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# PROPOSED REVISIONS OF NORTH CAROLINA'S SEARCH AND SEIZURE LAW

BARRY NAKELL†

In January 1973, the North Carolina General Assembly received the Legislative Program and Report of the Criminal Code Commission,<sup>1</sup> a proposal prepared by a twenty-six member commission appointed in November 1970 by the Attorney General pursuant to a joint resolution of the General Assembly.<sup>ii</sup> The Commission's legislative program deals comprehensively with criminal procedure in a proposed new Chapter 15A of the General Statutes. The proposal is now pending in the House of Representatives as House Bill No. 256 and in the Senate as Senate Bill No. 207. The purpose of this article is to discuss its search and seizure provisions.

## A. THE EXCLUSIONARY RULE

Ten years before *Mapp v. Ohio*,<sup>1</sup> North Carolina enacted<sup>2</sup> the exclusionary rule as a means of enforcing the fourth amendment. At that time, the United States Supreme Court had held that the constitutional prohibition against unreasonable searches and seizures applied to the states<sup>3</sup> but had applied the exclusionary rule only to federal officers.<sup>4</sup> The North Carolina statute thus reflected a state policy that the most effective acceptable procedure for ensuring freedom from unwarranted official invasions of privacy was to deprive the prosecution of the use in evidence of the fruits of illegal searches. This procedure withdrew

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i. CRIMINAL CODE COMMISSION, LEGISLATIVE PROGRAM AND REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA (1973). Hereafter, the Legislative Program will be cited by its proposed section numbers, as "Proposed § \_\_\_\_." The Report will be cited by page number, as "COMMENTS \_\_\_\_."

ii. Joint Resolution 24, 1971 N.C. General Assembly.  
<sup>1</sup>367 U.S. 643 (1961).

<sup>2</sup>In 1937, the North Carolina legislature adopted an exclusionary rule for searches conducted on the basis of an illegal search warrant. Ch. 339, [1937] N.C. Sess. Laws 670. In 1951, the statute was amended to apply the exclusionary rule also to searches unlawfully conducted without a warrant. Ch. 644, [1951] N.C. Sess. Laws 601. See STANSBURY'S NORTH CAROLINA EVIDENCE § 121, at 365 (Brandis rev. 1973). The North Carolina Supreme Court had earlier declined to adopt an exclusionary rule judicially. *State v. Fowler*, 172 N.C. 905, 913-14, 90 S.E. 408, 411-12 (1916).

<sup>3</sup>*Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

<sup>4</sup>*Weeks v. United States*, 232 U.S. 383 (1914); cf. *Wolf v. Colorado*, 338 U.S. 25, 27-29 (1949).

from police officers the incentive to engage in such conduct for the purpose of discovering evidence. Thereafter, the United States Supreme Court held that the exclusionary rule applied as a matter of constitutional imperative to all the states.<sup>5</sup> The Court imposed that universal mandate to protect judicial integrity<sup>6</sup> as well as to deter unlawful police conduct.<sup>7</sup> North Carolina's statute was amended in 1969 and now provides as follows:

(a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial.

(b) No search may be regarded as illegal solely because of technical deviations in a search warrant from requirements not constitutionally required.<sup>8</sup>

The practical justification for the exclusionary rule is that it represents the only institutional sanction for fourth amendment violations that has any significant impact on law enforcement practices. Because it withholds trustworthy physical evidence, it has never been heralded as a judicial ideal, although it does in addition represent responsible action by the courts to isolate their own processes from corrupt police conduct. At the same time, it has not been regarded as a foolproof antidote to illegal searches; it is just better than any other sanction that we have been willing to impose on our criminal justice system.<sup>9</sup>

The basic objective of the exclusionary rule is to impress upon law enforcement officers that illegal searches are not in their professional interest since they cannot yield judicially acceptable information. Empirical studies testing the validity of the exclusionary rule in light of that objective have proven inconclusive.<sup>10</sup> This is not surprising due to the difficulties in measuring the non-occurrence of undesirable activity and

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<sup>5</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>6</sup>*Id.* at 659. See also *Olmstead v. United States*, 277 U.S. 438, 470, 484 (1928) (Holmes & Brandeis, JJ., dissenting).

<sup>7</sup>367 U.S. at 647-57.

<sup>8</sup>N.C. GEN. STAT. § 15-27 (Supp. 1971).

<sup>9</sup>"The fact that there is little agreement and little evidence that the exclusionary rule does deter police lawlessness is much less significant, I think, than the fact that there is much agreement and much evidence that all other existing alternatives do not." Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1150 (1959). See also Paulsen, *The Exclusionary Rule and Misconduct By the Police*, 52 J. CRIM. L. & P.S. 255, 260 (1961).

