note 8, at 264-66.

137. Guzewicz v. Slayton, 366 F. Supp. 1402 (D. Va. 1973).

138. LaFave, *supra* note 8, at 265.

or circumstances where no warrant is necessary are not per se stale. The ten-day limitation serves purposes other than the evaluation of probable cause.

D. Challenging the Underlying Facts

Often at the motion to suppress, the defendant may wish to challenge the "facts" used to find probable cause by showing such "facts" to be untrue, recklessly collected or even the products of perjury. To the extent the defendant is permitted to challenge such facts at all, he may do so whether the search in question was pursuant to warrant or warrantless. Most cases addressing this issue have arisen in the context of searches conducted on warrant;[139] for that reason the problem is considered in Section III B 4 *infra*. The reader should be aware, however, that facts underlying probable cause may be challenged in connection with warrantless searches as well.

E. Probable Cause—Differing Standards

The question of differing standards of probable cause with reference to administrative searches will be considered in Section V D *infra*. It is enough here to say that those cases represent a difference not in the quantity of facts which render a result probable, but in what must be probable.

There are indications from the Supreme Court of a strong preference for the use of warrants, and implications that the probable cause standard may be different in warrant vis-à-vis warrantless searches.[140] It is clear, though, that the Court has not attempted to fashion separate quantitative standards. The best sense of these statements is that probable cause is largely elusive to begin with and that in "doubtful" or borderline cases, the presence or absence of a warrant may become important. Clearly a result cannot be more "probable" simply because a warrant is applied for. Yet, it seems

139. The explanation for this may lie in the fact that, once a police officer includes a "fact" in a supportive affidavit, he is "stuck" with it. When the search is warrantless, however, there is the possibility that he can later claim either (1) that he did not *rely* on such fact now proved false or (2) that he was in possession of facts which in reality he did not obtain until *after* the search or arrest. Several writers suggest strongly that this is common police practice. *See* J. Skolnick, Justice Without Trail 215 (1966).

140. Beck v. Ohio, 379 U.S. 89 (1964) (as to arrest warrants); United States v. Ventresca, 380 U.S. 102 (1965) (as to search warrants).

to be good policy to encourage the use of warrants, especially because of the numerous situations in which one is not required.[141]

III. IF PROBABLE CAUSE EXISTS, WAS THE SEARCH CONDUCTED PURSUANT TO A VALID WARRANT?

A. The Necessity of Warrants

The language in the fourth amendment does not require that all searches be conducted pursuant to warrant or even that *any* searches be so conducted. It requires only that *all* searches be *reasonable* and that warrants, if employed, meet certain requirements. The Court, however, has stated repeatedly that, in most situations, a search conducted without a warrant is per se "unreasonable."[142] It is only when requiring a warrant would frustrate some compelling interest of law enforcement (almost invariably characterized by an acute need for speed) that warrantless searches become reasonable.

The warrant procedure intensifies protection from "unreasonable" searches in a number of ways. An understanding of these is essential to understanding the insistence on utilizing warrants for most searches.

1. *Interposition of "Neutral Magistrate"*

The Court repeatedly has stressed the importance of conditioning police intrusion on the decision of a "neutral and detached" magistrate. Since such person is not involved in "the competitive enterprise of ferreting out crime"[143] his judgment, presumably, will be made strictly on facts and legitimate inferences untainted by emotion, hunch or the compulsion of his job. There is no reason to think a police officer is less aware of individual rights or the underlying rationales for those rights than most others, and much to suggest he is more aware than many. Yet the nature of his charge offers both the opportunity and, often, the seeming necessity for the compromise of such rights.

Apart from the legal prerequisite of "neutrality" and questions

141. *See* Sections IV and V *infra*.

142. *E.g.*, Cady v. Dombrowski, 413 U.S. 433 (1973).

143. Johnson v. United States, 333 U.S. 10, 14 (1948).

144. L. Hall, Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 242 (3d ed. 1969) [hereinafter cited as Modern Criminal Procedure]. The Supreme Court denounced the "rubber stamp" process in Aguilar v. Texas, 378 U.S. 108, 111 (1964).

as to who is a "magistrate" (both considered in Section III B *infra*) there are strong indications that this value of the warrant procedure is not, in fact, being served. In many locales the issuance of a warrant becomes a stylistic ritual of "rubber-stamping" by the issuer without any separate evaluation of the facts by a "detached" person.[144] This may be because the magistrate is not, in fact, "detached" but more often because time constraints do not permit careful examination or because such practice has become habitual.

The probable cause determination either by a magistrate or policeman, if incorrect, will result in suppression upon judicial review. The all too easy conclusion that the warrant, therefore, is not crucial must be resisted. First, the facts giving probable cause are memorialized by the warrant application and prevent retroactive assertion of facts not extant prior to the search. (See discussion in Section III A 2 *infra*.) Most important, however, such a conclusion presupposes that the exclusionary rule has devoured the fourth amendment. The primary enforcement mechanism for fourth amendment rights is exclusion of evidence illegally obtained.[145] This must not obscure the fact that the fourth amendment speaks of the right to be "secure" from unreasonable searches and seizures not merely to have redress when they occur. The interposition of the neutral, detached magistrate is designed to *prevent* violations. If the warrant requirement is not met, only those to whom evidence is found have any remedy at all, except for tort actions, which long ago proved insufficient.[146]

2. *Insuring Memorialization*

Usually search warrants are issued on the basis of written affidavits of police officers or others, although oral testimony is occasionally accepted.[147] In any case, the "facts" must be sworn to.[148] This procedure insures that those facts constituting probable cause are memorialized. At the suppression hearing, the prosecution is generally not permitted to proffer facts not communicated to the

145. Mapp v. Ohio, 367 U.S. 643 (1971).

146. *Id.* at 651.

147. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1 (Proposed Official Draft No. 1, 1972).

148. LaFave, *supra* note 8, at 259.

magistrate,[149] there is no danger that facts gathered subsequent to the warrant (including facts gathered as fruits of the search itself) can be used to validate it. The use of such facts, not present at the time of warrant application, can of course be the product of perjury. In addition, differentiating between what one knew at a prior time and what one has assimilated since then often requires difficult mental gymnastics. It is understandable that a policeman would tend to resolve honest doubts so as to legitimate his conduct. One writer has observed:

> [A]s one District Attorney expressed it, "The policeman fabricates probable cause." By saying this, he did not mean to assert that the policeman is a liar, but rather that he finds it necessary to construct an *ex post facto* description of the preceding events so that these conform to legal arrest [or search] requirements, whether in fact the events actually did so or not at the time of arrest. Thus, the policeman respects the necessity for "complying" with the arrest [or search] laws.[150]

3. *Defining the Scope of the Search*

The warrant must describe "the particular place to be searched and the particular persons or things to be seized."[151] The warrant search is thus limited to a particular place and, further, to areas within that place where the particular items could conceivably be located.[152] The Court has pointed out that the warrant operates to limit carefully the extent, duration, place and objects of the search. The scope of a warrantless search on the other hand, is limited only by the policeman's discretion.

4. *Rendering the Search More "Visible"*

Because the warrant procedure requires involvement of more people, the decision to search and the search itself become more visible. This "visibility" may provide natural checks to police abuses. If it becomes evident that particular policemen "strike-out"

149. United States *ex rel.* Boyance v. Myers, 270 F. Supp. 734, 738 (E.D. Pa. 1967) citing Aguilar v. Texas, 378 U.S. 108 (1964).

150. J. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1966).

151. *See* Section III B 2 *infra*.

152. Schlichter, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A. L. REV. 96, 106 (1971).

consistently in searches (and especially in the dramatic case when later facts prove police misconduct), his credibility, to the judge and to members of the law-enforcement team as well, is weakened or lost. Whether or not such abuses are widespread, it is important to design procedures most likely to unearth them if they occur.

B. REQUIREMENTS OF WARRANT

1. *"Neutral and Detached" Judicial Officer*

a. "Neutrality"

Although the language of the fourth amendment does not prescribe who shall issue the warrant, the Supreme Court has held the requirement of "neutral and detached magistrate" to be of constitutional dimension.[153] In *Coolidge v. New Hampshire*[154] the Court struck down a warrant issued by the state Attorney General in his capacity as a Justice of the Peace, noting that his prosecutorial role rendered him biased. The District of Columbia Court of Appeals has held that Maryland J.P.'s may issue warrants notwithstanding their limited power of arrest and their denomination as "conservators of the peace," reasoning that, unlike the prosecutor in *Coolidge*, the J.P. does not serve a prosecutorial function and there is thus "no unacceptable bias built into his job."[155] To the extent the J.P. performed a law-enforcement function, clearly it was secondary to his judicial responsibilities, whereas in *Coolidge* the *judicial function* was secondary.

In situations where the judicial officer aids the affiant in drafting the affidavit, or types it based on oral statements of the affiant, neutrality is not destroyed.[156] The Fifth Circuit has held that this activity in fact "demonstrates" neutrality since it proves the absence of "rubber-stamping."[157]

"Neutrality," then, means generally that the issuer may not possess an unreasonably high, usually job-connected, prosecution orientation.

153. Shadwick v. City of Tampa, 407 U.S. 345 (1972).

154. 403 U.S. 443, 450 (1971). *See also* Commonwealth v. Davis, ___ Pa. Super. ___, 310 A.2d 334 (1973).

155. United States v. Haywood, 464 F.2d 756, 761 (D.C. Cir. 1972).

156. United States v. Steed, 465 F.2d 1310 (9th Cir. 1972).

157. Albitez v. Beto, 465 F.2d 954 (5th Cir. 1972).

b. "Magistrate"

In *Shadwick v. City of Tampa*[158] the Supreme Court held that an arrest warrant for a municipal ordinance violation was validly issued by a municipal court clerk. The Court first traced the judicial history of the "neutral magistrate" requirement noting that the terms "magistrate" and "judicial officer" have been employed interchangeably. The Court reserved decision on the question of whether the issuer must be in the judicial branch[159] and held that the issuer must be (1) neutral and (2) competent to determine probable cause.[160] Legal training, the Court added, is not indispensible in showing competency to judge probable cause.[161] This is consistent with earlier Court decisions describing the probable cause decision as "common sense,"[162] "everyday,"[163] "designed to be applied by laymen"[164] and not necessarily for "legal technicians"[165] only.

The Court's decision covers only arrests for municipal violations. However, if the probable cause decision is indeed one which laymen can apply, there appears no natural check on extending the decision to arrest warrants for serious offenses, which one state supreme court has done,[166] or to search warrants. Yet there are strong reasons for not doing so. First, with reference to arrest warrants for minor offenses where "rubber-stamping" is most prevalent, judicial scrutiny may be "an already abdicated function."[167] In many cases the subject arrest warrants are not even constitutionally required.[168] Second, notwithstanding the Court's repetitive statements that probable cause is "common sense" and does not require "legal tech-

158. 407 U.S. 345 (1972).

159. *Id.* at 349.

160. *Id.* at 350; most courts prior to *Shadwick* had invalidated warrants issued by non-judges. State v. Matthews, 270 N.C. 435, 153 S.E.2d 791 (1967); State v. Paulick, 277 Minn. 140, 151 N.W.2d 591 (1967); State *ex rel.* White v. Simon, 28 Wis. 2d 590, 137 N.W.2d 391 (1965). *Contra*, State v. Ruotolo, 52 N.J. 508, 247 A.2d 1 (1968). In Mancusi v. Deforte, 392 U.S. 364 (1968), the Court held that subpoena duces tecum could not be treated as a search warrant since the district attorney who issued it was not a neutral and detached magistrate.

161. 407 U.S. at 351-52.

162. 380 U.S. 102, 108 (1964).

163. 338 U.S. 160, 175 (1948).

164. State v. Ruotolo, 52 N.J. 508, 514, 247 A.2d 1, 4 (1968).

165. 338 U.S. 160, 175 (1948).

166. Woodmansee v. Smith, 130 Vt. 383, 296 A.2d 182 (1972).

167. Comment, *Constitutional Requirements for Authority to Issue Warrants*, 1972 WASH. U.L.Q. 777, 781 (1972).

168. *See* Coolidge v. New Hampshire, 403 U.S. 443, 475-76 (1971).

nicians," decisions requiring recitation of underlying *facts*, not *conclusions*, factual foundations for "competence" and "credibility," sophisticated application of the "particularity" requirement, the direction to "carefully limit the scope of the search," all suggest that issuing warrants is hardly equatable with "practical considerations of everyday life." Third, while court clerks may not be as likely to abdicate the probable cause determination function because of time constraints as have judicial officers in some locales,[169] it is possible that such persons would be more susceptible to direct or indirect pressure to accommodate applicants who represent governmental power. As one's appreciation of his own governmental charge is diminished, he may lose "neutrality." This has undoubtedly been a cause of "rubber-stamping" as to the lower-level judiciary and granting this responsibility to persons lower yet can only increase this tendency.

2. *Particularity*

a. "the place to be searched"

The fourth amendment commands that all warrants particularly[170] describe "the place to be searched, and the persons or things to be seized." Undoubtedly, this language was generated by the Framers' fear of "general warrants" under which the police "rummage" for anything which may prove incriminating.[171] The degree of particularity required, however, must, according to the Supreme Court, be measured in a "common sense and realistic fashion."[172] Warrants and supportive affidavits "are not entries in an essay contest"[173] but are "normally drafted by non-lawyers in the midst and haste of a criminal investigation."[174] Resolution of the particularity problem is, like others in the fourth amendment area, ultimately referable to the continuing tension between the exigencies of police work and the interests of individuals.

In describing the place to be searched, a warrant is sufficiently particular "if the officer . . . can, with reasonable effort, ascertain

169. MODERN CRIMINAL PROCEDURE, *supra* note 144, at 242.

170. *See generally* Cook, *Requisite Particularity in Search Warrant Authorizations*, 38 TENN. L. REV. 496 (1971).

171. U.S. v. Matlock, 94 S. Ct. 988, 996 (1974) (Douglas, J., dissenting).

172. United States v. Ventresca, 380 U.S. 102, 108 (1965) (Fortas, J., dissenting).

173. *Id.*

174. *Id.*

and identify the place intended."[175] Courts have demonstrated a high tolerance for "technical" inaccuracies. For example, courts have often upheld warrants containing the improper address if other factors "cure" the error.[176] In a case in which the address failed to indicate the town, the court pointed to the "common-sense" approach in *United States v. Ventresca*[177] and found sufficient "particularity."[178] Where the place involved is a multi-dwelling or multi-office building, the warrant should specify the unit to be searched.[179]

The same "common-sense" attitude controls when the warrant is for the search of an automobile (a rare situation due to the broad automobile warrant exception). One writer has summed up the cases by noting " . . . the issue is simply whether the identity of the vehicle can reasonably be determined, and some inaccuracies may be tolerated."[180] As to searches of persons, the warrant must enable the police reasonably to identify such person, but his name is not an indispensable ingredient of that reasonableness.[181]

b. "the persons or things to be seized"

The distinction of "seizable" and "non-seizable" items, long a perplexing issue, was virtually eliminated by the Supreme Court's decision in *Warden v. Hayden*[182] holding that "mere evidence" of a crime was seizable, as well as contraband, fruits and instrumentalities of crime. With rare exception today, subject to proof of probable cause, any item may be seized pursuant to a warrant, if the warrant describes such item with sufficient "particularity" as required by the fourth amendment. Generally speaking, the items to be seized "must be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no discretion respect-

175. LaFave, *supra* note 8, at 266 n. 79, quoting People v. Martens, 338 Ill. 170, 171, 170 N.E. 275, 276 (1930).

176. Hurley v. Delaware, 365 F. Supp. 282 (D. Del. 1973). *See also* LaFave, *supra* note 8, at 267.

177. 380 U.S. 102 (1965).

178. Nottingham v. State, 505 P.2d 1345 (Okla. 1973).

179. Cook, *Requisite Particularity In Search Warrant Authorization*, 38 TENN. L. REV. 496, 498 (1971).

180. *Id.* at 499, n. 24, quoting Wangrow v. United States, 399 F.2d 106, 115 (8th Cir. 1968) (mistake of one letter in license tag description insignificant). *See also* Bowling v. State, 219 Tenn. 224, 408 S.W.2d 660 (1966) (warrant was correct as to auto license number, incorrect as to color, year, and model of car). *See also* Annot., 47 A.L.R.2d 1444 (1956).

181. *See* Annot., 49 A.L.R.2d 1609 (1956).

182. 387 U.S. 294 (1967).

ing the property to be taken."[183]

There are too many irreconcilable decisions for one to suggest a working "test." There are a number of considerations, however, which are generally recognized as relevant:

Susceptibility of description and risk of confusion with unsought items. Things contain varying amounts of recognizable attributes. An automobile, for instance, can be described by color, year, make, model, various identifying marks including license tags, serial numbers, and so forth. Thus, inclusion of an automobile in a search warrant would require a high degree of particularity, both because it is usually possible and because the sheer number of automobiles suggests that the chance of seizing the wrong vehicle is high. In contrast, the recitation of "about twenty beef hides and about twelve calfhides and one horse hide"[184] was held sufficient primarily because a nonexpert would have difficulty describing such items more particularly, and the risk of seizing unsought items was minimal.

Specification of Character. If a search warrant specifies "automobile" at a given address, there is a definite probability that the wrong "automobile" will be seized. As such, this recital may fail for insufficient particularity. It would be indeed rare, however, for police to have probable cause to seize an automobile without knowing enough about it to describe it so as to exclude any significant risk of seizing the wrong car. When items are defined by character, rather than identity, the risk of seizure of innocent items increases as the definition becomes more imprecise. The danger inheres in the increased discretion in the police to collect items defined in broad terms. In a recent case a warrant to seize "seditious materials" was deemed too vague.[185] The fear of general searches was evident in what was actually seized in that case as "seditious"—including a book of William Cullen Bryant poetry and a volume entitled "Tricks and Training for Cats."[186] These seizures were clearly outrageous,

183. LaFave, *supra* note 8, at 268 n. 91, quoting People v. Sovetsky, 343 Ill. 583, 588-89, 175 N.E. 844, 846 (1931), in which the court said: "The verified complaint, upon which a search warrant is issued, must state the facts on which the complainant bases his beliefs. . . ."

184. LaFave, *supra* note 8, at 268.

185. United States v. McSurely, 473 F.2d 1178 (D.C. Cir. 1972).

186. *Id.* at 1187-88.

but a seizure of the *Communist Manifesto* would be just as offensive though much more likely. Courts have struck down warrants specifying "any evidence pertaining to the felonious killing of," or allowing an officer to "enter said premises . . . to investigate and search into and concerning said violations."[187] These are general exploratory searches in the worst sense. Courts have, however, upheld warrants containing similar language, such as "instruments of the crime."[188] The Minnesota Supreme Court recently upheld a warrant specifying "items of identification to show constructive possession of above contraband such as rent receipts, utility bills, personal letters and other personal I.D."[189] In such recital, there is less chance of confusing non-related items, but there is an additional problem. It is perplexing how one who cannot identify items with any more specificity than that can have probable cause that those items are present. The warrant in that case included specification of contraband, and such other evidentiary items such as "rent receipts" could have been seized if observed during the search for contraband under the plain view doctrine.[190] Of course, the police must cease searching when they have found all the enumerated items, and enumerating such other evidentiary items will increase the duration and intensity of the search.

Particularizing contraband. Courts have been extremely liberal in judging the needed specificity of contraband. Warrants reciting "a quantity of heroin," "controlled drugs" and "gaming implements and apparatus" have been upheld.[191] To some extent these cases can be explained on the grounds that (1) contraband does not admit of detailed description, (2) the risk of confusion with unsought items is unimportant since contraband is by definition always illegally possessed and (3) knowledge of its attributes does not necessarily inhere in knowledge of its presence.[192] Beyond this, however, it has

187. Cook, *Requisite Particularity in Search Warrant Authorization,* 38 TENN. L. REV. 496, 506 n. 72 (1971), quoting Giles v. United States, 284 F. 208, 215 (1st Cir. 1922).

188. *Id.* at 505-06.

189. State v. Wiley, ___ Minn. ___, 205 N.W.2d 667 (1973).

190. *See* Section V G *infra.*

191. Cook, *Requisite Particularity in Search Warrant Authorization,* 38 TENN. L. REV. 496, 505-06 (1971).

192. It would be odd, for instance, for police to have probable cause of the presence of "mere evidence" such as clothing and not be able to describe it extensively. Often, however, probable cause as to the presence of narcotics occurs with very little idea as to the exact type, quantity, etc.

been recognized that the purpose of search warrants for contraband "is not to seize specified property, but only property of a specified character."[193]

3. *The Return*

A search warrant expires upon the running of the statutory validity period or upon return, whichever occurs first.[194] It is, of course, necessary that the warrant be executed before it expires. Many state statutes require that items seized under warrant be included in the "return."[195] The Supreme Court has recently indicated that the use of a return or its form, if used, is not of constitutional moment and entirely a matter of state law.[196]

4. *Challenging "Facts" in Supporting Affidavits*

When a policeman's decision to conduct a warrantless search comes under review, it is clear that if he fabricated facts justifying probable cause, probable cause *did not exist* and he knew it. Likewise, if he is reckless in gathering such facts, probable cause does not exist to the man of "reasonable caution." If, however, facts which he reasonably believes to be true and which constitute probable cause, are later shown to be inaccurate, probable cause *at the time of the search*—the crucial time—is not disproved. To say that what proves false on Tuesday could not have been "probable" on Monday is to ignore that a probability is a prediction.[197]

Probable cause in the abstract is meaningless—a thing must be "probable" to a particular person. For example, if an informant lies to the police about A's criminal activity, the police may have "probable cause," but clearly the informant does not. In the case of warrantless searches then, as to "facts" which are later shown to be false, only facts reasonably and honestly believed by the police officer will support a determination of probable cause.

When a warrant is involved, many new considerations are in-

193. LaFave, *supra* note 8, at 268 n.98 quoting People v. Prall, 314 Ill. 518, 523, 145 N.E. 610, 612 (1924).

194. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.4 (Proposed Official Draft No. 1, 1972).

195. *Id.*

196. Cady v. Dombrowski, 413 U.S. 433 (1973).

197. In Hill v. California, 401 U.S. 797 (1971), the Court found that though the wrong person was arrested, the arrest was with probable cause.

fused. Most important, however, is the interposition of a magistrate who determines probable cause. Case law makes it clear that it is the magistrate whose determination is reviewed on motion to suppress evidence obtained pursuant to a warrant and not the policeman's.[198] But what if the policeman lies in the affidavit or recites facts recklessly believed? The policeman does *not* have probable cause, but the magistrate *may*.

The extent to which a defendant can delve below facts in a supporting affidavit has not been decided by the Supreme Court[199] and has led to widely differing results in state and lower federal courts. Traditionally, the courts have refused to permit the defense to attempt to show that facts in an affidavit are inaccurate or even perjured.[200] Various reasons have been offered to justify this stance: (1) such showing is irrelevant to a review of the magistrate's decision, since *he* had no knowledge of the inaccuracies; (2) probabilities are predictions and can be wrong; (3) the opposite holding will discourage use of the warrant procedure; (4) courts would be inundated with "fishing-expedition" litigation of the truthfulness of underlying facts.

Several courts have recently held that the defendant is entitled to challenge inaccurate facts in supportive affidavits at least to some extent. Permitting police abuse to constitute the basis for a search is seen as a serious erosion of fourth amendment protection. And yet even these jurisdictions have carefully limited examination of affidavits. The Supreme Court has held that the discrediting of "peripheral" facts not essential for probable cause will not result in suppression.[201] A few courts have reasoned, however, that if the inclusion of facts unnecessary to probable cause springs from intentional police abuse, the deterrent rationale of the exclusionary rule is served by suppression.[202]

As to "necessary" facts, several courts have suppressed evi-

198. *See* Jones v. United States, 362 U.S. 257 (1960).

199. The Court expressly left the main question open in Rugendorf v. United States, 376 U.S. 528, 532 (1964).

200. Schlichter, *The Outwardly Sufficient Search Warrant Affidavit: What if It's False?*, 19 U.C.L.A. L. REV. 96, 106 (1971).

201. Rugendorf v. United States, 376 U.S. 528, 532 (1964).

202. United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); United States v. Pearce, 275 F.2d 318 (7th Cir. 1960).

dence when such facts were intentionally misrepresented by the affiant or "recklessly" or "unreasonably" believed.[203] Inaccurate facts "reasonably" believed are generally not excised because (a) inclusion of such facts is not deterrable and (b) such errors do not in fact negate probable cause at the relevant time.

Recognizing the fear of "fishing-expeditions," the Seventh Circuit has propounded a two-step procedure for examining supportive affidavits.[204] In order to obtain a hearing to examine the affidavit, the defendant must make an affirmative preliminary showing that (a) an included material fact is inaccurate *or* (b) a fact, material or not, has been intentionally misrepresented. If the resultant hearing discloses an intentional misrepresentation of *any* fact *or* that any *material* fact was "recklessly" believed, the warrant will fail. Some courts express this by suppressing evidence if the inaccuracies go to the "integrity" of the affidavit.[205] This procedure is responsive to several of the traditional arguments for not permitting review of affidavit facts. First, since an affirmative showing of some abuse is necessary to trigger the hearing, the "fishing-expedition" fear is obviated, though clearly much additional court time would be required. Second, since inaccurate beliefs must be "unreasonable" before suppression will result, warrant searches remain on the same footing with warrantless searches where reasonably believed inaccurate facts are permitted and there is no discouragement of the warrant process. One court has held that intentional misrepresentations which are the product of "ill will, bad faith or malice" can result in civil liability to the affiant.[206]

The fact that the magistrate's decision is under review remains a problem. And yet there appears to be a solution—even assuming that there *is* probable cause *to the magistrate* when facts are misrepresented intentionally or recklessly, may it not be argued that a search based on such warrant is unreasonable? Certainly there is nothing in the language of the fourth amendment compelling the decision that all searches on valid warrants are *reasonable*; and

203. *See* authorities collected in United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973).

204. *Id.* The Fifth Circuit has adopted the same basic test. United States v. Thomas, 489 F.2d 664 (5th Cir. 1973). *See also* State v. McMannis, ___ Ore. ___, 517 P.2d 250 (1973) and Theodor v. Superior Court, 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

205. *E.g.*, Rugendorf v. United States, 376 U.S. 528, 532 (1964).

206. Cashen v. Spann, ___ N.J. ___, 311 A.2d 192 (1973).

when the warrant issues on probable cause improperly created, the sense of the amendment is not impaired in the least if the search is held unreasonable.

The Seventh Circuit has indicated that an informant's identity need not be disclosed in an affidavit hearing.[207] While it may be that an informant (professional or of the "good citizen" type) has perjured himself, it would appear that such fact bears neither on probable cause (which in such case would exist *both* to the affiant and the magistrate) nor reasonableness of the search since such abuses are not abuses by government.[208] A subtle fear that going behind affidavits leads to cross-examination of informants and other police sources thus seems unfounded.

Once the court permits a hearing on the accuracy of facts included in an affidavit, the prosecution may attempt to rehabilitate the affiant. Occasionally this takes the form of showing additional facts, not contained in the affidavit, used to establish probable cause. Most courts deny to the police the right to support a warrant with facts not communicated to the judge.[209] Since the inquiry is into the magistrate's decision, reference to facts unknown to him is wholly irrelevant. Many courts, however, permit the introduction of additional facts upon a showing that they were orally communicated to the magistrate.[210]

Some courts have held specifically that the fourth amendment requires that such oral communication be sworn to.[211] The Third Circuit has recently announced that sworn oral testimony may be admitted in federal habeas corpus review of a state court conviction to rehabilitate a facially insufficient warrant affidavit.[212]

C. Execution of the Warrant

There are situations in which a search conducted pursuant to

207. United States v. Carmichael, 489 F.2d 983, 986-87 (7th Cir. 1973).

208. It is conceivable that as to the professional informant an established pattern of collaboration with police may bring his activities within the sphere of state action.

209. United States *ex rel.* Boyance v. Myers, 270 F. Supp. 734, 738 (E.D. Pa. 1967), citing Aguilar v. Texas, 378 U.S. 108 (1964).

210. *See* Model Code of Pre-Arraignment Procedure § 220.1 (Proposed Official Draft No. 1, 1972); United States *ex rel.* Boyance v. Myers, 270 F. Supp. 734, 737-38 (E.D. Pa. 1967).

211. Campbell v. Minnesota, 487 F.2d 1 (8th Cir. 1973). Of course all written communications are sworn to in affidavit form.

212. Gaugler v. Brierly, 477 F.2d 516 (3d Cir. 1973).

a validly issued warrant may be unreasonable. If the probable cause existing at time of issuance is terminated by "staleness" or counter-indications, the search cannot be justified under the warrant. Even in cases where probable cause exists, however, the method of execution may render the search unreasonable.

1. *Time of Execution*

Many state statutes impose a maximum time limit on the execution of search warrants.[213] Rule 41(d) of the Federal Rules of Criminal Procedure requires execution within ten days. These periods are outer limits only—a search conducted within such period may be "stale" or otherwise too late. If the search is conducted beyond these periods, it will be valid only if a new warrant has been issued or an exception to the warrant requirement can be shown. In addition, it is common for statutes to restrict the execution of warrants to daytime hours, though many such statutes permit nighttime searches upon a showing of certain compelling circumstances.[214] Some statutes require that such additional showing be made to the magistrate who must include authorization for nighttime entry into the warrant itself.[215] The Supreme Court has not considered whether any such time requirements are of constitutional dimension.

2. *The Announcement Requirement—Forcible Entry After Announcement*

The Court has held that announcement of the officer's authority and purpose prior to effecting an entry with or without warrant to make an arrest is compelled by the fourth amendment.[216] Court dictum indicates that entry to conduct a search would likewise require such notice.[217] It is clear from the few court decisions in this area that the rule of announcement before breaking, while constitutionally required in the normal situation, may admit of a number of valid exceptions. The decisions, then, seem to envision a "knock," a statement concerning the officer's authority and purpose

213. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1 (Proposed Official Draft No. 1, 1972).

214. *Id.* at § 220.2(3).

215. *Id.*

216. Sabbath v. United States, 391 U.S. 585 (1968); Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958).

217. *See generally* Ker v. California, 374 U.S. 23 (1963).

(-*e.g.*, "FBI Agents. We have a warrant to search the premises.") and a forced entry only after a refusal or a conclusion that no one is present.[218] It is clear that such a refusal may be implied as where sounds from within indicate the presence of persons but no attempt to open the door.[219]

The requirement of announcement appears to have common law origins, and courts in states with no statute on the subject have applied such common law. The rationales for the announcement requirement appear to be: (1) the reduction of the potential for violence inhering in the explosiveness of forced, unannounced entries into homes, especially at night; (2) the reduction in unnecessary damage to private property; (3) respect for privacy requires that its invasion be as inoffensive as possible.

Although "announcement" is now of constitutional dimension, many states have delineated exceptions either by statute or judicial creation. Congress has enacted legislation codifying the common law.[220] The following exceptions are widely recognized: (1) persons within are aware of the officer's presence and know his authority and purpose; (2) persons within are in imminent danger of bodily harm; (3) the officer reasonably concludes that persons inside are destroying evidence or attempting to escape; (4) unannounced entry would minimize risk to the officers.[221] These last two, clearly the most common, are often included in the all-encompassing phrase "exigent circumstances." This is somewhat unfortunate since "exigent circumstances" has developed a fairly well-defined meaning in another context—circumstances permitting the dispensing with the warrant requirement.[222] The cases seem to indicate that circumstances bearing only on the method of the intrusion need not be as "exigent" as those which permit the intrusion in the first place. For instance, courts have consistently held that forced entry is proper when the announcement is followed by "scuffling" and other noises indicating evidence was being destroyed.[223] It is inconceivable that

218. *E.g.*, United States v. Allende, 486 F.2d 1351 (9th Cir. 1973). *See also* Morens v. States, 277 So. 2d 81 (Fla. Ct. App. 1973).

219. United States v. Allende, 486 F.2d 1351 (9th Cir. 1973).

220. 18 U.S.C. § 3109 (1970).

221. *See* Ker v. California, 374 U.S. 23, 46 (1963) (Brennan, J., dissenting).

222. *See* Section IV *infra*.

223. United States v. Allende, 486 F.2d 1351, 1353 (9th Cir. 1973).

such facts alone could trigger the initial right to intrude.

3. *Dispensing with Announcement—"No-Knock"*

The distinction between the right to break in following a "refusal" or the arising of "exigent circumstances" and cases where the initial knock and announcement may be dispensed with must be understood. It is this latter situation—usually denominated "no-knock"—which has caused considerable controversy. Generally speaking, facts permitting an unannounced, forced entry should be strong. Where the suspect poses a serious threat to the safety of police, a "no-knock" entry would, in all probability comport with the Constitution.[224] It has been suggested that requiring prior sanction in the warrant itself for this type of entry may afford added protection to the suspect.[225] Others have suggested, however, that such use of the warrant procedure is improper since "exigent circumstances" generally arise at the scene, and do not pre-exist.[226]

Courts generally have been unwilling to sanction unannounced forced entry on the sole ground that the evidence sought is readily disposable, holding that it is the "particular facts of the case" and not the class of case which forms the exception.[227] When evidence, such as drugs or bookmaking paraphernalia, is readily disposable, courts will, however, permit a forced entry which follows almost immediately after the announcement.[228] Slight deviations from the appropriate statute have been excused. For example, the unlatching of a screen door before making the announcement or the failure to announce at the suspect's detached garage after announcing at the house have been held proper since "substantial compliance" was indicated.[229]

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224. Sonnenreich and Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 649-50 (1970); [hereinafter cited as Sonnenreich and Ebner]. *See also* People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, ___ Cal. Rptr. ___, *cert. denied*, 352 U.S. 855 (1956); State v. Furry, 310 Ohio App. 2d 107, 286 N.E.2d 301 (1971).

225. Sonnenreich and Ebner, *supra* note 224, at 651.

226. *Id.* at 649.

227. Meyer v. United States, 386 F.2d 715 (9th Cir. 1967); People v. Gastels, 67 Cal. 2d 586, 432 P.2d 706, 63 Cal. Rptr. 10 (1967); State v. Dusch, ___ Ind. ___, 33 Ind. Dec. 658, 289 N.E.2d 515 (1972).

228. Sonnenreich and Ebner, *supra* note 224, at 632.

229. People v. Peterson, 9 Cal. 3d 717, 511 P.2d 1187, 108 Cal. Rptr. 835 (1973).

IV. DOES THE CASE FIT AN EXCEPTION TO THE WARRANT REQUIREMENT?

All searches and seizures must be "reasonable" pursuant to the fourth amendment, and the Court has held that the procurement of a warrant is indispensible to "reasonableness" in most cases.[230] The warrant process, however, involves time, and in certain situations the inflexible requirement for a warrant would frustrate legitimate law-enforcement interests. When the opportunity to search, assuming probable cause, is fleeting, a warrantless search may be reasonable. Other situations, not characterized by the need for speed, in which warrantless searches may be reasonable are treated in Section V, *infra*. In those cases, though, probable cause is not required, and the search is not engaged in primarily to locate crime-connected items, but to serve some other interests.[231] Suffice it to say that all warrantless searches conducted for the sole purpose of discovering evidence of crime must, to be valid, arise in a context in which speed is essential.

A. Exigent Circumstances—Emergency

The term "exigent circumstances" is often used in a generic sense to denote all situations in which warrantless searches are reasonable; thus, all valid searches incident to arrest or all searches of vehicles on probable cause may be referred to as "exigent circumstances" searches. The term is also used to identify a smaller class of cases—those which the situation suggests the immediate threat of removal, concealment or destruction of evidence thought to be present—which cannot be neatly pigeonholed into a single exception like the automobile exception. The terms used to describe such cases are "emergency" or "exigent circumstances" in the narrower sense. Such cases arise in several contexts.

1. *Searches of the Person*

It is a rare case in which the police have probable cause to search a person for criminal items, yet do not have probable cause for an arrest of that person. If probable cause for arrest exists, such search will be valid as incident to arrest even when no arrest in fact

230. Cady v. Dombrowski, 413 U.S. 433, 439 (1973).

231. For example, an automobile inventory is conducted to protect the police from civil liability and to protect the owner's property.

takes place.[232] In cases in which probable cause to search exists independent of probable cause to arrest, nothing in the fourth amendment suggests a per se exception to the warrant requirement. In several situations, however, a warrantless search may be valid.

a. Highly Intrusive Searches—*Schmerber v. California*

Police may, incident to a valid arrest, conduct a rather extensive search of the arrestee without a search warrant. The fact of arrest does not, however, permit unlimited invasion of personal privacy.