<sup>10</sup>Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina, the Model, the Study and the Implications*, 45 N.C.L. REV. 119, 131-51 (1966); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667, 678-709 (1970).

the lack of pre-*Mapp* data indicating the frequency of illegal searches and seizures. A 1966 survey of North Carolina police chiefs, sheriffs, prosecuting attorneys, defense attorneys, and trial judges, however, showed that about three-fourths of those responding believed that the exclusionary rule is an effective way of reducing the number of illegal searches.<sup>11</sup>

The exclusionary rule has spawned a variety of collateral benefits. Perhaps paramount among them is that it provides the courts a means for establishing guidelines for police investigative methods. Since the courts before *Mapp* seldom had occasion to review the legality of police searches, they were unable to refine sufficiently the constitutional prohibition against "unreasonable searches and seizures." Although the guidelines being promulgated are occasionally unclear or fluctuating, they do enable police officers to know the limits of their authority with more exactitude than could be derived from the necessarily broad language of the fourth amendment itself.

Another byproduct of the exclusionary rule is greater law enforcement and public awareness of the requirements of the fourth amendment and, perhaps, even of the privacy policies behind them. Undoubtedly the trend toward greater professionalism in police departments—including higher personnel education and other selection requirements, more widespread training programs, and increased employment of police legal advisors—was prompted by the need to conform to constitutionally enforced investigative limitations.<sup>12</sup>

The exclusionary rule does, however, contain weaknesses. It has an impact only on police conduct that is primarily aimed at uncovering evidence.<sup>13</sup> If other objectives such as harassment, destruction of contraband, or accumulation of intelligence motivate the police, the exclusionary rule will not deter their conduct. Moreover, the primary effect of the exclusionary rule is to provide a windfall defense to the defendant whether he is innocent or guilty. It cannot be called upon to provide redress for the victim—whether in fact innocent or guilty—of an illegal search that bears no fruit.<sup>14</sup>

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<sup>11</sup>Katz, *supra* note 10, at 134-35. See also Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 Wis. L. REV. 283.

<sup>12</sup>Kamisar, *supra* note 9, at 1158; Nagel, *supra* note 11, at 287; Paulsen, *supra* note 9, at 262.

<sup>13</sup>See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 413, 417-18 (1971) (Burger, C.J., dissenting); *Terry v. Ohio*, 392 U.S. 1, 14 (1968); *Irvine v. California*, 347 U.S. 128, 136 (1954).

<sup>14</sup>See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 417-18 (1971) (Burger, C.J., dissenting).

Fairness in evaluating the exclusionary rule suggests the importance of distinguishing results that flow from the fourth amendment standards themselves from those that flow only from the exclusionary remedy. The fourth amendment itself places some evidence beyond the reach of law enforcement officers. If by violating search and seizure law the officers should acquire that evidence, forbidding its use at trial does no more than the fourth amendment contemplates. To that extent at least, the fourth amendment does expressly contain an exclusionary rule; it would exclude some evidence from trial by excluding it from the possession of prosecutorial authorities.<sup>15</sup> The exclusionary rule cannot be billed for the loss of such evidence. That loss is the cost contemplated by the fourth amendment as the price of privacy. The ledger for the exclusionary rule should reflect only the lost evidence that the fourth amendment would have allowed the police officers if they had postponed their search until their investigation had developed probable cause or until they had obtained a valid warrant. Even then, the cost due to the exclusionary rule cannot be determined because the suppression cases have not been audited to distinguish between those that would never have arisen had the fourth amendment been obeyed in the first place and those that would have survived if fourth amendment procedures had been followed. Similarly, the audit should take into consideration whether the prosecution of the particular case was defeated as a result of suppression of the illegally obtained evidence or whether, although weakened, it was nevertheless pursued to conviction on the basis of untainted evidence.

A final weakness often attributed to the exclusionary rule is that it does not punish the offending law enforcement officer.<sup>16</sup> The design of the rule is not, however, that each police officer should individually have the fruits of a search conducted by him suppressed in a succession of

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<sup>15</sup>See Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe that the Court Is Oblivious to the Needs of Law Enforcement*, 37 GEO. WASH. L. REV. 1218, 1236 (1969):

If the police had not 'blundered,' by committing the unreasonable search, the criminal never would have been brought to trial in the first place since there would have been no evidence to justify it. Therefore, in these instances the criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered.

<sup>16</sup>See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971). Chief Justice Burger explained in the course of that opinion that "Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." *Id.* at 417. If that criticism of the police is true, it sounds more like an argument against having any fourth amendment standards than against the exclusionary rule.

cases, each involving a violation of a different constitutional limitation, until finally he is familiar with fourth amendment law. Instead, the exclusionary rule is fashioned to provide police departments and police officers with an incentive to adhere to the dictates of the Constitution and thus encourages them to take personnel and educational measures to assure compliance.<sup>17</sup> The educated police cadet studying summaries of fourth amendment decisions and the police sergeant or legal advisor explaining recent rulings at roll call are the enforcement mechanisms created around the exclusionary rule (together with the incentive afforded by the threat of losing the use of needed evidence unless it is properly obtained). As experience under the infant exclusionary rule accumulates in the states, a commitment to lawful investigative procedures will be nurtured so that the cost to society in terms of lost prosecutions will be reduced to tolerable proportions—if, as we do not know, they are now any higher.

### (1) *The Scope of the Rule*

The Commission has proposed replacing the existing exclusionary rule in North Carolina with the following statute:<sup>18</sup>

Upon timely motion, evidence<sup>19</sup> must be suppressed if:

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<sup>17</sup>See Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 16 (1964): "That improvements are possible, and that preventive measures are feasible, is suggested by the performance of some of the federal agencies, notably the Federal Bureau of Investigation, which has a remarkable record as to the incidence of suppression of evidence secured by its agents."

<sup>18</sup>Proposed § 15A-974. The Model Code of Pre-Arrest Procedure provides, "A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this State." ALI MODEL CODE OF PRE-ARREST PROCEDURE § SS 290.2(2) (Official Draft No. 1, 1972) [hereinafter cited as MODEL CODE]. It then defines "substantial" in terms of the same factors as the Commission's proposal, adding two more:

(f) whether, but for the violation, the things seized would have been discovered; and (g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

*Id.*

<sup>19</sup>Proposed § 15A-971 defines "evidence" as "any tangible property or potential testimony which may be offered in evidence in a criminal action." The Comments to § 15A-974 explain that the "definition of 'evidence' set out in proposed § 15A-971 is very broad, but it may not include 'fruits of the poisonous tree' unless there is a constitutional requirement that such derivative evidence be excluded." COMMENTS 238-39. The Commission's uncertainty as to the meaning of its own draft, reflected in its statement "it may not include," is puzzling. A fair reading of the definition of "evidence" in proposed § 15A-971 would give no indication of any intention to make any provision regarding "fruits of the poisonous tree." The appropriate place for the legislation to provide one way or the other in that respect would be in the exclusionary rule of § 15A-974. As

- (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
- (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances including:
  - a. The importance of the particular interest violated;
  - b. The extent of the deviation from lawful conduct;
  - c. The extent to which the violation was wilful;
  - d. The extent to which exclusion will tend to deter future violations of this Chapter.

This proposal recommends two departures from present law. The first departure is an abandonment of the automatic suppression of evidence if it is found to have been acquired in an unconstitutional search. Instead, such illegally obtained evidence must be suppressed only if "authoritative case law"<sup>20</sup> declares that suppression is the appropriate sanction. The Comments explain: "There are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law."<sup>21</sup> Thus, the Commission did not suggest how it would "moderate some of the exclusionary rules" in regard to constitutional violations. Instead it recommended that North Carolina write its law reflexively to incorporate any Supreme Court restrictions on the scope of the exclusionary rule. Since North Carolina's exclusionary rule is not a creature of the United States Supreme Court but of our own legislature, it would seem incumbent upon the Commission to provide some reasons for changing a state policy that has prevailed since 1951. But in this respect the Commission's report is disappointing since not a single reason is offered in its report.

The Commission is not so coy in proposing moderations for the exclusionary rule when it is applied to non-constitutional state law violations in the procuring of evidence. This is the second departure from present law recommended by this section. The present statute excepts from the exclusionary rule "technical deviations in a search warrant." The proposed statute would except violations of statute that are not "substantial" and lists four criteria to be used in making that determination.

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discussed in the text, that section is drafted with sufficient flexibility to contract the exclusionary rule accordingly if the Constitution is interpreted to narrow the "fruit of the poisonous tree" doctrine stemming from *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>20</sup>COMMENTS 238.