In *Schmerber v. California*,[233] police arrested defendant for drunk driving and drew a blood sample to secure evidence of intoxication. This invasion was held to be beyond the scope of the normal search incident to arrest. The Court held that the police must demonstrate an unusually high level of suspicion—a "clear indication"—to validate such a search.[234] Once a "clear indication" is shown, however, the search may be warrantless since the "evidence" (alcoholic content in bloodstream) disappears rapidly.[235] Thus the *Schmerber* Court found that a "clear indication" had existed and therefore approved the search. If such highly intrusive searches are "clearly indicated" in a context where such a need for speed is not demonstrated, presumably a warrant would have to be obtained and the magistrate convinced to the "clear indication" standard.

b. Searching Persons Located on Premises Lawfully Being Searched

In *United States v. Di Re*,[236] the Court stated that during a lawful search of a residence or automobile, the police could not conduct a blanket search of all persons who happened to be on the premises at that time. More recent cases and statutes have, however, upheld such searches when the person searched bore some relationship to the purpose of the residence search and was more than "casually" present.[237] These cases do not speak in terms of

232. *See* Section V A *infra*.
233. 384 U.S. 757 (1966).
234. *Id.* at 770.
235. *Id.* 770-71.
236. 332 U.S. 581 (1948).
237. *E.g.*, United States v. Peep, 490 F.2d 903 (8th Cir. 1974).

probable cause, but in terms of "reasonableness," suggesting that the suspicion may be less than probable cause. These cases, considered together with statutes touching on this area,[238] indicate that *Di Re*'s influence is presently weak.

A recent trend is to denominate such police conduct a "frisk" thereby automatically diminishing the needed quantum of proof to "reasonable suspicion" and obviating the need for dealing with *Di Re*.[239] The facts in several of these cases do not suggest any suspicion at all apart from presence.[240] Behind many of these decisions is the realization that any drug-related search is more person related than searches for most other evidence. Drugs are often carried on the person and many premises searches or automobile searches could be frustrated by the simple expedient of placing the sought items on one's person.[241] Often, also, in narcotics-law enforcement, the police may obtain probable cause to search a particular location yet not have probable cause to arrest any particular person, at least until possession of or control over the premises is determined.

2. *Residence Searches*—VALE v. LOUISIANA

Warrantless searches of residence upon probable cause have been permitted in several contexts in which imminent destruction, concealment or removal of evidence is threatened. For example, if a residence, automobile or other "private place" is on fire, exigent circumstances exist for a search for items provided the police have probable cause to believe the items are crime-connected and located in the burning place.[242] This probable cause must first be demonstrated, however, since the question of an item's existence is always anterior to the question of its destruction.

The most recurrent problem in this area is the threat of destruction of evidence by those in concert or symphathy with an individual arrested in or near his home. In *Vale v. Louisiana*,[243] the Court addressed the admissibility of evidence discovered during a search of defendant's house following his arrest on the front steps. The

238. *E.g.*, MODERN CRIMINAL PROCEDURE, *supra* note 144, at 71 and at 261.
239. *E.g.*, People v. Noreen, ___ Colo. ___, 509 P.2d 313 (1973).
240. United States v. Peep, 490 F.2d 903 (8th Cir. 1974).
241. LaFave, *supra* note 8, at 273.
242. Steigler v. Anderson, 360 F. Supp. 1286 (D. Del. 1973).
243. 399 U.S. 30 (1970).

Court assumed, arguendo, the existence of probable cause to search the house for narcotics which, the state argued, "are easily removed, hidden or destroyed."[244] The prosecution urged it was unreasonable "to require the officers under the facts of the case to first secure a search warrant before searching the premises, as time is of the essence inasmuch as the officers never know whether there is anyone on the premises to be searched who could very easily destroy the evidence."[245] The Court struck down the search, stating that the state bore the burden of showing the existence of an "exceptional situation" to validate such warrantless searches and that it had not done so.[246]

Due both to the unusual facts of *Vale* and the Court's conclusory treatment of the "confederate" issue, a number of unanswered questions remain. Must the police show they had reason to believe other persons were in fact on the premises *before* searching either for such persons or for evidence, or may they always make a "protective sweep," as some courts have held?[247] Must the police confine such search to a search for persons, at least until such persons are found? If such persons are found, may the police then search for evidence, or should they preserve the status quo until a warrant can be obtained by controlling ingress, egress and other actions of such persons?[248]

Several courts have held that specific knowledge of other potential arrestees acting in concert with the arrestee may permit a warrantless search if such persons are on the premises or at large and in the general vicinity.[249] Many of these cases assume that the police need not, if the initial burden of showing the existence of such persons is met, guard the premises or automobile, but may search it immediately.

The "protective sweep" cases are perplexing. These cases proceed on the theory that arrests in a home always trigger a right to

244. *Id.* at 34.

245. *Id.*

246. *Id.*

247. United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970); United States v. Broomfield, 336 F. Supp. 179 (E.D. Mich. 1972); People v. Block, 6 Cal. 3d 239, 491 P.2d 9, 90 Cal. Rptr. 657 (1971).

248. Griswold, *Criminal Procedure, 1969—"Is it a Means or An End?"*, 29 MD. L. REV. 307, 317 (1969).

249. Mattern v. McGinnis, ___ F. Supp. ___, 13 Cr. L. Rptr. 2316 (D. Ala. 1973).

search for confederates if destructive evidence is suspected. When the police search a home for persons who may conceal or destroy evidence incriminating to an arrestee, however, it seems clear that such action is not only preliminary to the search for evidence, but is a search itself. It would seem that some quantum of suspicion as to the presence of such confederates should be required before such search can be conducted.

3. *Automobiles*

For many years, when probable cause has been directed at the presence of items in an automobile, the mobility of such automobile gave rise to exigent circumstances (per se).[250] Several recent decisions have limited the mobility doctrine, and police have now been compelled in several cases to identify "exigent circumstances" *other than* the fact of mobility to conduct a warrantless automobile search. Those cases are considered next with the automobile cases.

B. AUTOMOBILE SEARCHES ON PROBABLE CAUSE

1. *Supreme Court Decisions—From* CARROLL *to* COOLIDGE

The general warrant exception for the searches of automobiles is today both extremely important and extremely complex.[251] Its importance lies in the American public's love affair with the automobile and the currently high incidence of possessory crimes, chiefly drugs and firearms. The complexity is generated by the variety of factual patterns in which the police search cars, recent Court decisions which conflict with one another and by-pass resolution of certain central inquiries, and the ease with which the automobile doctrine can be confused and overlapped with other search and seizure doctrines not peculiarly applicable to automobiles.[252]

It will avoid some confusion to recognize initially that there are really *two* automobile exceptions to the warrant requirement—the classic exception in which probable cause is required, and a more recent line of cases, dispensing with both the warrant *and* probable cause requirements. (The latter is discussed in Section V C *infra*.)

250. *See* Section III B *infra*.

251. *See generally* Miles and Wefing, *The Automobile Search and Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105 (1972).

252. The following relatively lengthy discussion of two Court decisions may appear out of joint with the summary nature of this article. Presently, however, these cases form the only authority in a situation which occurs daily and both are complex.

The classic exception was originally announced in *Carroll v. United States*.[253] Prohibition agents stopped an automobile believed to contain contraband liquor and conducted a warrantless search on the street pursuant to authorization in the Volstead Act. Most cases prior to *Carroll* had turned on whether such search could be upheld as incident to the arrest of the occupants.[254] The Court upheld the search but stated clearly that the right to search is wholly independent of any right to arrest the occupants or anyone else. The Court pointed out that when there is probable cause for a search of the car, the warrant requirement would be unduly frustrating since the car has high "mobility" and the opportunity to search is "fleeting."[255] The existence of probable cause is indispensible to the rationale since a "fleeting" opportunity is hardly meaningful unless there is something which may fly. *Carroll* thus rests on the *concurrence* of probable cause and a mobile vehicle.

Subsequent cases indicated that two facts in *Carroll*—(1) car stopped in transit and (2) warrantless search congressionally authorized—were descriptive, not operative. In *Scher v. United States*[256] the warrantless search of a parked, unoccupied automobile was held valid under *Carroll* since it was *potentially mobile*; and in *Brinegar v. United States*,[257] the Court assumed sub silentio that no statutory authorization was necessary to uphold warrantless automobile searches.

Since a parked, unoccupied car is mobile enough to satisfy *Carroll*, the inquiry becomes: When, if ever, does an automobile become so immobile that *Carroll* does not apply? *Preston v. United States*[258] appeared to hold that impounded vehicles were outside *Carroll*. The police arrested three men for vagrancy and towed the car to a garage where it was searched. The Government urged upholding the search primarily as incident to arrest. Clearly since defendants were all in custody and separated from the car, the rationales for searching the car incident to arrest—the threat to the

253. 267 U.S. 132 (1925).

254. Miles and Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105, 114 (1972) [hereinafter cited as Miles and Wefing].

255. Carroll v. United States, 267 U.S. 132, 151 (1925).

256. 305 U.S. 251 (1938).

257. 338 U.S. 160 (1949).

258. 376 U.S. 364 (1964).

officer's safety by use of weapons contained in the car and the threat of immediate destruction of evidence—were absent. On this issue *Preston* was clear and undoubtedly is the law today. Yet *Preston*, at the time, appeared to say more. The Court said:

> Here, we may assume, as the Government urges, that, either because the arrests were valid *or because the police had probable cause to think the car stolen*, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and another place.[259]

Since the evidence was suppressed, *Preston* seemed to mean that an impounded vehicle was *no longer mobile*.

If it meant that, *Chambers v. Maroney*[260] overruled it. Petitioners were stopped and arrested for armed robbery. The Court found that the police had probable cause to search the car for fruits and instrumentalities of the crime. There was no question but that a *Carroll* search could have been conducted *on the street*. However, the car was towed to the police station and then searched. The Court stated:

> [T]he probable cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.[261]

Chambers, then, argues (1) that an impounded car is mobile unless the police can "immobilize" it, (2) that "immobilization" implies a seizure, at least temporarily, (3) that a seizure is no less intrusive than a search, and therefore (4) the search is reasonable. *Preston* was distinguished as turning on incident-to-arrest grounds, which was not wholly true, as the *Preston* Court had assumed probable

259. *Id.* at 367-68.
260. 399 U.S. 42 (1970).
261. *Id.* at 52.

cause to search the car.[262]

The Court expressed doubt in *Chambers* as to whether the fourth amendment would permit a warrantless seizure of a car until a warrant is obtained. Yet in *United States v. Van Leeuwen*,[263] decided earlier in the same term, the Court upheld the warrantless seizure of first-class mail until a warrant could be obtained. In fact,in *Van Leeuwen* the probable cause did not materialize until *after* the seizure. The seizure itself was upheld on an extension of the stop-and-frisk rationale of *Terry v. Ohio*.[264] In *Van Leeuwen*, the Court indicated that if the police could temporarily seize persons on less than probable cause, a fortiori they could seize mail. Temporary seizure of an automobile on probable cause seems to follow as well, yet no one in *Chambers* alluded to *Terry* or *Van Leeuwen*.

The impounded automobile quickly came under court scrutiny again in *Coolidge v. New Hampshire*.[265] It is a matter of speculation whether *Coolidge* solved more problems than *Chambers* raised, but it is clear that *Chambers* and *Coolidge* in combination are perplexing if only because *Coolidge* does not purport to overrule *Chambers*.

When Coolidge became a suspect in a murder investigation, he voluntarily produced guns for police inspection, voluntarily took a polygraph examination and was generally "cooperative." The police finally determined that they had probable cause that Coolidge had committed the crime and that crime-connected items were contained in his house and two cars. The Court found that probable cause for the arrest and searches in fact existed.

Armed with an arrest warrant for Coolidge and a search warrant for the house and both cars (all of which were held defective),[266] local police arrested Coolidge for murder, took him into custody, transported his wife and children (the sole remaining occupants of the house) to the home of a relative, placed a guard at the house who remained even after the subject car had been taken from Coolidge's driveway and towed to the station house. There it was vacuumed two days later, and twice more over a year later. Sweepings ob-

262. *Id.* at 50.
263. 397 U.S. 249 (1970).
264. 392 U.S. 1 (1968).
265. 403 U.S. 443 (1971).
266. They had not been issued by a neutral party. *Id.* at 449.

tained during these searches were introduced at Coolidge's trial.[267]

Only four Justices of nine voting unequivocally concurred in the automobile aspect of the majority opinion, which struck down the warrantless search. Four Justices dissented, but only Justice Black relied on *Chambers*.[268] Justice Harlan concurred in the decision but specifically only on other issues.[269] Any attempt to define the *Coolidge* holding on the automobile issue is haunted by a fear that it held nothing at all.

The Court held *Carroll* inapplicable since the car was immobile, not only at the station house, but *as it sat in defendant's driveway*. This immobility was based on the following facts: (1) the car was unoccupied in defendant's driveway when the police arrived; (2) Coolidge was taken into police custody and his wife sent away; (3) the car had been under police guard at all times after the initial entry; (4) Coolidge had been under suspicion for two weeks and had not made any attempt to elude the authorities; (5) the evidence sought (sweepings indicating deceased's presence in car) was not readily disposable. The Court noted:

> A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility.[270]

Coolidge seems to say (1) temporary warrantless seizure of a car on probable cause may be permissible (resolving the doubt *Chambers* created) but a search of it impermissible; and (2) "mobility" is a fact to be determined in a practical, common-sense way.

The *Chambers* holding that an impounded vehicle was mobile seemed doomed. The Court avoided rejecting *Chambers*, however,

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267. *Id.* at 448.

268. *Id.* at 493 (Black, J., dissenting). Justice White, joined by Justice Blackmun and the Chief Justice, relied on the *Cooper-Harris* line of cases. *See* Section V C *infra* for discussion of those cases.

269. Justice Harlan's concurring opinion is a bit mysterious. He concurs in parts I, II-D and III and in the decision, but does not join in part II-B, the section holding *Carroll* inapplicable. Clearly, however, the prosecution need show only one basis for validating a search and to concur in the result one would perforce have to exclude the *Carroll* exception. Section II-D, in which Harlan joins, deals with *Carroll* also but does not definitively set forth a theory for its inapplicability apart from that posited in II-B. The fairest assessment of the matter is that Harlan was convinced of *Carroll*'s inapplicability but could not agree entirely with the II-B analysis and did not articulate his own reasons for his conclusion.

270. 403 U.S. at 461 n. 18.

by stating that it said no such thing. *Chambers*, the Court argued, involved a situation where a *Carroll* search could have been made *on the street* at the initial seizure, and in such situations, the police simply do not lose the power to search by moving the car. In *Coolidge* there is *never* a mobile vehicle. But *Chambers* expressly turned on the mobility *at the station*. *Coolidge* does not explain, reconcile or overrule *Chambers* but changes its meaning. *Coolidge* compels the following analysis: Was the car "mobile" in a common-sense way immediately before seizure? If not, no *Carroll*-type search is permissible. If so, that right will continue notwithstanding the near-total immobilization by impoundment. Yet if this is what *Coolidge* means, it overlooks that "mobility" is an "exigent circumstance" and triggers a warrantless search *only* because the opportunity to search is fleeting. As mobility disappears, so too does the exigency. The *Coolidge* Court seemed, in other portions of the opinion, extremely sensitive to the need for carefully limiting warrant exceptions.[271] The theory that a *Carroll* right to search, once attached, does not disappear is not necessary to the decision, is at odds with the sense of the opinion, and exists, perhaps, only to avoid overruling *Chambers* outright.

It is not entirely clear why Coolidge's car should be considered immobile as it sat in his driveway. The fact that the police secured it by guarding it and ushering away all those with a propensity to move it does not appear dispositive since, as the Court says, *Chambers* presents a vehicle mobile where it was seized. But in *Chambers* all those with a motivation to move it were arrested. The "mobility" is one, if *Chambers* means what *Coolidge* says, which must be measured *prior to seizure* since *all* seized vehicles are immobile. (If immobility is to be temporary, as where the occupants are not to be arrested or where it is inconvenient for the police to "secure" the car, the potential "mobility" is real and a *Carroll* search is authorized upon probable cause.) Both *Chambers* and *Coolidge*, then, involved cars truly "immobilized" by seizure. The only difference in mobility seems to be that in *Coolidge* the motivation to move the car and dispose of the evidence was absent (1) because the defendant, perhaps, had no reason to suspect the car contained "evidence," and (2) the evidence was of a type not readily disposable. As to mobility at the scene, then, *Chambers* and

271. *See* Section II-D of the Court's opinion.

Coolidge standing together admit of three interpretations: (1) the lack of motivation to dispose and "ready disposability" are the only operative differences, and *Coolidge* is therefore an "extreme" case and *Chambers* remains largely viable (this does not appear to be the "sense" of *Coolidge*); (2) *Coolidge* overrules everything in *Chambers* but the result (this requires some imagination since the result of a prior case needs no protection if the rationale is to be destroyed); (3) *Coolidge* limits *Chambers* by re-exploring it (the problem here is that it does not limit *Chambers* nearly enough since in both cases the cars were "mobile" *before* seizure *except for* "motivation" and ready disposability.

When police seize and impound a vehicle, the warrant requirement frustrates no immediate police need, and there appears no sound reason for permitting a *Carroll*-type search and dispensing with the warrant requirement since both turn on the same thing—existence of probable cause—and since the warrant affords greater protection. It is hard to discern what outbalances the individual's interest in being accorded the extra protection of a warrant in what is admittedly a balancing procedure.[272] The individual's right is protected in two ways: (1) if the magistrate does not find probable cause, the intrusion will not take place at all and (2) if the magistrate does so find, review of probable cause will be only on facts actually extant before the search.

The Court has often asserted in this context, and others, that "the question is not whether it is reasonable for the police to search without a warrant, the question is whether the search is reasonable."[273] It is perplexing why the second question is not merely another way of expressing the first.

2. *Lower Courts—Post-*COOLIDGE

State and federal courts have responded differently to *Chambers* and *Coolidge*. The Fourth Circuit recently evidenced some frustration with the "state of flux" created by *Coolidge* and

272. Terry v. Ohio, 392 U.S. 1, 27 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). The only conceivable arguments are: (1) it is inconvenient to get a warrant in the limited sense that it takes time and effort; (2) the magistrate would refuse to issue even where there is probable cause; (3) the intrusion of seizure has already occurred and a further intrusion should not raise constitutional problems.

273. Coolidge v. New Hampshire, 403 U.S. 443, 474 n. 29 (1971), quoting United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

Cady v. Dombrowski.[274] Since *Dombrowski*, unlike the *Carroll* line, involved a probable cause exception, it should be separated from *Coolidge* to avoid confusion.[275]

The Fourth Circuit recognized at least one constant running through all Supreme Court automobile cases—the danger of loss of evidence *at some point* and holds proof of such danger indispensible.[276] Since the officers could have temporarily guarded the car while another obtained a warrant, the Court continued, such danger was not present. While the decision may represent good fourth amendment law, it is not compelled by *Coolidge*.

Recent cases upholding warrantless automobile searches have been forced to deal with *Coolidge*. Although there is an occasional suggestion that the automobile issue in *Coolidge* did not command a majority and is, therefore, not controlling,[277] two patterns of distinction are developing.

Several courts, recognizing that the immobility determination in *Coolidge* rested on a combination of factors disproving *any* need for speed, distinguish situations where immobility is not as strong. The Supreme Court of New Jersey, for example, distinguished *Coolidge* from a case before them, noting (1) that the car was initially confronted in the street, not the suspect's driveway, and (2) the search, unlike *Coolidge*, was made immediately after probable cause arose so that the risk of loss was higher.[278] The Sixth Circuit, on the other hand, found the facts in *Lewis v. Cardwell*[279] indistinguishable from *Coolidge* since probable cause had been extant for two weeks in that case also, and the fear of loss was minimal.

One inevitable trend has gained momentum. As *Carroll* clearly permitted warrantless auto searches because "mobility" was *itself* an "exigent circumstance," it was thought unnecessary to identify other exigent circumstances to uphold an automobile search. Since *Coolidge*, however, courts have upheld searches of autos on probable

274. United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974).

275. *Dombrowski* in fact involved a quasi-inventory. While there was some indication that the police expected to find a particular item (a revolver), the Court did not express a finding of probable cause, but based the decision on a rationale separable from those in *Chambers* and *Coolidge*.

276. United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974).

277. State v. LaPorte, 62 N.J. 312, 301 A.2d 146 (1973).

278. *Id.*

279. 476 F.2d 467 (6th Cir. 1973).

cause with proof of the same types of exigencies long accepted for house searches.[280] The most prevalent is proof of others in a position to dispose of evidence, such as in *Vale*.[281] The Ninth Circuit has pointed out that the presence of confederates must exceed a "generalized fear," but when demonstrated will permit a warrantless search.[282] The Louisiana Supreme Court has held that exigent circumstances *must* be shown to permit warrantless searches of automobiles under police seizure and struck down the search, on probable cause, of a vehicle stopped *in transit*.[283] This result is clearly beyond anything required by *Coolidge*.

Finally, some courts have resolved the precise *Chambers* question—automobile, "mobile" at scene, impounded and then searched—both ways. Many speak of the *immobility at the police station* as operative.[284] While this may be within the spirit of *Coolidge*, the Court in *Coolidge* seemed insistent on saving the *Chambers* result. Others find mobility *at the scene* determinative.[285]

Justice Harlan, concurring in *Coolidge*, spoke of the need for an "overhauling" of search and seizure law.[286] If such is to take place, the automobile doctrine warrants early treatment. Until the Court clarifies *Carroll-Chambers-Coolidge*, lower courts will continue to decide cases on an almost wholly ad hoc basis.

V. DOES THE CASE FIT AN EXCEPTION TO THE PROBABLE CAUSE REQUIREMENT?

Although probable cause is a necessary ingredient of a valid warrant, a search may be "reasonable," and therefore valid under the fourth amendment, absent *both* probable cause and a warrant. It should be borne in mind throughout this section that the existence of probable cause or the use of a warrant are irrelevant in the context of a search which falls under one of the probable cause exceptions. The following are the most commonly recognized exceptions to the probable cause requirement.

280. People v. Dumas, 9 Cal. 2d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).
281. 399 U.S. 30 (1973).
282. United States v. Connally, 479 F.2d 930 (9th Cir. 1973).
283. State v. Hargiss, 288 So. 2d 633 (La. Sup. Ct. 1974).
284. Mobley v. State, 270 Md. 76, 310 A.2d 803 (1973).
285. People v. Wiseman, ___ Ill. App. 3d ___, 303 N.E.2d 522 (1973).
286. 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

A. Search Incident to Arrest

The question of the availability, scope and consequences of a search conducted incident to arrest probably has occupied more Supreme Court time than any other fourth amendment issue. Its history has been tortuous—cases have been rejected, reinstated, only to be abandoned again. The present state of the law is perhaps less intellectually satisfying than former approaches, yet it is relatively easy to apply. This is important since policemen must make judgments in this sphere almost daily.

1. *Lawful Arrest*

Any evidence discovered by a search incident to an *unlawful* arrest is excluded as a fruit of the poisonous tree.[287] The legality of an arrest, for its own sake, has received scant judicial treatment since little turns on it.[288] If the arrest is quashed, the defendant is generally susceptible to immediate re-arrest. In addition, the validity of the arrest cannot be challenged at many stages in the process.[289] Thus, the law of arrest has developed in cases where the arrest formed the putative basis for a search because the search was incident to arrest, because a "plain view" discovery was made during the arrest procedure, or because a confession was obtained as a result of that detention.[290]

a. Necessity of Probable Cause

Since an arrest is a "seizure" of a person, it must be reasonable to comply with the fourth amendment.[291] In all but the area of "stop and frisk" (see Section V F *infra*), probable cause for arrest is an indispensible element of this "reasonableness." Probable cause for arrest differs from probable cause to search only insofar as the set of conclusions which must be probable are different. The conclusions that (1) a crime has been committed, and (2) that the arrestee committed it, must both be probable in order to justify arrest. Questions of qualifying the concept of "probable cause," and of what

287. Wong Sun v. United States, 371 U.S. 471 (1963).
288. Coolidge v. New Hampshire, 403 U.S. 443, 475 (1971).
289. *See* Note, 100 U. Pa. L. Rev. 1182, 1207-08 (1952).
290. The fourth amendment and the exclusionary rule apply not only to hard evidence but to confessions which are the product of unlawful arrests. Wong Sun v. United States, 371 U.S. 471 (1963).
291. Beck v. Ohio, 379 U.S. 89 (1964).

types of facts, including hearsay, police records and tips from informants, may properly be used are resolved just as they are in the search context (see Sections II B, II C *supra*).

The Supreme Court has announced a decided preference for arrests made pursuant to warrant, so that in a case where probable cause is borderline, the presence or absence of a warrant may be determinative.[292]

b. Necessity of Arrest Warrant

It is a strange curiosity that the Supreme Court, long emphasizing the necessity for search warrants in a variety of contexts, has not, with perhaps one short-lived exception,[293] addressed the necessity of warrants for arrest. The Court recently remarked in *Coolidge v. New Hampshire*:

> It might appear that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his "person . . . papers and effects," without prior judicial approval. The question of the scope of search and seizure once the police are on the premises would appear to be subsidiary to the basic issue of when intrusion is permissible. But the law has not developed in this fashion. . . . It is clear then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of fourth amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well-defined "exigent circumstances."[294]

Yet in *Coolidge itself*, the Court "assumed" an arrest inside the defendant's house was valid without attempting to identify any exigent circumstances.[295]

In the absence of Court decisions delineating when the fourth amendment requires warrants for arrests, most states have adopted the common law rule permitting warrantless arrests in all felony

292. *Id.*

293. *See* MODERN CRIMINAL PROCEDURE, *supra* note 144, at 270-71, referring to Trupiano v. United States, 334 U.S. 699 (1948) and United States v. Rabinowitz, 339 U.S. 56 (1950).

294. Coolidge v. New Hampshire, 403 U.S. 443, 475-77 (1971).

295. 403 U.S. at 455.

cases and for all misdemeanors committed in the officer's presence.[296] The percentage of arrests for misdemeanors committed outside the presence of police is minimal, and, even in those situations, warrantless searches may be upheld upon the showing of certain exigencies.[297] Until the Court speaks *and* acts with reference to arrest warrants, there is no reason to suspect this approach will be modified. The fourth amendment, thus provides exceedingly greater protection against the invasion of a man's house, car or other private place than against the invasion of his person and restraint of his liberty.[298]

2. *The Scope of the Search*—CHIMEL v. CALIFORNIA

The primary focus of the long line of Court decisions concerning searches incident to arrest has been the permissible scope of those searches. The most recent decision, *Chimel v. California*,[299] modified a 1950 case which had required merely that the search be "reasonable" in scope[300] and added much needed predictability into this area. *Chimel* held that searches incident to arrest are reasonable insofar as they are necessary to prevent the arrestee from producing a weapon and threatening the officer's safety or effectuating an escape, or concealing or disposing of evidence, a danger most prevalent in narcotics cases. Recognizing that there is no "point of rational limitation once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items," the Court strictly limited the scope to (1) the arrestee's person and (2) the area within his immediate control.[301]

The right to conduct a search incident to arrest is limited not only by scope and some triggering factor (see Section V A 3 *infra*), but by two other limitations. First, the search must be reasonably contemporaneous with the arrest to be "incidental" thereto. If the search comes too early (*i.e.*, *before* probable cause to arrest develops) it clearly cannot be considered incidental to the arrest. Unless there is some other basis for upholding such search, the fruits clearly

296. *See* MODERN CRIMINAL PROCEDURE, *supra* note 144, at 270.
297. *Id.*
298. If entry into the arrestee's house is necessary to effectuate the arrest, requirements of daytime hours and knock and announce are applicable. *See* Section III C *supra*.
299. 395 U.S. 752 (1969).
300. United States v. Rabinowitz, 339 U.S. 56 (1950).
301. Chimel v. California, 395 U.S. 752, 763 (1969).

cannot be used for any purpose. This does not mean, however, that the police must have announced the arrest or even effected it prior to the search. Mr. Justice Harlan observed in his concurring opinion in *Peters v. New York*:

> The Court implies, however, that although there is no problem about whether the arrest of Peters occurred *late* enough, i.e., after probable cause developed, there might be a problem about whether it occurred *early* enough, i.e., before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards". . . . Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause, the prosecution must be able to date the arrest as early as it chooses following the obtaining of probable cause.[302]

A search may also fail the "contemporaneous" requirement if it comes too long *after* the arrest, even though it is within the physical scope of *Chimel*. The recent Supreme Court case of *United States v. Edwards*[303] indicates, however, a broadening of the concept of contemporaneity in this regard. In that case, ten hours after the arrest of defendant and while he was still in custody, police seized the clothes he was wearing and subjected them to laboratory analysis. The court upheld this warrantless search and seizure noting (1) that the clothing was still within defendant's immediate control and thus within the spatial scope of incident searches and (2) that since defendant was still in custody resulting from the arrest, the search was contemporaneous thereto. Both of these points are critical. In *Preston v. United States*[304] the Court held that a search of defen-

302. 392 U.S. 40, 76-77 (1968) (emphasis added).

303. 94 S. Ct. 1234 (1974). *See also* United States v. Williams, 416 F.2d 4 (5th Cir. 1969).

304. 376 U.S. 364 (1964).

dant's car while he was in jail was not incident to arrest because a search at a time and place removed from the arrest is not contemporaneous thereto. It must be recognized, however, that in *Preston* the automobile was not within defendant's immediate control when it was searched.

The Court in *Edwards* seems to imply that an arrest involving station-house custody is in fact a continuing arrest, and the search need only be incident to the *custody* which is a product of such arrest. For example, if the police were to arrest an individual and release him immediately, a search ten hours later clearly could not be incident thereto. The only basic difference between such case and *Edwards* is that the police never gave up their custody in *Edwards* and the "arrest" therefore was still operative ten hours later.

The second limitation on the right to make a search incident to an arrest deals with highly intrusive personal searches which pierce the body shell such as "body-cavity" searches, or drawing blood for chemical testing. Proof of a high level of suspicion (usually expressed as a "clear indication") must be made to justify such searches.[305]

In addressing the question of whether a search remained inside an area within the arrestee's "immediate control," lower courts since *Chimel* have recognized a number of relevant factors in addition to the threshold questions of distance, and general accessibility. The two most prevalent of these factors are the extent of police restraint of the arrestee and the objective indications of danger at the scene of the arrest.

The Fifth Circuit held that a briefcase one and one-half feet from the defendant was not within defendant's immediate control after he had been handcuffed by FBI agents.[306] Similarly, the Second Circuit, rejecting "the notion that *Chimel*'s 'immediate control' test permits law-enforcement agents to search the entire room in which an arrest takes place," struck down a search of a closet in a one-room apartment since six BNDD agents had the arrestee under restraint and one agent stood between her and the closet.[307] On the

305. *See* discussion of Schmerber v. California, 394 U.S. 757 (1966), *supra* note 233 and accompanying text.

306. United States v. Jones, 475 F.2d 723 (5th Cir. 1973).

307. United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

other hand, a Maryland court upheld a search under the front seat of an automobile as one arrestee stood, unshackled, at the door and the other sat on the passenger side of the front seat.[308] These cases are clearly explained in terms of the degree to which the arrested defendants were restrained or controlled by the officers involved. But some courts have apparently ignored the fact of police restraint entirely and have upheld searches which would be within the arrestee's immediate control *if* such restraint were absent.[309] This is a misapplication of both the letter and the spirit of *Chimel*.

In *Preston v. United States*[310] a search of an impounded vehicle at the police station after the arrestee was in custody was held not to be incident to arrest because too remote in time and place and therefore not contemporaneous. *Preston* was, however, decided before *Chimel*; such searches today are also defective as incident to arrest since the automobile, whatever may have been the case at the scene of arrest, is clearly beyond the arrestee's immediate control once he is permanently separated from it. A seeming paradox is presented, however, by situations in which police do not intend to take the arrestee into more permanent custody at the station house or jail, but intend to release him immediately. Presumably the area within his immediate control is now increased since he may, when the temporary restraint is lifted, more readily obtain a weapon or evidence. This would mean that such searches could be *more* extensive when *less* restraint is exercised. Yet two recent Court decisions (see Section V A *infra*) have indicated that searches incident to non-custodial arrests *must* be based on demonstrable indications that dangerous weapons may be present or that destruction of evidence is threatened. It would seem that these proofs could seldom be made in non-custodial arrests since such arrests normally involve petty offenses.

The Sixth Circuit recently upheld a search of a desk-type table, three to five feet from an arrestee who was forced to stand against the wall.[311] The court noted that he had not been handcuffed (as the arresting officers had none) and was "still resisting and trying to move in directions other than those described by the officers,"

308. Howell v. State, ___ Md. App. ___, 306 A.2d 554 (Ct. Spec. App. 1973).
309. State v. Reynolds, 32 Ohio St.2d 101, 290 N.E. 2d 557 (1972).
310. 376 U.S. 364 (1964).
311. United States v. Becker, 485 F.2d 51 (6th Cir. 1973).

and, all in all, "the situation was not completely under control."[312] The court distinguished an earlier case in which an officer had blocked arrestees' path to the place searched and both arrestees were entirely controlled. While the matter of restraint was important, the court pointed out that the arrestee was potentially dangerous and had, by his actions, given cause to be more concerned about his reaching a weapon or evidence.[313] In a decision invalidating a search of a closet urged as incident to arrest, the Second Circuit stated:

> Nor did the officers here involved point to any articulable reasons leading them to believe that [the arrestee] was an especially dangerous person against whom extraordinary measures may have been required, or that the search was actually an attempt to secure an area which the officers, in good faith, subjectively believed was within [her] area of immediate control.[314]

Several recent decisions have upheld "protective sweeps" of a house after an arrest to search for persons who may be inclined to destroy evidence left behind.[315] The Seventh Circuit makes it clear that such practices cannot be upheld as incident to arrest since they are clearly beyond the scope authorized in *Chimel*.[316] They may, however, be valid under the "exigent circumstance" doctrine of *Vale v. Louisiana*[317] (see Section IV A 2 *supra*) if there is evidence of the presence of others and probable cause as to the presence of crime-connected items.

3. *Triggering the Right to Search Incident to Arrest*

Chimel defined the scope of a search incident to arrest, but left open the question of whether every arrest triggers the right to make a search within that scope. The rationales for such searches were clearly identified as (1) protecting the officer's personal safety by removing weapons and (2) preventing immediate destruction of evidence.[318] The Court did not make it clear whether the right to search

312. *Id.* at 55.
313. *Id.*
314. United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973).
315. *See* note 247 *supra* and accompanying text.
316. United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973).
317. 399 U.S. 30 (1970).
318. Chimel v. California, 395 U.S. 752, 763 (1969).

was limited to arrests in which one of these dangers could be demonstrated, or whether, since these possibilities occur in some situations, the search is reasonable in all. It is obvious that in many arrests, especially for minor offenses, there is no threat to the safety of the arresting officer, nor evidence capable of immediate disposal, either because the offense is one which carries no tangible evidence (such as most traffic violations) or because attendant circumstances indicate the evidence cannot be present.

The answer appears to have come in the recent companion cases, *Robinson v. United States*[319] and *Gustafson v. Florida*;[320] not uncommonly, however, these cases raise new, unresolved problems. Basically these cases hold that the mere fact of "custodial arrest" triggers the power to make a *Chimel*-scope search.[321] (Nothing in these cases changes *Chimel*'s definition of the *scope* of such searches.)[321.1] "Custodial arrest" is somewhat misleading since every arrest involves the restriction of freedom at least temporarily. The term is, however, used to label an arrest involving a police decision to render the custody more premanent by taking the arrestee to the

319. 94 S. Ct. 467 (1973).

320. 94 S. Ct. 488 (1973).

321. *Id.* at 491-92.

321.1. The text proceeds on the assumption that a search incident to a custodial arrest, even where there is no evidence which could be destroyed and when no indications of "dangerousness" are present, is of the scope set down in *Chimel*—(1) the person and (2) the area within his immediate control. This conclusion may be somewhat facile in light of the persistent use in *Robinson* and *Gustafson* of the term "arrestee's person" without a concomitant use of "area within his immediate control." Indeed, in *Robinson* the Court breaks down the history of the search incident to arrest into two components: (1) the search of the person (the Court intimates that the right to search the person was never in doubt); and (2) the scope of the search incident to arrest beyond the person (which has, of course had a tortuous history). 94 S. Ct. at 471-73. After making this distinction, the Court concentrates on the search of the person and specifically authorizes searches incident to custodial arrest as to "person" searches. It is of course possible to conclude from this that a mere custodial arrest, in which there is no danger of evidence destruction or threat of force, authorizes a search of the person only, but not of the "area within his immediate control." Several considerations militate against this interpretation. First, the Court does not speak in these cases of the inventory of a person's belongings typical in connection with custody at the police station or local jail. If it did the decisions could be viewed as a stepped-up inventory. Instead, the Court deals with *Terry v. Ohio*, 392 U.S. 1 (1968) and with the need of police to protect themselves in suspect confrontations. Since an arrest, and especially a custodial arrest, is a more serious invasion of personal liberty than a "stop," the Court refuses to require even the "reasonable suspicion" of dangerousness requirement that *Terry* imposes prior to making a frisk. 94 S. Ct. at 473. The Court firmly rests the right to make a custodial arrest on the arresting officer's interest in protecting himself. 94 S. Ct. at 476. Second, *Chimel*'s definition of the scope of a search incident to arrest was different *in kind* than all the cases preceding it and did not merely

station house or jail.[322] Taken with *Chimel* these cases indicate that proof of *any one* of the following three conclusions will trigger the right to search incident to arrest: (1) the officer's personal safety is threatened; (2) disposal of evidence is threatened; (3) a "custodial arrest" has been made. Thus a search incident to a *non-custodial* arrest may still be valid under (1) and (2).