<sup>21</sup>*Id.*

The Commission's proposed moderations of the rule were obviously inspired by Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Named Agents*.<sup>22</sup> The major part of that opinion advocated an alternative to the exclusionary rule, namely, workable machinery for private damage actions against the governmental agency responsible for an offending police officer.<sup>23</sup> The Chief Justice acknowledged that "private damage actions against individual police officers concededly have not adequately met this requirement . . . ."<sup>24</sup> He ascribed their failure to the reluctance of juries in most cases to return verdicts against individual officers and to the difficulty of finding non-exempt assets of an officer from which a judgment can be satisfied.<sup>25</sup> A third deficiency of the private damage action is that it imposes the burden and the expense of enforcing fourth amendment law on the private citizen. The plaintiff does not have a right to appointed counsel, and his recoupment of costs is contingent on victory. The private damage action provides a remedy only when an illegal search invades the privacy of a person who has the initiative, resources, time, and courage to pursue the hardships of litigation.

Chief Justice Burger recommended that the federal government and the states "develop an administrative or quasi-judicial remedy against the government itself"<sup>26</sup> rather than the individual police officer, waive sovereign immunity<sup>27</sup> for that purpose, and replace jurors with

<sup>22</sup>403 U.S. 388, 413-27 (1971). See also Burger, *supra* note 17.

<sup>23</sup>The Chief Justice reasoned that "If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule." 403 U.S. at 414. The validity of this conclusion would seem to depend on two questions: first, whether the imperative of judicial integrity rationale would require the exclusionary rule even if the deterrence rationale did not, and, second, whether the alternative remedy provided a level of deterrence equivalent to that provided by the exclusionary rule. See Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1561-63 (1972); Paulsen, *supra* note 9, at 257-59; cf. *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>24</sup>403 U.S. at 421. See also UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, THE POLICE 31-32 (1967); Foote, *Tort Remedies for Police Violation of Individual Rights*, 39 MINN. L. REV. 483, 499 (1955); Nagel, *supra* note 11, at 302-05; Paulsen, *supra* note 9, at 260-61; *Symposium—Police Tort Liability*, 16 CLEV.-MAR. L. REV. 415, 432 (1967).

<sup>25</sup>403 U.S. at 421-22.

<sup>26</sup>*Id.* at 422-23. But see Paulsen, *supra* note 9, at 261: "Imposing liability on government units . . . will not completely deter the state from engaging in unconstitutional practices. It may be very attractive for state officials acting according to a calculus of police values, to violate now and pay later."

<sup>27</sup>See Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548, 558-71, 579-602 (1972).



professional decision-makers.<sup>28</sup> Perhaps a jurisdiction considering such a remedy might include a workable procedure for the government to assume its prosecutorial responsibilities in such a case.

The Commission chose not to follow Chief Justice Burger's suggestion.<sup>29</sup> Rather, it took its cue from a secondary position that the Chief Justice indicated he was willing to take without waiting for legislative proliferation of his remedial scheme. "Independent of the alternative embraced in this dissenting opinion," he wrote, "I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced."<sup>30</sup> In an appendix to his opinion, the Chief Justice hinted at some substance to this oblique statement by noting as "interesting"<sup>31</sup> a proposal by the American Law Institute<sup>32</sup> to limit application of the exclusionary rule to "substantial" violations of the Constitution.<sup>33</sup> The Commission acknowledged that it relied on the American Law Institute draft in preparing its proposal.<sup>34</sup>

It is premature for any predictions that the Supreme Court as presently constituted will tinker with the scope of the exclusionary rule. The present members of the Court who participated in the decision in *Mapp*, Justices Douglas, Brennan and Stewart, all joined in the prevailing opinion and have never officially waived from that position. Among the other sitting members of the Court, Justices White and Marshall have always adhered to the exclusionary rule without complaint about its nature or scope. Thus a majority of the present Court has not publicly indicated any dissatisfaction with the exclusionary rule.

On the other hand, Chief Justice Burger gave clear expression to his contrary views in *Bivens*. Justice Blackmun wrote a separate dissent in *Bivens* without addressing the exclusionary rule or the Chief Justice's opinion.<sup>35</sup> That same day, the Court decided *Coolidge v. New Hampshire*,<sup>36</sup> and Justice Blackmun noted in that case that he joined

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<sup>28</sup>403 U.S. at 422-24.

<sup>29</sup>In the case of violations of its chapter on electronic eavesdropping the Commission recommended "liquidated damages computed at the rate of one hundred dollars (\$100.00) a day for every day of violation or one thousand dollars (\$1000.00), whichever is higher" as well as punitive damages, attorneys' fees and costs. Proposed § 15A-299.

<sup>30</sup>403 U.S. at 424.

<sup>31</sup>*Id.*

<sup>32</sup>ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 23-24 (Tent. Draft No. 4, 1971).

<sup>33</sup>403 U.S. at 424-26.

<sup>34</sup>COMMENTS 238-39; see note 18 *supra*.

<sup>35</sup>403 U.S. at 430.

<sup>36</sup>403 U.S. 443 (1971).

in that portion of a dissenting opinion written by Justice Black "which is to the effect that the Fourth Amendment supports no exclusionary rule."<sup>37</sup> Justice Black, who concurred specially in *Mapp* and who is no longer on the Court, argued in dissent that the fourth amendment contains no exclusionary rule, but that the exclusionary rule inherent in the fifth amendment might operate to require the exclusion from evidence of some information obtained in an illegal search.<sup>38</sup> Justice Harlan, who also is no longer on the Court, wrote a concurring opinion in *Coolidge* to explain that he believed the exclusionary rule for the fruits of an illegal search should be applied only if the search "could be said to offend those values which are 'at the core of the Fourth Amendment.'"<sup>39</sup> This reasoning distinguishes between the standards that should be applied for the exclusion of evidence in federal cases and those to be applied in state cases, presumably because federal cases are governed directly by the fourth amendment, while state cases are governed in his opinion only by the due process clause of the fourteenth amendment.

More recently, in a concurring opinion in *Schneckloth v. Bustamonte* written by Justice Powell, and joined in by Justice Rehnquist as well as Chief Justice Burger, the two newest members of the Court indicated general agreement with the Chief Justice's dissent in *Bivens*.<sup>40</sup> Justice Blackmun noted that he agreed "with nearly all that Mr. Justice Powell has to say in his detailed and persuasive concurring opinion,"<sup>41</sup> but no other Justices associated themselves with that opinion.

Like Chief Justice Burger in *Bivens*, the Commission made no attempt to evaluate the effect on the exclusionary rule by modifying it to apply only to "substantial" unconstitutional conduct. The proposed modification would, however, significantly undermine the deterrence benefits of the exclusionary rule without ameliorating the problem of supplying a defense to guilty defendants. In *Bivens*, Chief Justice Burger perceived that "obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared."<sup>42</sup> A

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<sup>37</sup>*Id.* at 510.

<sup>38</sup>*Id.* at 496-500.

<sup>39</sup>*Id.* at 490-91.

<sup>40</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 267 (1973).

<sup>41</sup>*Id.* at 249.

<sup>42</sup>*Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421 (1971).

restriction of the exclusionary rule to "substantial violations" will result in almost as great a disservice as its outright overruling.

The success of the exclusionary rule depends upon its communicating to law enforcement officers as an inevitable proposition that the fruits of an illegal search will be useless to them in any prosecution.<sup>43</sup> Hedging that sanction by advising the officers that "maybe the prosecutor can avoid exclusion even if the search was illegal" can carry only one message. Law enforcement officers cannot realistically be expected to concern themselves about the distinctions between legal and illegal searches if in either case they can generally use in judicial proceedings whatever the search turns up. Drawing the exclusionary line on the basis of the substantiality of the violation will reinforce the impression among law enforcement officers that backing off the exclusionary rule is the same as backing off the substantive standards themselves. For that matter, as far as constitutional violations are concerned, can there be an "unreasonable" search or seizure that is not also a "substantial violation" of the fourth amendment? The constitution has built its own flexibility around the definition of tolerable invasions of privacy, making it semantically difficult to disassociate an exception to the exclusionary rule based on the nature of the police conduct from a violation of the substance of the fourth amendment itself. Even if law enforcement officers learned the difference, would they be any more motivated to abstain from illegal but potentially productive searches than they are now motivated to refrain from illegal searches designed for purposes other than finding judicially useful evidence? As to violations of purely state law provisions, there are some statutory requirements for warrant procedure that may be regarded as "technical" and that should not be enforced by the exclusionary rule. The legislation now in force provides for that. By changing the term "technical" to the term "substantial" and introducing a highly subjective definition of that term, the Commission is inviting police officers to ignore such fundamental requirements recommended by the Commission as giving notice of a right to refuse consent before obtaining consent to a search, giving notice of authority and purpose before forcibly entering a home to search it, and recording of a search warrant application.

The factors listed by the Commission as being among the circumstances to be considered in determining whether a violation is "substantial" illustrate the elasticity of this new concept. One factor is the "ex-

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<sup>43</sup>See Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185, 203 (1961).

tent to which exclusion will tend to deter future violations of this Chapter."<sup>44</sup> But exclusion in any single case or on a sporadic basis can be expected to have no deterrent effect. Only a regular and reliable refusal by the courts to exploit illegal searches will discourage their commission.

A second factor in the determination of the substantiality of a violation is "the extent to which the violation was wilful." If that factor were simply "whether the violation was wilful" it might be manageable even though not desirable. Even if a violation were committed with an awareness of its unlawful character and without the justification of exigent circumstances, this factor would allow a court to find that, though wilful, it was not wilful enough to justify exclusion of its fruits. Such a rule would put a premium on police ignorance of search and seizure law.