Robinson and *Gustafson* provoke three pertinent questions: (1) Must it be shown that the decision to take the subject into "custody" was reached prior to the search? (2) Must this decision be announced prior to the search? and (3) Are there constitutional limitations on the decision to take a subject into custody?

As to the first, it seems reasonably certain that, insofar as the *fact* of the custodial arrest gives rise to the right to search, the decision to conduct such an arrest must *be* a fact prior to the search itself. Clearly it is the arrest for the crime initially suspected, and not the arrest generated by items uncovered by the search, which must be "custodial."

The second question is more difficult and in one sense nearly inseparable from the first. If the decision to make a "custodial arrest" need not be announced prior to the search, the procedure of searching and then making the "custody" decision based on the result of the search becomes possible, if not invited. Moreover, it would be extremely difficult to prove that this is, in fact, what happened. The most obvious solution would be to require an announcement to the arrestee that he is the subject of a "custodial arrest." Of course, the policeman could lie about having given the warning, or the suspect could lie about having received it; yet this is preferable to resolving the issue solely by reference to the state of mind of one person. If the search is made because of the safety or

restrict the area of permissible scope. Unlike earlier cases, the scope set down in *Chimel*, which reached beyond the arrestee's person itself, was not an effort to delineate an additional area of search (such as a house or a room or an automobile) but was instead a recognition that the search of the person of the arrestee might be meaningless if areas within his immediate grasp could not be searched as well. It seems fair to conclude that when *Robinson* and *Gustafson* refer to a search of an arrestee's "person," the area within his immediate control is meant to be included. The fact remains, however, that the Court's opinions in these cases leaves the issue in doubt when the arrest is custodial but not accompanied with indications of "dangerousness" or the threat of evidence destruction. If either of these indications *are* present, it is clear that the full *Chimel*-scope search is permissible.

322. Robinson v. United States, 94 S. Ct. 467, 476-77 (1973).

evidence-preservation grounds, the need for speed may outweigh any requirement for announcement. In such situations, however, the same danger is not present since the officer must be able to articulate some facts to support his conclusion that one of these conditions existed.

Mr. Justice Stewart's concurring opinion in *Gustafson* raises the third question:

> It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense [failure to have driver's license in his possession] violated his rights under the Fourth and Fourteenth Amendments.[323]

The reasonableness of an arrest, like the reasonableness of a search, is ultimately referable to the balancing of the interests of law enforcement and of the particular individual. The Court has, in varying contexts, clearly held that the extent and duration of the intrusion is a matter to be balanced.[324] In *Robinson* and *Gustafson* the evidence indicated that custodial arrests for the violation in question were not invariable, though not uncommon.[325] Evidence of past police practices would appear to be relevant in resolving the reasonableness inquiry, but it is likewise arguable that no amount of past police practices can render all custodial arrests reasonable. Apart from the fourth amendment issue, principles of selective enforcement and equal protection may be applicable in certain circumstances though such cases often require enormous proof.[326]

4. *"Pretext" and "Timed" Arrests*

Occasionally the situation arises in which, given a valid arrest and a search apparently incident thereto, courts have excluded the evidence because the arrest was a "pretext" made only to trigger a search not independently justifiable due to the absence of probable cause. Thus, for example, a policeman with mere suspicion that X possesses narcotics, may arrest him on a minor offense (often a traffic offense such as failure to have an operative license plate

323. Gustafson v. Florida, 94 S. Ct. 488, 492 (Stewart, J., concurring).

324. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

325. 94 S. Ct. 488, 491 n. 3.

326. *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965).

light) for the primary purpose of making the "incidental" search to recover the narcotics. In these situations it is the *arrest* which is incidental to the *search* and not the reverse.

Because showing an arrest was a "pretext" requires proof of a policeman's subjective intent, it is difficult to prove even when suspected. The relatively few successful attacks on this ground have invariably included objective indications that the primary police desire was the "incidental" search. In one recent case the police, knowing a suspect had been driving on a suspended license, waited until they believed he possessed narcotics before arresting on the license charge and found narcotics during the "incidental" search.[327] The court suppressed the evidence, stating the arrest was made "for the purpose of circumventing his fourth amendment rights."[328] Occasionally proof of the pretext can be made not by showing the actual intent of the officer, but by reference to his function in the department. For example, proof that the detective who stopped and arrested defendant for doing 36 M.P.H. in a 30 M.P.H. zone and discovered narcotics in the incidental search was assigned to the narcotics division and did "not generally make traffic arrests" (especially of so minor a character) was a crucial factor in the court's decision to suppress.[329]

Circumstances present at the scene may turn an invalid pretext arrest into a permissable arrest and *Chimel* search. In *Green v. United States*,[330] police officers suspected that four persons were involved in a confidence game. Before probable cause developed, the police stopped three of the men for questioning. Two were arrested for vagrancy and searched. The fruits of those searches were suppressed since the vagrancy ordinance had been "corrupted in use so as to constitute a tool of avoidance or shortcut to the basic requirements of due process in the adminstration of justice."[331] During the questioning, however, the police noticed a straight-edged razor protruding from the third man's pocket and arrested him on a concealed weapons charge. The search incident to that arrest was *upheld* though "motivated by the same suspicion."[332]

327. Blazak v. Eyman, 339 F. Supp. 40 (D. Ariz. 1971).
328. *Id.* at 43.
329. Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968).
330. 386 F.2d 953 (10th Cir. 1967).
331. *Id.* at 955.
332. *Id.* at 956.

It is difficult to articulate a test for pretext arrests. One court stated that it is a "question of the motivation or primary purpose of the arresting officer."[333] This approach, which concededly identifies the chief characteristic of pretext arrests, may be unworkable in certain situations. For example, it is difficult in the weapons arrest in *Green* to identify which purpose was primary. It may be too restrictive of surveillance practices to require that the offense which triggers the arrest present a graver problem than the offense subjectively suspected. Perhaps the test should be whether, in light of all the circumstances, the arrest would have been made *absent the pre-existing desire to search* in connection with another offense. Therefore in *Green*, the police could be expected to make an arrest for concealed weapons. However, the officers would not have made the *vagrancy* arrest but for the pre-existing desire to conduct a search.

Closely allied to the "pretext" arrest is one which is "timed." Here the arrest is for the same offense for which the police desire to search, but is delayed until the suspect is in a place (such as his house, or automobile) where the incident search is most likely to yield fruits. Here, as in the "pretext" cases, the arrest itself may be upheld, but the search incident to that arrest invalidated.[334] Proofs in a "timed" arrest case must show that the police deliberately disdained earlier clear opportunities to arrest for the sole purpose of enhancing chances on the incident search. There are many *legitimate* reasons for delaying arrest such as developing more evidence, or minimizing the risk to the policeman or bystanders. When such factors are shown, the search will be upheld even though the time and place of the actual arrest may also increase the likelihood of discovering evidence in a search incident thereto. And of course there is no objections to an arrest "timed" to occur as *quickly* as possible and before the suspect disposes of evidence, provided only there is antecedent probable cause.

"Timed" arrests are a less serious problem after *Chimel* limited the scope of incidental searches. No longer can police, by the expedient of delaying an arrest until a suspect is in his house, search the entire house incident to that arrest. "Pretext" arrests, however, may

333. Williams v. United States, 418 F.2d 159, 161 (9th Cir. 1969).
334. McKnight v. United States, 87 U.S. App. D.C. 151, 183 F.2d 977 (1950).

be more of a danger today because of the widespread narcotics traffic and the fact that narcotics are often carried on the person, an area clearly *within* the *Chimel* scope.

B. CONSENT

1. *Consent by Defendant*

As with most rights, the right to be free from unreasonable searches and seizures can be relinquished by voluntary consent. In the recent case of *Schneckloth v. Bustamonte*,[335] the Supreme Court set down standards by which alleged consent should be evaluated. Initially, the prosecution bears the burden of showing the existence of consent "freely and voluntarily given."[336] "Voluntariness" is itself an "amphibian"[337] reflecting a balancing of society's interest in law enforcement and the individual's interest. In determining voluntariness in each case, reference should be had to the "totality of circumstances" including the defendant's age, education, and intelligence, the length of detention, the intensity and duration of police contact, the presence or absence of physical or psychological punishment or "third degree" methods, and whether or not defendant was informed of his constitutional right not to consent.[338]

The defendant argued, as one circuit had held,[339] that, similar to *Miranda*'s[340] treatment of in-custody confessions, no consent should be valid absent prior announcement of the right not to consent. The Court rejected this notion, stating:

> [I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigating technique of law-enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search

335. 412 U.S. 218 (1973).
336. *Id.* at 222.
337. *Id.* at 224.
338. *Id.* at 248-49.
339. Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).
340. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that confessions produced by custodial interrogation were admissible only if the defendant was first advised, among other things, of his constitutional right not to speak.

> may develop quickly or be a logical extension of investigative police questioning.[341]

The Court went on to point out that such setting is "a far cry from the structured atmosphere of a trial" and "while surely a closer question," "immeasurably far removed from 'custodial interrogation.' "[342] Responding to the assertion that consent acts as a waiver, and that waivers, at least of constitutional rights, must be "an intentional relinquishment or abandonment of a known right," the Court stated that waivers, as so defined, apply to rights *necessary to a fair trial*, but that the fourth amendment has "nothing to do with the fair ascertainment of truth at a criminal trial."[343] The Court stressed that failure to instruct as to the right to refuse consent is a factor in determining "voluntariness" but not a *sine qua non*. In addition, the Court stated that it would ask too much of police officers in an unstructured street setting to make difficult on-the-spot determinations of "waiver." Yet, the "totality of circumstances" test itself appears to call for just such a sophisticated judgment. If the police have no other valid ground for conducting a valid search, acting pursuant to questionable consent may result in suppression of the fruits. The police decision to search, then, involves more than an evaluation of the consent: it also involves a judgment on whether alternative investigative techniques, including surveillance, may offer a higher probability of obtaining usable evidence. Once a bad search occurs, it becomes difficult—impossible in some cases— to cure it.[344]

Bustamonte is strictly limited to consents given by persons not in custody. Other courts have held, both before and after *Bustamonte*, that consent given while in custody should be closely scrutinized, and several courts have stated that no in-custody consent is valid because of the implicit coercion involved. Certainly, in custodial settings, the announcement of the right to refuse would normally be required, although one post-*Bustamonte* case held an in-custody consent with no announcement valid stressing the defendant's experience and education. There is authority that if the defendant's consent is motivated by a desire to receive a benefit from

341. Schneckloth v. Bustamonte, 412 U.S. 218, 231-32 (1973).
342. *Id.* at 232.
343. *Id.* at 242.
344. *See* United States v. Jones, 475 F.2d 723 (5th Cir. 1973).

the state (such as a recommended light sentence or a promise to "go easy" on others) it is valid.[345] On the other hand, a non-custody consent given after a warning may be invalid under the "totality" test.

Several common police practices have been challenged as per se coercive. In *Bumper v. North Carolina*[346] the Court held invalid any consent given after the police indicate they have a warrant since "he announces in effect that the occupant has no right to resist the search."[347] *Bustamonte* should have little effect in this area as the *Bumper* Court held such practice implicitly coercive, indicating that a consent under such circumstances would be "voluntary" only in an extreme case.[348]

2. *Third-Party Consent*

It is well accepted that an individual's rights under the fourth amendment, unlike other constitutional rights, can be lost through the action of a third party. The Court recently re-affirmed that "a consent search is fundamentally different in nature from the waiver of a trial right"[349] and, therefore, the consent may come from someone other than the putative defendant.

Several theories have been advanced over the years both to explain the rationale and delimit the effectiveness of third-party consent. The earliest appears to have been the agency—or apparent authority—test, which reasoned that the ultimate defendant had, in law if not in fact, appointed the third person his agent.[350] This test has largely fallen into disuse, not only due to the patent absurdity of an appointment, fictional or otherwise, of persons to waive one's constitutional rights, but also because the statement of the rule did not suggest any natural guidelines for its application.

Presently, nearly all third-party consents are measured by the

345. United States v. Culp, 472 F.2d 459 (8th Cir. 1973).

346. 391 U.S. 543 (1968). *See also* Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973).

347. 391 U.S. at 548 (1968).

348. In Earls v. State, ___ Tenn. ___, 496 S.W.2d 464 (1973), the defendant, who had "some college education," after being told the police had a warrant (which later proved defective), stated "you needn't have brought a search warrant. You gentlemen are welcome to search anywhere on my premises you want to search and take anything you find." The Court held this "invitation" to search overcame the *Bumper* rule.

349. United States v. Matlock, 94 S. Ct. 988 (1974).

350. *Id.* at 992.

relationship of the consenting party *to the place* searched, and not his relationship to the ultimate defendant. The authority to consent to the search of a place turns on "mutual use of the property by persons generally having joint access or control for most purposes,"[351] and not on "subtle distinctions, developed and refined by the common law in evolving the body of property law which, more than almost any other branch of law, has been shaped by distinctions largely historical."[352]

Thus, a person with joint access and control over a house may consent to a search thereof as against a spouse, paramour, child or casual guest.[353] With respect to children, especially minors, courts generally presume total access and control by parents.[354] Yet the rule of joint access has two limitations. First, a person with a legally recognized right of access who, in fact, does not normally exercise such a right, does not have a sufficient relationship with the "place" to consent to its search. Thus, a mother who had, for a period, respected her 19-year-old son's stated desire that she not enter his room, could not consent to a search of the room, especially since the son had locked it.[355] Second, while one may enjoy actual control or access over most portions of a house, he may not consent to a search of areas which are in actuality held privately by the suspect.[356] For example, consent by a homeowner to search the room occupied by his brother-in-law, a casual guest, was held valid, but consent to search his duffel bag located within that room was not since the evidence indicated no right of access *or* actual access to it.[357] Thus, if X and Y share an apartment but each maintains a separate bedroom kept private from the other, X may consent to a search of his

351. *Id.* at 993 n.7

352. Jones v. United States, 372 U.S. 256, 267 (1960).

353. United States v. Robinson, 479 F.2d 300 (7th Cir. 1973) (paramour); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (spouse); People v. Nunn, ___ Ill. 2d ___, 304 N.E.2d 81 (1973) (child); State v. Jackson, 85 N.M. 465, 513 P.2d 399 (1973) (casual guest).

354. Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 344 (1968).

355. People v. Nunn, ___ Ill.2d ___, 304 N.E.2d 81 (1973). The court announced a new test for third-party consent—whether the suspect has a reasonable expectation that a given individual will not consent to a search. For discussion of this aspect of the case, *see* note 90 *supra* and accompanying text.

356. Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 350 (1968).

357. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (1973).

bedroom and the common living quarters but not to Y's bedroom.

That notions of property law are largely irrelevant in this context is demonstrated most vividly by landlord-tenant cases. A landlord who normally gives temporary but exclusive control to the tenant may not consent as against the tenant.[358] Possession, not title, is the keynote. This is likewise true of the owner of a rooming house[359] or, television crime-drama notwithstanding, the owner-proprietor of a hotel or motel.[360] Such labels as "landlord," "head of household," or "casual guest" are used not because such legalities are determinative, but to import the actual physical arrangement practiced with respect to a given area. An employer may, for example, consent to a search of the work area of an employee, but not to an area set aside for the private use of the employee.[361] The general rule of actual control applies as well to partners, co-tenants and agents.[362]

The test of access and control applies equally to the consent search of movable personal property. Thus, the consent to search a suitcase or duffel bag depends on the consenting party's past use of such container.[363] In *Frazier v. Cupp*,[364] the Supreme Court "dismissed rather quickly" the argument that, while a duffel bag was used in common by defendant and a third party, *part* of the bag was used exclusively by defendant, and consent to search that part was, therefore, invalid. This does not mean that part of a "place" or "thing" may not be the subject of consent though the rest is, but only that such argument, when directed at a duffel bag, represents a "metaphysical subtlety."[365]

Property law concerning custody of personal property is, likewise, not determinative. A bailee, for example, may consent to a

358. Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 350 (1968).

359. McDonald v. United States, 335 U.S. 451 (1948).

360. Stoner v. California, 376 U.S. 483 (1964).

361. Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 347 (1968).

362. Mintz, *Search of Premises by Consent*, 73 DICK. L. REV. 44, 53-56 (1968).

363. Erickson v. State, 507 F.2d 508 (Alaska 1973).

364. 394 U.S. 731 (1969).

365. *Id.* at 740. The Court in *United States v. Matlock* makes it clear that the state must show that the consenting party had control over the particular portion of the house searched.

search of bailed goods only when the nature of the bailment suggests a conveyance of sufficient control. Containers bailed for transportation or storage have been held not a subject of consent by the bailee,[366] though factors such as the simultaneous bailment of a key, or actual instructions by the bailor, are important.[367] Often, however, when the law effects the transfer of custody of personal property (as with the baggage of a defaulting guest of an innkeeper under a statutory lien) the custodian may consent to its search since the custody is not limited by agreement or the intent of the parties.[368]

One class of case—the consent by high school officials to searches of areas of supposed privacy, such as lockers—is difficult to explain with reference to the "control" theory. These cases, often criticized, rest on the theory that high school officials stand *in loco parentis* to the students and, therefore, can consent on the same basis as parents.[369] There is, presently, a tendency to relax the fourth amendment in the school-drug area;[370] yet, the problem deserves scrutiny on that honest level, not by denominating as a "parent" someone whose loyalties to his "child" are normally subordinate to his loyalty to police authorities with whom he often develops a pattern of collaboration.[371] Such consent arising at the college level has generally been held invalid.[372] This result can be explained on the decreased need for direct supervision, the increased age of the "child," and higher judicial respect for a dormitory room (a "house") than for a locker or desk.

One other test for the validity of third-party consent recently advanced by a few writers[373] and adopted in at least one state[374] is whether the suspect has a "justifiable expectation" that others will *not* consent. It is highly unlikely that this approach will gain wide-

366. Mintz, *Search of Premises by Consent*, 73 DICK. L. REV. 44, 64 (1968).

367. *Id.* at 84.

368. *Id.* at 64.

369. *See, e.g.*, People v. Overton, 20 N.Y.2d 360, 299 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *remanded*, Overton v. New York, 303 U.S. 85 (1968).

370. Waters v. United States, 311 A.2d 835 (D.C. Ct. App. 1973).

371. Note, *Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards*, 56 CORNELL L. REV. (1971).

372. *E.g.*, Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

373. Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 14-16 (1970).