A third factor is "the extent of the deviation from lawful conduct." Insofar as state law violations are concerned, the standard of "technical" violations now in force would seem more serviceable than the proposed standard. If this factor were also applied to constitutional violations, its meaning would be difficult to fathom in view of the fact that the central concept of the fourth amendment is reasonableness.

The final factor is "the importance of the particular interest violated." Except for violations of state law requirements that may fairly be regarded as "technical," the interest violated in all search and seizure cases is the same—the fundamental right to privacy. To the extent that there might be a greater interest in privacy in the home, for example, than in an automobile, substantive search and seizure standards take cognizance of them already.<sup>45</sup> In *Terry v. Ohio*, the Supreme Court held that even a stop-and-frisk on the street "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."<sup>46</sup> The Court insisted that "it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'"<sup>47</sup>

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<sup>44</sup>See *Terry v. Ohio*, 392 U.S. 1, 14-15 (1968).

<sup>45</sup>See, e.g., *Cady v. Dombrowski*, 93 S. Ct. 2523 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Harris v. United States*, 390 U.S. 234 (1968) (per curiam); *Cooper v. California*, 386 U.S. 58 (1967); *Carroll v. United States*, 267 U.S. 132 (1925). As the Supreme Court said in *Terry v. Ohio*, 392 U.S. 1, 9 (1968), "the specific content and incidents of this right must be shaped by the context in which it is asserted."

<sup>46</sup>*Terry v. Ohio*, 392 U.S. 1, 17 (1968).

<sup>47</sup>*Id.* at 16-17.

The unpredictability of the application of the exclusion sanction will withdraw the *in terrorem* impact of the exclusionary rule (especially since the officers involved in an illegal search will not be personally penalized when it does strike) and yet will still result in the needless forfeiture of cases whenever the sanction is in fact applied. Indeed, this "moderation" of the exclusionary rule may be counterproductive. It may popularize illegal searches to such an extent that more evidence has to be thrown out than now is the case; it may also discourage officers from utilizing lawful procedures in the hope that their saving of time or effort might be rewarded by a judicial disinclination to hold their violation "substantial." Application of the exclusionary rule would become so fraught with conditions as to hold out hope to law enforcement officers that an illegal search might be worthwhile. This hope would supply an incentive to engage in such a search sufficient in too many cases to override the deterrence of the exclusionary rule. The failure of the Commission to propose an effective civil damage remedy or any other effective alternative procedure for enforcing search and seizure law exacerbates this problem: the emphasis on legal procedures in the exclusionary rule is being softened without any corresponding encouragement of lawful investigative techniques being provided police officers from any other source. Before North Carolina takes a step so inconsistent with more than two decades of state policy, it should have convincing evidence that it is necessary. No such evidence is available.

## (2) *The Suppression Hearing*

(a) *Procedure.* Under present North Carolina law, the appropriate time for a defendant to raise the issue of illegal search and seizure is at trial when the fruits of the search are offered in evidence.<sup>48</sup> The court may in its discretion hold a hearing on that issue in advance of trial,<sup>49</sup> and North Carolina courts often do so.<sup>50</sup> Such a pre-trial hearing on the admissibility of the evidence frees the trial of unnecessary interruptions.<sup>51</sup>

The Commission, seeking to standardize the use of the pre-trial hearing procedure, has recommended that if a defendant desires to

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<sup>48</sup>See *State v. Thompson*, 15 N.C. App. 416, 419, 190 S.E.2d 355, 358 (1972).

<sup>49</sup>See *State v. Pike*, 273 N.C. 102, 105-06, 159 S.E.2d 334, 336-37 (1968); *State v. Myers*, 266 N.C. 581, 583, 146 S.E.2d 674, 676 (1966).

<sup>50</sup>See *State v. Turnbull*, 16 N.C. App. 542, 543, 192 S.E.2d 689, 690 (1972); COMMENTS 236.