374. People v. Nunn, ___ Ill. 2d ___, 404 N.E.2d 81 (1973).

spread acceptance. Although the Court hinted in *Frazier v. Cupp*[375] that the *Katz* language may be useful in the consent context, a recent Supreme Court case dealt with third-party consent strictly on the control theory without mentioning this aspect of *Frazier*.[376] In addition, like the agency approach, the "justifiable expectation" analysis (sometimes expressed as "assumption of risk") is conceptually difficult to apply. The principal inquiry is whether society deems an expectation reasonable (assuming it exists at all) and, thus worthy of protection. Such an approach assumes that society is willing to tolerate some third-party waivers of fourth amendment rights, but not all. If one accepts the first premise, it becomes difficult, other than arbitrarily, to define the second. So long as the third-party consent area is in general soluble only on arbitrary grounds, the arbitrariness ought at least be predictable. Such predictablity is extremely important to police in the consent setting since decisions must be made rapidly in "unstructured" settings which break quickly. The "control" approach has at least this benefit. Perhaps it is not completely unfair to suggest that the sense of the law is that the expectation of non-consent from someone with requisite control is not justifiable.

Finally, the Court recently held that, apart from the power to consent, third persons who consent must, as the suspect himself, do so "voluntarily" under the guidelines of *Bustamonte*.[377] It would appear, however, that the prosecution's burden will be lighter in these cases since the party in question does not view himself as a suspect and would more likely consent absent any coercion.

3. *Implied Consent*

Recent statutes, expecially prevalent in the drunk-driving, airport and military contexts, have provided that certain activities of an individual will imply a consent to specified governmental intrusion.[378] Such consent is fictional and generally survives an express indication of non-consent. In fact, "implied consent" has little to do with consent. Though an over-simplification, the validity of such statutes depends ultimately on whether the intrusion "consented

375. Frazier v. Cupp, 394 U.S. 731 (1969).
376. United States v. Matlock, 94 S. Ct. 988 (1974).
377. *Id.* at 993.
378. *E.g.*, IND. CODE § 9-4-4.5-1 (1971).

to" is one which would be reasonable *without* consent.

C. AUTOMOBILE INVENTORIES

The police seizure of an automobile incident to arrest of the occupant is generally defensible as serving interests in road safety, the protection of the car itself, and the convenience of the owner. When no probable cause exists as to the presence of crime-connected items in the car, the right to search is not controlled by the *Carroll* line of cases.[379] Often, warrantless searches of seized automobiles without probable cause are sought to be upheld as "inventories." The urged rationales are the police's duty to protect items belonging to the car's owner and a need to protect themselves from civil liability for the actual or alleged loss or destruction of valuables. The inventory process protects the police in two ways: (1) by reducing valuables to their exculsive control, it prevents loss or destruction; and (2) by making a record of the valuables, it facilitates a defense against unjust claims by embittered arrestees.[380]

The Supreme Court has, since 1967, decided three cases which could have been decided squarely on the "inventory" issue. In each case, it upheld police procedures which, without probable cause to search, resulted in discovery of evidence in a seized automobile; but in each case it avoided squarely deciding the inventory issue and rested the holding on other considerations. Yet the decisions do suggest Court approval of several of the underlying justifications for the inventory process, and to that extent foster a mood of acceptance.

In *Cooper v. California*[381] the police had arrested defendant in his car for selling heroin and by state law were *required* to impound the car and hold it pending forfeiture proceedings. A week later while forfeiture proceedings were still pending, a police search discovered incriminating evidence in the glove box. Despite the conceded absence of probable cause, the Court upheld the search.

> They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. . . . The forfeiture of petitioner's car did not take place until over four months

379. *See* Section IV B *supra*.
380. Miles and Wefing, *supra* note 254, at 145-53.
381. 386 U.S. 58 (1967).

> after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, *even for their own protection*, to search it.[382]

The dissenters in a recent Court decision have suggested that *Cooper* rests on the proposition that "the police were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right to retention."[383] Yet while *Cooper* does contain an element of colorable title, its rationale is broader—a search conducted for the *protection of the police*. But what interest of the police is protected by such right? Absent indications that the auto's presence represents a threat to safety, such searching appears to protect police *only* from unjust civil claims—the chief justification offered for inventories in general. Most courts have read *Cooper* narrowly as extending the right to search only impounded automobiles subject to forfeiture proceedings,[384] yet a few have read it as authorizing inventories in other situations as well.[385]

In *Harris v. United States*,[386] a policeman, pursuant to mandatory department regulations, searched an impounded vehicle to inventory and protect valuables. At the conclusion of the search, while securing the doors and windows, he saw a registration card bearing the name of the robbery victim on the metal stripping over which the door closed. The Court found it unnecessary to decide the inventory issue since the evidence was not found as a result of the search, but after the search had ended and while the officer was taking measures only "to protect the car while it was in custody."[387] This part of the officer's conduct was not a search at all, but a discovery made "while engaged in the performance of [his] duty to protect the car. . . ."[388] The decision, then, recognizes some duty to protect the car itself, if not the contents. Since this duty gives the police the right to be near the car and to lock doors and windows, evidence visible from any vantage point at which the police have the right to

382. *Id.* at 61-62.
383. Cady v. Dombrowski, 413 U.S. 433, 450 (1973) (Brennan, J., dissenting).
384. O'Reilly v. United States, 486 F.2d 208 (8th Cir. 1973).
385. Miles and Wefing, *supra* note 254, at 135-43.
386. 390 U.S. 234 (1968).
387. *Id.* at 236.
388. *Id.*

be would not be the fruits of a search. Such viewing of crime-connected items would, in turn, create probable cause as to the presence of those items, and a warrant to seize the items seen would probably not be required.[389] Finding such items may, in addition, create probable cause as to the presence of other items within the car. It would seem, pursuant to *Coolidge*,[390] that a warrant would be required to search for such items since probable cause and mobility never co-existed.[391] Notwithstanding the fact that the court did not rest *Harris* squarely on the inventory ground, many courts have read it to authorize inventory.

The most recent and most apposite Court decision in the area is *Cady v. Dombrowski*.[392] Driving in Wisconsin, defendant Dombrowski lost control and his car crashed through a guard rail into a bridge abutment. He subsequently called the police to report the matter, telling them he was a Chicago police officer. When the police confronted him, they judged him drunk and arrested him for drunk driving. The car was towed to a private garage at police direction. The police, under the impression that Chicago police were required to carry their service revolvers at all times and not having found it on Dombrowski's person, searched the car for it pursuant to "standard procedure" in such cases. The police testified that they were concerned, due to low security at the private garage, that the gun could have been stolen and fallen into the wrong hands. A search of the trunk produced bloodstained items later admitted at defendant's murder trial. There is no indication the police had the slightest suspicion of a murder prior to this discovery.[393]

The Court denominated this procedure a "search" and held it reasonable.[394] The decision is, at the threshold, not controlled by *Carroll-Chambers-Coolidge*[394.1] because probable cause did not exist. Even if there was probable cause to believe the revolver was in the car (the Court concludes only that the officer "reasonably believed" it was there) there was no probable cause that the item sought was crime-connected. It was sought only so that the wrong

389. *See* Section V G 2 *infra*.
390. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
391. *See* note 255 *supra* and accompanying text.
392. 413 U.S. 433 (1973).
393. *Id.* at 447.
394. *Id.* at 442.
394.1. *See* Section IV B *supra*.

persons would not obtain possession of it. Rather the search was upheld on principles "extrapolated" from *Cooper* and *Harris*. The *Cooper* search protected the custodian's "safety;" the *Harris* intrusion protected the owner's property; and the search in *Dombrowski* protected the general public "who might be endangered if an intruder recovered a revolver from the trunk of the vehicle."[395] This public safety interest undoubtedly represents the bare holding, yet broad language in the opinion can be taken as forecasting Court acceptance of the inventory procedure.

> The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of *caretaking* "search" conducted here of a vehicle that was neither in the custody of nor on the premises of its owner, and that had been placed where it was by lawful police action, was not unreasonable solely because a warrant had not been obtained.[396]

It seems not entirely implausible to suggest that "caretaking" searches of automobiles to protect judically recognized interests of the police, the owner, and the public at large *are* inventories; the remaining difference is that *Dombrowski* involved actual belief that the inventory was *particularly* necessary under the facts known to the police.

With notable exceptions, lower courts have generally upheld police inventories. Various justifications have been advanced. Several courts have held, since *Harris*, that a police inventory itself is not a search since it is conducted not to uncover evidence, but to protect interests of the police and the owner.[397] One court, relying on the Model Code of Pre-Arraignment Procedure definition of automobile search as "an intrusion under color of authority . . . for the purpose of seizing things," held that an inventory is not a search since the avowed purpose is not to seize things.[398] On the other hand, the California Supreme Court has stated that "regardless of professed benevolent purposes and euphemistic explication . . . an inventory search involves a thorough exploration by the police into

395. *Id.* at 447.
396. *Id.*
397. Miles and Wefing, *supra* note 254, at 135.
398. People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971).

the private property of an individual."[399] The Eighth Circuit recently remarked: "To consider an inventory procedure not to be a 'search' does violence to the concept of the fourth amendment as a protection of the privacy of the citizenry against unwarranted invasion by governmental officials."[400]

The Supreme Court has, in other contexts, held that state intrusion becomes no less a "search" simply because the discovery of criminal evidence is not the purpose for the intrusion. In *Camara v. Municipal Court*, the Court stated:

> It is surely anomalous to say that the individual and his private property are fully protected by the fourth amendment only when the individual is suspected of criminal behavior.[401]

Later in the same opinion, however, the Court listed the fact that the search was not aimed at discovering evidence of crime as a factor tending to show reasonableness. This seems, at least, to put the fight in the right ring. Asserting that a policeman opening an automobile trunk is not engaged in a search because there is a legitimate need apart from ferreting out crime is only slightly better than saying: (1) a search is an intrusion into an area justifiably expected to be private; (2) no one can justifiably expect to be free from reasonable searches; therefore (3) all reasonable searches are not searches. *Katz* cannot mean this. The "no search" theory simply does not comport with established fourth amendment principles. In addition, the theory is not even necessary as the inventory can, with less torture, be upheld as a reasonable search.

The most plausible argument for upholding inventories is simply that they are reasonable. The Court has stated "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[402] A number of proffered factors appear on the governmental interest side of the scale: (1) protection of the police officers when the car's

399. Miles and Wefing, *supra* note 254, at 138 n.152, citing Mozzetti v. Superior Court, 4 Cal. 2d 699, 705-6, 484 P.2d 84, 88, 94 Cal. Rptr. 412, 416 (1971).

400. United States v. Lawson, 483 F.2d 535 (8th Cir. 1973).

401. 387 U.S. 523, 530 n.6 (1967) citing Abel v. United States, 362 U.S. 217, 254-56 (1960) (Brennan, J., dissenting); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1950).

402. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

presence is a threat to their safety; (2) protection from spurious claims; (3) protection of the owner's property; (4) protection of the public from objects, especially firearms, within the car coming into the hands of others; (5) it is "standard procedure."[403] None is completely persuasive. The last is, at best, a bald assertion of reasonableness, and at worst, a suggestion that all police conduct which becomes "standard" ought to be tolerated. Factors (1) and (4) represent highly unusual cases. When articulable evidence indicates the presence of such dangers, a search properly limited to its purpose would undoubtedly be reasonable. Factors (2) and (3) represent the heart of the governmental interest and are present in nearly every case. As to (3), however, the owner is in the best position to judge whether he desires this protection and if he does, he can request or consent to such a procedure. The fear of spurious civil claims or loss to the owner is surely real yet may be exaggerated. One Arizona court observed:

> Unscrupulous persons who desire to steal articles will simply not list them on the inventory. Owners who wish to assert spurious claims against law enforcement officers or the garage owners can simply claim that the officers did not list them on the inventory. In fact, we can envision instances when the taking of an inventory may actually alert potential thieves to the value of items contained in the automobile.[404]

In combination with the advanced positive goals of police inventory is a recognition that a police inventory is, by its nature, less intrusive in fact than a search for items of crime.[405] Two limitations on the way an inventory is conducted would serve to make it more reasonable, and some courts have insisted the inventory remain with these limits.

First, since the avowed purpose is to protect valuable items, the search should be limited to those portions of the car where such items are normally kept. Thus a search of the visible portions of the cab, the glove box, the trunk, and perhaps under the front seat, may be reasonable, but a prying behind seats, under rugs, under the

403. *See* Cady v. Dombrowski, 413 U.S. 433, 443 (1973).

404. Miles and Wefing, *supra* note 254, at 141 n.169, citing *In re* One 1965 Econoline, 17 Ariz. App. 64, ___, 495 P.2d 504, 506 (1972).

405. *Id.* at 136.

hood, or into the structural portions would clearly go beyond the stated purpose.[406] When the police have the right to search a car for evidence, they are limited as well to places where the objects may be found, but items of crime, expecially contraband, are often ingeniously hidden and the scope is therefore relatively broad.

Second, since an inventory is a protective technique, not a quest, it need not involve the opening of all natural containers. The Supreme Court of Oregon recently suppressed evidence found inside a fishing tackle box during an inventory.

> The officers testified they were not searching for evidence, but were only inventorying the automobile's contents. With no exigent circumstances present they could easily have inventoried "one fishing tackle box," along with other items in plain view.[407]

One last approach is espoused by the D.C. Court of Appeals in *Mayfield v. United States*.[408] The court there held that extensive inventory searches were not "unconstitutional" but that any evidence obtained during the inventory is inadmissible. While the result is beguiling in that it seems to protect all interests, it is a mysterious application of the exclusionary rule. The rule exists only to enforce fourth amendment rights. If the search is constitutional, it is hard to see what interest of the defendant is being enforced by suppression other than an interest to be free from incriminating evidence, an interest not entitled to protection for its own sake. The net effect of the decision, which may indeed be the intent, is to make such searches unreasonable in the criminal process context but reasonable for the purposes of any civil liability of the police. In any event, since the search is not denominated as unconstitutional, such use of the exclusionary rule cannot be constitutionally mandated but results from the appellate court's supervisory power over lower

406. *Id.* at 137 n. 143. *See* People v. Andrews, 6 Cal. App. 3d 428, 85 Cal. Rptr. 908, *cert. denied*, 400 U.S. 908 (1970). *See also* People v. Garrison, 189 Cal. App. 2d 549, 11 Cal. Rptr. 398 (1961).

407. *See* State v. Keller, ___ Ore. ___, ___, 510 P.2d 568, 570 (1973). *See also* State v. Florance, ___ Ore. App. ___, 515 P.2d 195 (1973); *contra*, Boulet v. State, 109 Ariz. 433, 511 P.2d 168 (1973). In searching persons incident to arrest, however, the police generally may open closed containers found on the person. State v. Duboy, ___ Me. ___, 313 A.2d 708 (1974).

408. 276 A.2d 123 (D.C. Ct. App. 1971).

federal courts. Under this theory, states would be free to admit evidence so found.

D. ADMINISTRATIVE SEARCHES

The overwhelming majority of "search" law has developed in the context of a police quest for evidence of criminality. It is that context which forms the primary focus of this article. However, since certain rationales employed in the "administrative search" cases are easily, perhaps too easily, extended to the "competitive enterprise of ferreting out crime,"[409] these cases are briefly considered.

In *Camara v. Municipal Court*,[410] the Supreme Court examined the reasonableness of an inspection by a local housing inspector pursuant to an ordinance to establish compliance or noncompliance with health regulations. Overruling a prior decision which had upheld such inspections as touching "at most upon the periphery of the important interests safeguarded by [the fourth and fourteenth amendments],"[411] the Court reasoned:

> [i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[412]

The Court held that such administrative searches were unreasonable unless consent was given or a warrant procured. The Court identified the evil of such searches as follows:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.[413]

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409. *See* Johnson v. United States, 333 U.S. 10 (1948).

410. 387 U.S. 523 (1967).

411. Frank v. Maryland, 359 U.S. 360 (1959).

412. Camara v. Municipal Court, 387 U.S. 523, 530 n.6 (1967) citing Abel v. United States, 362 U.S. 217, 254-56 (1960) (Brennan, J., dissenting); District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1950).

413. 387 U.S. at 532.

The warrant procedure, presumably, would diminish these evils, but so could other forms of documentary proof. In rejecting respondent's contention that "the warrant process could not function effectively in this field,"[414] the Court presented itself with a perplexing problem. The fourth amendment provides that "no warrants shall issue but upon probable cause;" there is, however, nothing "probable" which triggers such inspections—if anything, the inspector will "probably" find compliance. The Court concluded:

> [I]t is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.[415]

The essence of the holding is that an administrative search conducted pursuant to a search warrant is reasonable if the inspection scheme is reasonably necessary. Since a warrant cannot be valid apart from probable cause, the concept of "probable cause," which has a definite, if undefinable,traditional meaning is unfortunately compromised in the process. The holding may be reducible to this: if inspection schemes are reasonably necessary such inspections are reasonable when conducted pursuant to warrant, and such warrant shall issue upon probable cause to believe such searches are reasonable.

The Court listed the following bases for the reasonableness of such searches: (1) a "long history of judicial and public acceptance;" (2) public interest demands that dangerous conditions be abated; (3) the intrusion occasioned is "relatively limited" because "the inspections are neither personal in nature nor aimed at the discovery of evidence of crime."[416] These are basically the same arguments made by respondent to urge upholding *warrantless* inspections. They explain the conclusion of "reasonableness;" they do not explain probable cause.

And yet the compromising of "probable cause" is not crucial in *Camara* itself since a strong argument in favor of reasonable warrantless searches can be made. Therefore, requiring a warrant which imports some notice to the homeowner in fact increases protection.

414. *Id.*
415. *Id.* at 538.
416. *Id.* at 535-37.

It is conceivable, however, that this use of "probable cause" can result in validating searches unreasonable if warrantless partly *because of the absence of probable cause.* For instance, in *Davis v. Mississippi*,[417] it was suggested that temporary detention of a criminal suspect for fingerprinting on less than probable cause to arrest may be reasonable if done pursuant to warrant.[418] The primary (if not only) defect of such warrantless arrest is the absence of probable cause. The issuance of such warrant would have to be on *Camara*-type probable cause, which is *contrived* probable cause. When the absence of probable cause is the primary defect in a warrantless search, it is hard to accept a *Camara*-warrant as curative. The only protection it affords is notice, and in the context of police seizure, lack of notice is certainly not the problem.

Recently, Justice Powell suggested that although random searches by border patrols outside the "functional equivalent" of the border were unreasonable, the use of "area warrants" (describing an area identified as one where there is a high incidence of alien traffic) may validate such random searching.[419] While the opinion stresses the need for empirical showings of high incidence, probable cause in the traditional sense is not envisioned as the test, since probable cause in that sense could rarely be shown. *Camara*-type probable cause is meant—yet, again, it is the lack of probable cause which renders such searches unreasonable to begin with. (Clearly the lack of a warrant is generally immaterial since these random searches involve the stopping of moving vehicles, long an exception to the warrant requirement.[420])

Cases since *Camara* disclose a retreat from its warrant requirement, though the opinions are always careful to distinguish the case on facts. Thus in *United States v. Biswell*[421] the Court upheld a warrantless inspection of a federally licensed gun dealer, stressing (1) that such searches were a reasonable exercise of license policing and (2) unlike *Camara* and *See v. Seattle*[422] in which any

417. 394 U.S. 721 (1969).

418. For a discussion of *Davis*, *see* Section V F 3 *infra*.

419. Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Powell, J., concurring).

420. *See* Section IV B *supra*.

421. 406 U.S. 311 (1972).

422. 387 U.S. 541 (1967). *See* was the companion case of *Camara*. The Court extended the *Camara* ruling to warrantless, forced entry of a locked warehouse at night. *Id.* at 545.

violation would be "relatively difficult to conceal or correct in a short time," the requirement of a warrant in *Biswell* would frustrate inspection since advance notice would be given.[423] In conducting administrative searches, as the Court pointed out in *Camara*, the inspector would first seek consent, which would be given in most cases. Only when withheld would a warrant be procured. If evidence of a violation were easily disposable, the inspectors would be forced to obtain a warrant for every inspection—otherwise, any person in violation could refuse initial entry and conceal evidence before the warrant could be obtained. To the extent that the *Camara-Davis* warrant may gain acceptance in searches conducted primarily to uncover crime, the initial attempt for consensual entry would be foolish except in cases in which the evidence sought could not easily be concealed, such as fingerprints or voice or handwriting characteristics.

In *Wyman v. James*[424] the Court held home visits by ADC caseworkers a "reasonable search" without a warrant noting that advance notice was generally given anyway. The Court distinguished *Camara* stating that refusal to admit the caseworker was not a crime as was refusing the housing inspector in *Camara*. It is difficult to see why such difference should be operative. First, commission of the crime of refusing entry depends itself on the reasonableness of the search—it is not a fact arguing for or against reasonableness. Second, the continuation of ADC benefits cannot be conditioned on waiving constitutional rights.[425] Perhaps this part of *James* can be taken as forecasting the eventual demise of the *Camara* warrant requirement. It is hoped that if this happens, *Camara*-type probable case dies as well.

E. Border Searches[426]

The Supreme Court in the recent case of *Almeida-Sanchez v. United States*[427] reaffirmed the long standing proposition that, though within the purview of the fourth amendment, searches of

423. United States v. Biswell, 406 U.S. 311, 316 (1972).
424. 400 U.S. 309 (1971).
425. Shapiro v. Thompson, 394 U.S. 618 (1969).
426. A border search is, of course, a type of administrative search; however, since its development antedated *Camara* and rests essentially on different rationales, it is considered separately.
427. 413 U.S. 266 (1973).

incoming persons and things at the international border are reasonable in many situations where the same conduct would be unreasonable in the interior. Although many reasons have been advanced for the different standard, such as a long history of public acceptance, minimal intrusion, the high incidence of unlawful entry of persons and items, the primary basis is the need for national self-protection from the entry of certain unwanted persons and items.[428]

1. *Degree of Suspicion*

While many cases speak of the right to search at the border upon "mere suspicion" or "unsupported suspicion," the fact is that border searches are upheld absent *any* suspicion.[429] It is "reasonable" in all cases to require one entering the country "to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[430] The fact is that at many ports of entry *everyone* is searched regardless of whether or not he is suspected of carrying unlawful items. Clearly, then, the fact of border crossing triggers a right in the government to conduct a full search of that person's luggage, automobile and other effects and a search of the person's outer clothing.[431]

As the search of the person increases in intrusiveness, however, escalating standards of suspicion must be met. If a "strip" search is to be conducted, for example, "real suspicion" must be shown.[432] If the body's outer shell is to be pierced, as by a search of the rectum or vagina, or by forced vomiting, a "clear indication" must be shown—a standard initially imposed by the Supreme Court for the drawing of blood samples.[433] Some cases indicate, however, that "clear indication" is less stringently applied in this context so that the test produces results similar to the standard of probable cause in non-border cases. However, at any level of required suspicion, no court has required the obtaining of a warrant for searches at the border.

2. *The "Border" and its "Functional Equivalents"*

The Court stated in *Almeida-Sanchez* that

428. 267 U.S. 132, 160 (1925).

429. Almeida-Sanchez v. United States, 413 U.S. 266, 289 (1973) (White, J., dissenting).

430. Id. at 272 quoting from Carroll v. United States, 267 U.S. 132, 154 (1925).

431. Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

432. *Id.*

433. *Id.*

> [W]hatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well.[434]

As examples of such functional equivalents, the Court listed "an established station near the border, at a point marking the confluence of two or more roads that extend from the border," and any airport terminal with respect to international arrivals.[435]

The search of defendant's car in *Almeida-Sanchez* had been made by a "roving patrol" twenty-five air miles north of the Mexican border at a point past the confluences of other roads, not all of which led into Mexico. Notwithstanding the Government's urging to label the search reasonable due to the high use of this road for unlawful alien traffic, and the wide expanse of unpatrolled border in the region, the Court found that such a search was not functionally equivalent to a search at the border.

Not every search conducted on the open road or past a specified distance from the border is outside the border search category, however. Language of the Ninth Circuit is particularly instructive:

> Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance are such as to convince the factfinder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States.[436]

F. Stop and Frisk

1. *The "Stop" on "Reasonable Suspicion"*

In *Terry v. Ohio*[437] and companion cases,[438] the Court scruti-

434. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).
435. *Id.* at 273.
436. Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966) quoted in 8 San Diego L. Rev. 435, 438 (1971).
437. 392 U.S. 1 (1968).

nized the early phase of police-suspect confrontation, theretofore a "low visibility" procedure. Pressed on the one side to invalidate all encounters not satisfying traditional arrest and search theories, and on the other to keep such preliminary encounters isolated from fourth amendment scrutiny, the Court did neither. Rather, it held that a "stop" was enough of an arrest to activate fourth amendment concerns yet not so much as to require "probable cause," the minimum requirement for traditional arrest. Likewise, a "frisk" was a "search" but not a "full-blown" search, and something less than probable cause would suffice. In fashioning tests for "stops" and "frisks," the Court announced that the issue could be resolved only by a balancing of interests.[439] On the one side is the critical need for aggressive law enforcement and crime prevention, and the fact that "stops" or "frisks," as defined in *Terry*, are lesser intrusions than "arrests" and "searches." On the other hand, even temporary restraint and limited searching "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."[440]

Of course, the events which may trigger a policeman's suspicion are nearly infinite—yet *Terry* attempts to formulate a workable test to decide when an officer may pass from observation and surveillance to the imposition of detention, however temporary. To validate a "stop," the police must show (a) that "specific and articulable facts . . . taken together with rational inferences from those facts" (b) lead him "reasonably to conclude in light of his experience that criminal activity may be afoot."[441] This language, usually shortened to "reasonable suspicion," remains the central inquiry in evaluating a police decision to "stop" a suspect.

Terry seemingly imposed other restrictions, but the more recent case, *Adams v. Williams*,[442] renounces their importance. First, in *Terry* the "specific, articulable facts" came from direct police observation but in *Williams* the "stop" was predicated entirely on an informant's tip, yet was held proper. More important, *Terry* involved observed activity which indicated that the suspect was an

438. Sibron v. New York, 392 U.S. 40 (1968); Peters v. New York, 392 U.S. 40 (1968).
439. Terry v. Ohio, 392 U.S. 1, 27 (1968).
440. *Id.* at 17.
441. *Id.* at 30.
442. 407 U.S. 143 (1972).

immediate threat to the police or others (actions suggesting impending robbery attempt). In *Williams* the suspected offenses were possessory only and even though possession of a firearm was "reasonably suspected," nothing suggested that the suspect's activities pointed toward the attempted commission of any crime beyond possession. Many courts have extended the *Terry* rationale to "stops" for possessory offenses, even when the facts do not raise any suspicion about firearms or other incipient danger.[443]

Recent decisions in the "reasonable suspicion" area are largely irreconcilable. The Second Circuit has upheld a stop on little more, apparently, than the observation of a "known" drug dealer emerging from a "restaurant known to be a headquarters for the narcotics trade" possessing "the brown paper bag which has long been a sort of hallmark of the narcotics business."[444] In so holding, the Court referred to "the rather lenient test for a stop" enunciated in *Williams*.[445] On the other hand, the D.C. Court of Appeals recently invalidated a stop made on school grounds after the suspect had shoved money into an envelope after meeting with a known addict and engaged in "furtive" movements to conceal the envelope from the approaching officer.[446]

The point is that the outcome of any balancing test is determined, perhaps even pre-determined, by the weight one subjectively ascribes to the factors being balanced. It is true that probable cause, admittedly importing a higher suspicion than "reasonable suspicion" is also partially subjective; however, while incapable of precise definition, "probable cause" has been molded by thousands of cases and is today substantially an objective measure. "Reasonable suspicion" is as yet too young to have acquired a well-recognized sense.

Several factors in the "reasonable suspicion" inquiry, however, should be considered, but often are not. Many recent cases have relied at least in part on "furtive" conduct as justifying initial police intrusion.[447] Insofar as *Terry* requires "specific, articulable facts,"

443. *E.g.*, McKessick v. State, ___ Ala. ___, 284 So. 2d 516 (1973).
444. United States v. Santana, 485 F.2d 365 (2d Cir. 1973).
445. *Id.* at 368.
446. Waters v. United States, 311 A.2d 835 (D.C. Ct. App. 1973).
447. *E.g.*, State v. Sheffield, 62 N.J. 441, 303 A.2d 68 (1973). *See also* State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

the assertion of "furtiveness" is conclusory and therefore inadequate. Just as in the probable cause determination, *facts*, and *not conclusions*, should be required. For example, in applying the *Terry* rationale to airport "stops," many courts have completely ignored the requirement of "specific, articulable facts" and have sanctioned the limited intrusion of a magnetometer search to *everyone* who passes a given point.[448]

Second, many courts, in determining whether "reasonable suspicion" exists, refer to conduct of the suspect, such as flight or nervousness, which is *responsive* to police presence or action.[449] Flight or other reactions at the recognition of police may be considered, but it is elementary that the prosecution cannot use evidence (including a suspect's statement or conduct) *caused* by the "stop" to justify the "stop."[450] The key question is: When did the stop occur? For instance, if a person flees at the sight of police, whether or not the police are actively engaging in surveillance of that suspect, such fact may be considered with others to prove "reasonable suspicion."[451] It is clear in that instance that the suspicious conduct pre-dated the stop. In a recent Seventh Circuit case, however,[452] the facts were not so clear. During a race riot at a high school, police were tipped that three male Negroes with firearms had been seen entering a yellow car. Upon seeing such a car with such occupants, the police sounded the siren. The occupants then were seen "reaching down," presumably either to hide weapons or to secure them for use. The court utilized this "reaching down" in part to posit "reasonable suspicion" without pinpointing the time of the "stop."[453] The dissent very correctly questions the use of such fact.[454]

Clearly a policeman who casually "stops" someone on the street to ask for a match is not conducting a "stop." First, the policeman does not intend to impose significant detention, and second, the subject recognizes he is free to go. If he decides to walk away, the

448. McGinley and Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293, 313-15 (1972).

449. *See, e.g.*, State v. Wausnock, ___ Del. ___, 303 A.2d 636 (1973) and United States v. Adams, 484 F.2d 357 (7th Cir. 1973).

450. *See* Wong Sun v. United States, 461 U.S. 471 (1963).

451. *E.g.*, United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

452. United States v. Adams, 484 F.2d 357 (7th Cir. 1973).

453. *Id.* at 358.

454. *Id.* at 362 (Swygert, Chief Judge, dissenting).

officer will undoubtedly conclude that he is impolite, but certainly would not impose physical restraint. A "stop" at the least, must involve police-citizen contact in which the citizen, for however temporarily, is not free to go. Sounding a siren and pulling a car off the road inherently imports such contact. Police do not stop moving vehicles to ask for a match, and the Ninth Circuit has held that stopping a motorist to ask him questions about another suspect is a "seizure" and thus a "stop."[455] Judicial use of an individual's conduct which is responsive to the imposition of this contact permits the police not merely to acquire "reasonable suspicion" but to provoke it or, worse, create it.

If a policeman *with probable cause* to arrest stops a suspect, the encounter will be judged by arrest standards even though no words of arrest are spoken—even when the officer is not subjectively certain of probable cause.[456] The effect of this is to validate any discovery of evidence through a "search" even when the procedure goes beyond the permissible scope of a "frisk" (see Section V A 2 *supra*). If an initial, forcible detention rests only on "reasonable suspicion," the discovery of evidence, at least theoretically, depends on the policeman's remaining inside the "stop" and "frisk" scope.

Even inside that scope, however, many confrontations commencing as "stops" ripen into arrest. The most common way this occurs is through discovery of concealed weapons pursuant to the "weapons frisk." In addition, during the "stop" for questioning or the "frisk" for weapons, the officer may obtain a "plain view" (including "plain smell," "plain touch" or "plain hear") which will elevate suspicion to probable cause and trigger an arrest and incident search.[457]

2. *The "Frisk"*

Since *Terry* involved a "stop" and "frisk" of an individual who posed an immediate threat of violent activity, the question of whether a "frisk" is a separately justifiable activity or depends on a valid "stop" was raised. Justice Harlan, in his concurring opinion, stated: "I would make it perfectly clear that the right to frisk in this

455. United States v. Ward, 488 F.2d 162 (9th Cir. 1973).

456. *See* Peters v. New York, 392 U.S. 40, 76 (Harlan, J., concurring). *See also* Cupp v. Murphy, 412 U.S. 291 (1973), discussed at note 481 *infra* and accompanying text.

457. *E.g.*, United States v. Zamora, 364 F. Supp. 1170 (S.D. Tex. 1973).

case depends upon the reasonableness of a forcible stop to investigate a suspected crime," since "[a]ny person, including a policeman, is at liberty to avoid a person he considers dangerous."[458] A policeman's response to a "dangerous" person differs from the average citizen's response only when the "dangerousness" carries indicia of criminality, extant or potential. The indication is that Justice Harlan's resolution of this issue has been accepted—a "frisk," at the very least, requires a prior right to conduct a "stop." But a "stop" does not automatically trigger the right to "frisk." The officer, to conduct a "frisk," "need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[459] As Justice Harlan points out "the right to frisk [after a valid "stop"] must be immediate and automatic *if* the reason for the stop is, as here, an articulable suspicion of a crime of violence."[460] If the presence of weapons is not normally associated with the suspected criminal activity which validates the stop, the police presumably must articulate "specific facts" on which they concluded the suspect was "dangerous."

Once any "frisk" is justified, the actual procedure of "frisking" like all searches, must not be broader than the rationale for its initiation. "[L]imitations upon the fruit to be gathered tend to limit the quest itself."[461] The Court stated the purpose of, and the intended "fruit" of a frisk:

> The sole justification of [a frisk] is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer.[462]

Clearly a "frisk" is not justified "by any need to prevent the disappearance or destruction of evidence of crime,"[463] but is limited to a weapons search. In *Terry* the officer's frisk consisted in a "pat-down" of the outer clothing and a reaching in only as to those who

458. Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring).
459. *Id.* at 27.
460. *Id.* at 33 (Harlan, J., concurring).
461. *Id.* at 29.
462. *Id.*
463. *Id.*

he believed from the pat-down to possess weapons. The Court held this intrusion was within the permissible limit. This does not mean, however, that a "frisk" to be valid must entail this two-step pat-down process. The Court left the matter for development "in the concrete factual circumstances of individual cases."[464] In *Williams*, the officer's first move upon confrontation was a reaching into defendant's waistband precisely where an anonymous tipster had indicated the firearm would be. This, the Court held, was a reasonable frisk. The Fourth Circuit has extended the *Williams*-type frisk to a valise carried by a suspect, since an informant had suggested that the suspect often carried a pistol in the valise.[465]

The Ninth Circuit recently warned, however, that "frisks" must be reasonably limited. The court, clearly exasperated with the BNDD agents involved in the case, stated that the agent's fear

> approaches paranoia. Even when 6 or 8 agents, all armed, have a group of citizens herded into a room, a search of a citizen's wallet is justified on the ground that it might contain a razor blade. . . . The agents also showed that their conception of a "frisk" includes seizing and inspecting all papers in the wallets, pockets and purses of all residents.[466]

One other trend is developing in the area. An old (by search and seizure standards) Court decision prohibits, in connection with a valid premises search, the automatic searching of all persons on those premises.[467] If the prosecution is careful, however, to denominate the activity a "frisk," several courts have validated the procedure, apparently with little other evidence to suggest "dangerousness" and without any "articulable facts" showing the person "frisked" is engaged in criminal activity.[468] These decisions are especially troublesome in light of the blurred "search"-"frisk" line in the wake of *Williams*.

If the frisk is properly limited, any discovery, whether of weapons or not, is protected. Thus, if a policeman conducting a two-step pat-down removes what feels like a gun but turns out to be drugs

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464. *Id.*
465. United States v. Poms, 484 F.2d 919 (4th Cir. 1973).
466. United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973).
467. United States v. Di Re, 332 U.S. 581 (1948).
468. United States v. Peep, 490 F.2d 903 (8th Cir. 1974). *See also* People v. Noreen, ___ Colo. ___, 509 P.2d 513 (1973).

in a hard container, the drugs are admissible.[469] This outcome is clearly proper under traditional "plain-view" concepts. [See Section V G *infra*.] The valid discovery of evidence other than weapons is possible in another way as well. Assume an officer conducting a two-step pat-down touches what feels like contraband (this requires a little imagination). Clearly the officer cannot remove it as part of the "frisk" for weapons. But this valid tactile operation may give rise to probable cause to arrest. Then a search incident to that arrest will result in admissible evidence.

These results are all theoretically proper, yet they tend to invite "stops" and "frisks" which are pretextual—which have as their primary desire the recovery of evidence other than weapons.[470]

3. *Temporary Detention—"Long Stop" or "Short Arrest"?*

Terry and *Williams* dealt with momentary detention for investigation. After a short encounter period, the policeman's options are (1) conduct a "frisk" if justified by the *Terry* test, (2) effect an arrest if probable cause develops, or (3) permit the suspect to go on his way. Even in the last situation, Justice White saw a crime-prevention value in that the suspect is now aware he is the subject of official scrutiny and may abandon, at least temporarily, any criminal design.[471]

The Court generally has invalidated "stops" of longer duration, especially when a suspect is taken to headquarters. In *Morales v. New York*[472] the defendant had confessed (after *Miranda* warnings) during police-station detention. The Court remanded to the New York courts indicating that the confession's admissibility under the fourth amendment depended on the prosecution's showing (1) probable cause existed for arrest and the detention represented a valid arrest, (2) the defendant's presence at the station was voluntary, or (3) the confession was not the "product" of the detention. The Court left open the "question of legality of custodial questioning on less than probable cause for full-fledged arrest."[473] Less than a month

469. Comment, *Constitutional Standards for Stop and Frisk, Guidelines and Implementation*, 5 CALIF. W.L. REV. 265, 274 (1969).