<sup>51</sup>*Cf. State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971).

suppress evidence on the ground that it was obtained unlawfully, he must do so prior to trial.<sup>52</sup> The motion must be made in writing and supported by an affidavit.<sup>53</sup> To facilitate this procedure, the Commission would impose an obligation on the prosecution to notify the defendant at least twenty working days before trial of any evidence that it has obtained by virtue of a search conducted without a search warrant or out of his presence.<sup>54</sup> If the prosecution fails to give this notice, the defendant may then raise his objection for the first time at trial.<sup>55</sup> The court may decide the pre-trial motion summarily if the papers filed by both sides do not raise a triable issue of fact,<sup>56</sup> or may hold a hearing before or during trial.<sup>57</sup> "The judge must set forth in the record his findings of facts and conclusions of law."<sup>58</sup> If denied, the motion may be renewed before or during trial only upon a showing "that additional pertinent facts have been discovered by the defendant which he could not have [earlier] discovered with reasonable diligence . . . ."<sup>59</sup>

In addition to expediting trials, this procedure will enable motions to suppress illegal evidence to be disposed of before the swearing-in of a juror or a witness causes jeopardy to attach.<sup>60</sup> This will enable the

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<sup>52</sup>Proposed §§ 15A-976(a), -979(d). This requirement would also apply to a motion to suppress evidence obtained in violation of some provision of the Constitution other than the fourth amendment, such as an illegal confession. It is constitutional as long as the defendant is aware that the evidence would be offered in time to make a pre-trial motion, and the Commission's proposal makes such knowledge a condition of the requirement.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. . . . And if such a claim is made after the trial is under way [sic], the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim.

*Nardone v. United States*, 308 U.S. 338, 341-42 (1939); see *United States v. Allen*, \_\_\_ F.2d \_\_\_, \_\_\_ (4th Cir. 1973); *United States v. Cranson*, 453 F.2d 123 (4th Cir. 1971).

Separate provision is made for challenging the admissibility of evidence obtained by wiretapping. Proposed §§ 15A-297(g)(4)-(5), (h), (i).

<sup>53</sup>Proposed § 15A-977(a).

<sup>54</sup>*Id.* § 15A-975.

<sup>55</sup>*Id.* § 15A-976(b).

<sup>56</sup>*Id.* §§ 15A-977(b), (c).

<sup>57</sup>*Id.* §§ 15A-976(c), -977(d).

<sup>58</sup>*Id.* § 15A-977(f).

<sup>59</sup>*Id.* § 15A-976(d).

<sup>60</sup>See *United States v. Jorn*, 400 U.S. 470, 479-80 (1971); *Downum v. United States*, 372 U.S. 734 (1963); *Green v. United States*, 355 U.S. 184, 188 (1957); cf. *Illinois v. Somerville*, 410 U.S. 458 (1973); *Wade v. Hunter*, 336 U.S. 684, 688, 691 (1949); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

prosecution to obtain review of an adverse decision by means of an interlocutory appeal without violating the fifth amendment's proscription against double jeopardy. Allowing the prosecutor to appeal that decision would minimize the occasions when an erroneous trial court decision on the collateral search and seizure question might foreclose or weaken a prosecution. It might also create an atmosphere in which trial judges will be more willing to grant a motion to suppress since they know that this decision can be reviewed. The prosecutorial appeal permits the state to obtain an authoritative ruling on the questioned procedure without encouraging the police to continue a practice held unlawful in order to create an appealable test case in which a different judge makes a ruling in their favor.<sup>61</sup> Accordingly, the Commission has also recommended a provision authorizing the prosecutor to appeal from the granting of a motion to suppress upon certifying "that the appeal is not taken for the purpose of delay and that the evidence is essential to the case."<sup>62</sup> No corresponding interlocutory appeal from the denial of a motion to suppress would be afforded to the defendant. But provision would be made for him to obtain appellate review upon appeal from a judgment of conviction, specifically "including a judgment entered upon a plea of guilty."<sup>63</sup>

(b) *The Scope of the Hearing.* The basic issues are whether the search was constitutionally "unreasonable" and whether, in the Commission's formulation, there were any "substantial violations" of state law in its conduct. With regard to the constitutional question, the issue of reasonableness ordinarily breaks down into two parts: whether there was probable cause or, alternatively, some legal basis for searching without probable cause,<sup>64</sup> and whether there was a lawful search warrant

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<sup>61</sup>UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 140 (1967).

<sup>62</sup>Proposed § 15A-979(c). *Commonwealth v. Fisher*, 422 Pa. 134, 221 A.2d 115 (1966). Several jurisdictions already provide for an interlocutory appeal by the prosecution from an adverse ruling on a suppression motion. CAL. PENAL CODE § 1538.5(o) (West Supp. 1973); ILL. ANN. STAT. ch. 110A, § 604(a)(1) (Smith-Hurd Supp. 1973); MINN. STAT. ANN. § 632.11 (Supp. 1973); N.Y. CRIM. PRO. LAW § 450.20 (McKinney 1971).

Because the term "essential to the case" is not defined, it might give rise to litigation over its meaning that should be avoided by clarification in the statute.

<sup>63</sup>Proposed § 15A-979(b).