470. *See* Section V A 4 *supra*.

471. Terry v. Ohio, 392 U.S. 1, 34-35 (1968) (White, J., concurring).

472. 396 U.S. 102 (1969).

473. *Id.* at 105-06.

later the Court decided *Terry* and upheld such questioning in a *street* setting.

In *Davis v. Mississippi*,[474] decided after *Terry*, the Court suppressed fingerprint evidence obtained during the dragnet detention of 24 persons, being satisfied that no probable cause existed. Since the "reasonable suspicion" test is not alluded to, *Terry* is at least tacitly limited to briefer, more informal, detention. In his opinion, in *Davis*, Justice Brennan suggested that detention for fingerprinting on less than probable cause to arrest may be valid if "narrowly circumscribed procedures" were utilized.[475] Two features of this statement bear attention. First, Justice Brennan indicates that the fingerprinting process is (1) highly scientific and reliable, (2) not susceptible to a great deal of official abuse, (3) not repetitive and (4) involves none of the "probing into an individual's private life and thoughts which marks an interrogation or search."[476] Interrogation and line-ups are expressly recognized as different, and detention for such purposes, even on warrant, is most likely unconstitutional.[477] Second, the opinion states that

> the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.[478]

While the word "warrant" does not appear in that statement, Justice Harlan's concurring opinion takes it to import a warrant,[479] and it is hard to imagine what other form of prior judicial authorization does not "admit of any exception" in this context. The fourth amendment makes it clear that "no warrant shall issue but upon probable cause. . . ." The Court stated that probable cause for arrest did not exist. Clearly probable cause for the "search" for fingerprints can hardly exist independent of probable cause to arrest the subject of the printing. There is, then, some mystery as to what it is that must be probable. Justice Brennan refers to *Camara v. Municipal Court*[480] in which the Court in an "administrative search"

474. 394 U.S. 721 (1969).
475. *Id.* at 728.
476. *Id.* at 727.
477. *But see* Wise v. Murphy, 275 A.2d 205 (D.C. Ct. App. 1971).
478. Davis v. Mississippi, 384 U.S. 721, 728 (1969).
479. *Id.* at 728-29 (Harlan, J., concurring).
480. 387 U.S. 523 (1967).

context wrenched probable cause from its traditional moorings. In *Camara*, however, the search was arguably reasonable *without* probable cause and the substitution of a new type of probable cause had relatively little significance. The arrest and incident search in *Davis*, however, fails initially because probable cause is lacking. Use of *Camara*-type probable cause in this context is troublesome.

In *Cupp v. Murphy*,[481] the Court recently upheld a station house detention for the purpose of extracting scrapings from under the suspect's fingernails. The police had not arrested Murphy, and in fact did not arrest him until a month later. However, the Court found that probable cause for the arrest had existed and that the "search" was valid under *Chimel* as being incident to arrest.[482] The Court here follows a point Justice Harlan made in *Peters v. New York*—a search incident to arrest *must* be subsequent to probable cause for arrest, but need not antedate the *decision* to arrest. Thus, *Murphy* does not authorize station house detention on "reasonable suspicion."

Two other recent cases are tangentially relevant. In *United States v. Dionisio*[483] and *United States v. Mara*[484] the Court held that a subpoena compelling a subject to appear before a grand jury and give voice or handwriting exemplars was not an unreasonable seizure absent probable cause. Whatever the rectitude of these cases may be, however, they clearly rest on the traditionally broader power of the grand jury, vis-á-vis the police, to develop evidence through forced encounters.

G. Plain View

1. *Justified Prior Intrusion*

The "plain view doctrine" is probably the most misunderstood area of search and seizure. For one thing, the doctrine's title is too narrow since "plain hearing," "plain smell" or "plain touch" are likewise recognized. More important, however, is the fact that no "doctrine" is necessary to explain the core principle—that any use or derivative use of a police observation depends on proof that such observation was not itself obtained during the course of conduct

481. 412 U.S. 291 (1973).
482. *Id.* at 295.
483. 410 U.S. 1 (1973).
484. 410 U.S. 19 (1973).

violative of the fourth amendment.[485] Thus, the validity of the plain view depends on the officer "being in a place he has a right to be."[486]

It is necessary to differentiate the pure "plain view" cases from cases where no intrusion has taken place. Thus, for example, a policeman who, while walking down a sidewalk, inadvertently spies contraband on the front seat of a parked car has in common usage had a "plain view." Yet, since he had not entered any zone of privacy, the "plain view" doctrine is not involved, though utilizing it here will lead to the correct result. The observation is protected simply because no "search" or arrest took place. If, however, a policeman in someone's house sees contraband in "plain view" on a table, the entire matter turns on whether his being in the house was justified. The Court stated recently:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.[487]

One recent case held that a police officer, standing on a cooperative neighbor's porch, spied marijuana growing in defendant's backyard in "plain view" notwithstanding that it was located behind a six-foot fence.[488] The simple truth is that anything is in plain view once one is in a position to see it. The relevant questions are: (1) Is the police conduct which gives rise to the observation a "search," "arrest" or other intrusion governed by the fourth amendment?; (2) If so, is it reasonable?; and (3) Did the officer stay within the proper scope of such reasonable intrusion?

"Plain view" observations, then, always arise during police intrusion which has as its object something other than (or at least in addition to) the search for and seizure of the items later observed in "plain view." As the Court stated in *Coolidge*:

> [I]t is important to keep in mind that, in the vast

485. Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

486. LaFave, *supra* note 8, at 333.

487. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). For the meaning of the word "inadvertent," *see* Section V G *infra*.

488. United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972).

> majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being the normal concomitant of any search, legal or illegal.[489]

Such cases arise during various types of intrusion. At the core of the "plain view" doctrine is that the prior intrusion must prove valid.

a. Arrest

In many cases, the police observe items in "plain view" while attempting to effect arrest. With a possible exception under the "inadvertance doctrine"[490] if the arrest is, or would be, lawful and any intrusion into private areas is reasonably necessary to effectuate the arrest, any "plain view" will be protected. The existence of probable cause is, of course, indispensible, but, in most cases, an arrest warrant is unnecessary.[491] If the arrest involves the entry into a house or other protected structure, requirements such as "daytime hours" and "announcement of authority and purpose" must be complied with.[492] In addition, the police must demonstrate some reason to believe the intended arrestee is present at such place though this belief need not approach probable cause.[493] Entering the arrestee's own home is almost always reasonable in this regard. Once inside, the police are entitled to search for the arrestee, though the intensity and duration of such a search will be governed by the likelihood under the circumstances that the suspect is present and actively avoiding capture. As an outer limit of the scope, of course, such search must be limited to places where a person may be found.[494]

b. Hot Pursuit

A slightly different type of arrest and search was recognized in *Warden v. Hayden*.[495] An armed robbery suspect entered a house

489. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).
490. *See* Section V G 3.
491. *See* Section V A 1 b *supra*.
492. *See* note 298 *supra*.
493. MODERN CRIMINAL PROCEDURE, *supra* note 148, at 267.
494. LaFave, *supra* note 8, at 284-86.
495. 387 U.S. 294 (1967).

shortly after a crime. Police entered five minutes later in "hot pursuit" and seized firearms in a bathroom flush tank, ammunition in a bureau drawer and under a mattress, and clothes (which matched the description of clothes worn by the robber) in a washing machine. Clearly the entry to arrest was proper, but the police could hardly have been looking for the suspect in such places. Nevertheless the Court upheld the seizures, reasoning that the police had the right to search as well for weapons "which he had used in the robbery or might use against them."[496] In emphasizing that all seizures "occurred prior to or immediately contemporaneous" with the arrest, the Court broadened the permissible scope of the search "to prevent the dangers that the suspect at large in the house may resist or escape."[497] Since the search of the washing machine was within the scope of a search for weapons, the observation of the clothes was protected. The Court did not denominate the clothes as being in "plain view" (though that would be the appropriate legal explanation) perhaps because such would call attention to the meaninglessness of the doctrine's title. *Warden v. Hayden* is thus based on an entry to arrest (1) immediately after the commission of a crime (2) in hot pursuit of a suspect (3) known to be armed and dangerous. Generalized searches for weapons during entry for arrest under other circumstances are not so authorized.

c. Searches

Many "plain view" observations occur during a search for other items. For such observations to be protected, it must be shown that such searches were reasonable (which often, of course, requires a warrant) and that the search stayed within permissible limits. Thus, if the search is for particular items, the search must be limited to areas where such items can be found;[498] if the search is incident to arrest, it must be limited to the arrestee and the area within his immediate control.[499]

d. Stop and Frisk

A vaild "stop"or "frisk" may lead to a plain view observation of incriminating items. If that observation is within the permissible

496. *Id.* at 298.
497. *Id.* at 299.
498. LaFave, *supra* note 8, at 290.
499. *See* Section V A 2 *supra*.

scope of such procedures, it is protected.[500] Often, since the officer did not have sufficient basis for arrest of "full-blown" search initially, such observations may give probable cause leading to arrest, which in turn leads to a search incident to arrest. This type of escalating encounter is protected by the fourth amendment if the prosecution can justify each step as being based on lawful prior steps.

2. *Seizure and Other Consequences of a "Plain View" Observation*

If a "plain view" observation is protected, the police may use such observation to form probable cause for arrest or for a further search; however, if the observation is not protected, any such use would be "fruit of the poisonous tree."[501] But having lawfully observed items in "plain view," may the police immediately seize such items, or must they obtain a warrant? The threshold question is whether the items are connected with criminal activity either because they are contraband, fruits or instrumentalities of crime, or "mere evidence" thereof.[502] In *United States v. Gray*,[503] police conducting a search for illicit liquor observed firearms in "plain view" and seized them. The Sixth Circuit held such seizure improper since (1) they were not contraband and thus not facially criminal, (2) they had no connection with the suspected crime underlying the search and (3) there were no other indications that they were connected with crime in any way.[504] It was not, then, "immediately apparent" that such items were "incriminating,"[505] and they were, therefore, improperly seized. It is difficult to quantify "immediately apparent," but it is clear that the Constitution requires at least probable cause to believe the items are connected with crime.

Assuming that it is immediately apparent that the viewed items are incriminating, the next question is whether a warrant must be obtained. Courts have almost universally answered this question in the negative due to language in *Warden v. Hayden*[506] and

500. Deberry v. Commonwealth, 400 S.W.2d 64 (Ky. 1973).
501. United States v. Soviero, 357 F. Supp. 1059 (S.D.N.Y. 1972).
502. *See* Warden v. Hayden, 387 U.S. 294 (1967).
503. 484 F.2d 352 (6th Cir. 1973).
504. They were later found to have been stolen.
505. United States v. Gray, 484 F.2d 352, 355 (6th Cir. 1973).
506. 387 U.S. 294 (1967).

Coolidge.[507] And yet approval of the warrantless seizures in *Warden* is at least partly explicable on the grounds that they were made while defendant was in the house avoiding arrest—*i.e.*, on "exigent circumstances." In *Coolidge*, the Court noted:

> Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.[508]

The right, then, is triggered by the finding of "evidence." Clearly it would be a meaningless exercise to leave an item to go to a magistrate and convince him it is "probably" where it was left. And yet probable cause for a search requires, in addition to the probability of an item's presence in a particular place, the probability of its criminal connection. The interposition of the "neutral and detached magistrate" may serve as a valuable protection in cases where criminal connection is not clear. When the items are contraband, warrantless seizure should doubtless be permitted. When, however, an item does not carry criminality on its face, warrantless seizures in the absence of exigent circumstances should not be so readily permitted. Perhaps this is the intent of the "immediately apparent" language in *United States v. Gray*.[509]

If the observation is proper, but the seizure improper, the evidence itself will be suppressed; however, the police can still testify to *their observation* of the evidence since it was not the product of unlawful activity and since the subsequent unlawful seizure does not taint the observation.[510]

3. *The "Inadvertence" Requirement*

The Court's opinion in *Coolidge* imposes another condition on "plain view" seizures—the discovery of the items must be "inadvertent."[511] Noting first that the "plain view" doctrine does not

507. 403 U.S. 443 (1971).
508. *Id.* at 467-68.
509. 484 F.2d at 355.
510. United States v. Lee, 274 U.S. 559, 563 (1927), cited in Coolidge v. New Hampshire, 403 U.S. 443, 469 n.26 (1971).
511. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971).

"turn an initially valid (and therefore limited) search into a 'general' one" and that the "inconvenience of procuring a warrant to cover an inadvertent discovery is great,"[512] the Court then stated:

> But where the discovery is anticipated; where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."[513]

The test for whether a discovery is anticipated is, apparently, probable cause. Since probable cause is required to obtain a warrant, failure to procure a warrant should not invalidate a search unless the warrant *could* have been procured. An interesting effect of the "inadvertence" rule is that it tends to cast the parties in the criminal case in unlikely roles—defense arguing that probable cause *did* exist and the prosecution that it *did not*. While it may be true that, as a factual matter, most "plain view" observations are inadvertent, elevating this fact to a requirement appears to ignore certain long-standing elements of the "plain view" doctrine. Nothing about "plain view" turns a limited search into a "general" one since the police must always justify their presence at the vantage point as being consistent with a purpose *apart from* any search for the items so found. It may be that the police enter for a *number* of purposes, for example, as in *Coolidge*, to effect arrest *and* to search for a car. The search for the car, had it been the *only* purpose, would fail because it was warrantless and *no* warrant exception (including the traditional automobile exception of *Carroll*) was demonstrated. If the arrest had been the *only* purpose (and finding the car *truly* advertent), the observation and seizure would be permissible provided it occurred within the scope of the entry for, and effectuation of, arrest. If an anticipated discovery is made within the scope of a valid entry for arrest, there appears to be no reason to differentiate it from the "inadvertent" discovery so made since both cases turn on the validity of the arrest and not on the validity of the search of

512. *Id.* at 469-70.
513. *Id.* 470-71.

the car. The *Coolidge* facts amply demonstrate that the car was not merely in "plain view," but could not be missed by anyone even casually on the premises. In some cases it may appear that a "plain view" was contrived, but this would fail because the observation really does not flow from the arrest,but from an active search for the plain view items themselves under the pretext of arrest.

When evidence is discovered pursuant to a search incident to arrest (that is, on the arrestee's person or within his immediate control) the "inadvertence" of such discovery is *not* relevant according to the Court.[514] It is not clear why "plain view" during arrest and searches incident to arrest should be treated differently since both depend on the validity of the arrest and the requirement that the police conduct remain within carefully prescribed limits. Perhaps one explanation for the requirement is a general fear of pretextual entries, avowedly for one purpose, yet directed in fact at a warrantless search. Yet there are good reasons not to use a rule of "inadvertence" to deter such practices. First, since *Chimel*, the "pretext" or "timed" arrest has lost much of its usefulness to the narrowing of the incident search. Second, when a "pretext" or "timed" arrest or search is conducted, courts will suppress the fruits for that reason alone.[515]

Ultimately, the *Coolidge* "inadvertence" rule may not require too much but rather too little. The opinion powerfully asserts the need for a constitutionally dimensioned arrest warrant requirement and expresses wonder that no such requirement exists.[516] Yet the Court once again refuses to announce such a rule notwithstanding that it would be hard to contrive a fact situation more strongly suggesting it.

Whatever the propriety of the "inadvertence" rule, it has had little impact on lower courts. Many courts have rejected it and upheld plain view seizure of anticipated items when the prosecution could show "exigent circumstances" for the initial intrusion, stressing that *Coolidge* dealt only with *planned* warrantless seizures.[517] The Second Circuit has held that a warrantless arrest and search

514. *Id.* at 481-82.
515. *See* Section V A 4 *supra*.
516. Coolidge v. New Hampshire, 403 U.S. 443, 473-84 (1971).
517. United States v. Lisznyai, 470 F.2d 707 (2d Cir. 1972).

for anticipated items is permitted when the suspect gives signs of leaving or removing the sought items.[518] Other courts have ignored the inadvertence doctrine where seemingly applicable[519] and the California Supreme Court has *refused* to apply it, pointing out that only four Justices joined in this section of the opinion.[520]

Because of a clear exception when any exigencies are shown, the inadvertence rule would appear to be applicable only to arrests and searches which are planned. In the search situation, since a warrant would be required in such case, the inadvertence rule would apply only to items which the police anticipated finding but failed to include in the warrant. This would be a rare situation. This situation—arrest with no exigency and with anticipated plain view of specified items—may be the only situation in which the rule of "inadvertence" is significant. The only safe alternative for the police in such cases is to obtain a search warrant. An arrest warrant is not enough since the arrest is most likely, valid without the warrant.[521]

CONCLUSION

In *Coolidge v. New Hampshire*, the Supreme Court stated:

> Of course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent.[522]

The Court then quoted language of Justice Harlan directed at the fifth amendment privilege against self-incrimination noting it was equally applicable to the fourth:

> There are those, I suppose, who would put the "liberal conconstruction" approach of cases like *Miranda* and *Boyd v. United States*, [citation omitted] side-by-side with the balancing approach of *Schmerber* and perceive nothing more subtle than a set of constructional antimonies to be

518. *Id.*
519. Ludlow v. State, ___ Ind. ___, 302 N.E.2d 838 (1973).
520. North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 933 (1972).
521. Coolidge v. New Hampshire, 403 U.S. 443, 484 (1971).
522. *Id.* at 483.

> utilized as convenient bootstraps to one result or another. But I perceive in these cases the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court.[523]

The one certainty in the future of fourth amendment law is further change resulting from the tension between "law and order" on the one hand and the sanctity of the individual and his privacy on the other with "reasonableness" the only ultimate guide. Nor is such change, often criticized as "judicial legislation," improper even in a constitutional setting, as the Framers must have intended, by selecting "reasonable" as the crucial term, that this guarantee reflect contemporary attitudes.

In an age of race riots, youth rebellion, narcotics traffic running wild, skyjacking and sensational kidnappings, it is understandable that the hue and cry for law and order pulls at the fourth amendment; yet police riots, the ugly specter of data banks and other sophisticated information-gathering and co-ordinating techniques, the prevalence of wiretapping and other surreptitious invasions of privacy by those near the highest levels of government, and a pervasive feeling that one *cannot* "get away from it all" even temporarily, all pull in the opposite direction. Thus, the tension increases, but it continues. A working knowledge of the law of arrest, search and seizure must begin with an understanding that all cases, all issues, are ultimately the product of this tension.

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523. *Id.* at 484.