<sup>64</sup>The most frequent situation in which probable cause is not required for a search is when the search is conducted with the consent of a person entitled to give it. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); Proposed §§ 15A-221 to -223. Probable cause may also be unnecessary for a border search, *see Almeida-Sanchez v. United States*, 93 S. Ct. 2535 (1973) (dictum), and for a welfare search, *Wyman v. James*, 400 U.S. 309 (1971). The question of whether probable cause is needed for a stop-and-frisk is discussed *infra* Part D.

or some recognized exigent circumstance justifying dispensing with it.<sup>65</sup>

Thus the reasonableness under the fourth amendment of most searches depends in part upon whether they were conducted with probable cause. If a search is conducted without a warrant, the question of the existence of probable cause will be judicially reviewed for the first time at the suppression hearing because the courts and not the searching officer are the ultimate judges of probable cause. If before conducting a search, an officer obtained a warrant, the issuing judicial officer presumably determined the existence of probable cause. To what extent should the defendant be permitted to challenge the factual basis for that determination at the suppression hearing? There are as many as five possible answers: (1) the defendant should not be permitted to inquire into the facts behind the warrant at all; (2) the defendant should be permitted to test the truthfulness of the affiant's oath, but not any of the underlying information, such as an informer's tip relied on by the affiant in good faith; (3) the defendant should be permitted to contest the truthfulness of the affiant's oath, and to inquire into the truthfulness of any underlying information, such as an informant's tip, only for the purpose of testing the good faith of the affiant's reliance on that information; (4) the defendant should be permitted to test the truthfulness of the affiant's oath and also of all the information upon which it is based; and (5) before a factual challenge to a warrant will be permitted, the defendant should be required to make an advance showing of a reasonable basis for doubting the affidavit.

The question of whether a defendant must be permitted to challenge the factual basis of a search warrant is an open one in the annals of the United States Supreme Court.<sup>66</sup> North Carolina case law has not

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<sup>65</sup>The recognized exigent circumstances include: search incident to a lawful arrest, *Chimel v. California*, 395 U.S. 752 (1969); search of a mobile or impounded vehicle, *Cady v. Dombrowski*, 93 S. Ct. 2523 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Cooper v. California*, 386 U.S. 58 (1967); *Preston v. United States*, 376 U.S. 364 (1964); *Carroll v. United States*, 267 U.S. 132 (1925); search based on consent, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); stop-and-frisk, *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968); border search, *Almeida-Sanchez v. United States*, 93 S. Ct. 2535 (1973) (dictum); welfare search, *Wyman v. James*, 400 U.S. 309 (1971). The question of whether a national security search may be conducted without advance judicial approval is unresolved. See *United States v. United States District Court*, 407 U.S. 297 (1972).

<sup>66</sup>In *Rugendorf v. United States*, 376 U.S. 528 (1964), the Court said: "Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' . . ." *Id.* at 531-32. Earlier in *Steele v. United States*, 267 U.S. 498 (1925), the Court held:



yet come to grips with the problem either. The clearest statement on the issue came in the recent court of appeals decision in *State v. Salem*.<sup>67</sup> In that case, the court upheld the refusal of the trial court to require a police officer to answer questions designed to attack the credibility of an informer who furnished information relied upon by the officer in applying for the search warrant. The court said that the "question before the trial court was not whether the informer was in fact reliable, but whether the facts sworn to by the officer as being within his personal knowledge were sufficient to support the magistrate's independent determination that the informer was reliable and that the information given by the informer to the affiant was probably accurate."<sup>68</sup> If that were all that the court had said on the subject, its holding would not foreclose a challenge to the validity of a search warrant by showing that the officer's affidavit was false, but would simply not permit a showing that the informer's tip was false. It would also indicate that the facts attributed to the informer may not be probed even for the purpose of testing the credibility of the officer. Such a holding would have sufficed to decide the case, but the court went on to imply that the scope of a defendant's challenge is limited to the face of the affidavit and the search warrant.<sup>69</sup>

Similarly enigmatic is the court of appeals' language in *State v. Logan*.<sup>70</sup> After holding that the variations between the affidavit and the testimony of the affiant-officer at the suppression hearing were insignificant, the court wrote a puzzling paragraph. The first sentence seems to grant a right to a factual challenge to the affidavit: "[i]f the defendant wishes to attack the motives and the credibility of the affiant or the

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If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness. If it appears . . . that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause the property to be restored to the person from whom it was taken.

*Id.* at 501. See also *Steele v. United States*, 267 U.S. 505, 511 (1925): "[T]he question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the court . . ." (emphasis added.) However, both *Steele* cases were based on a statute that explicitly provided for a factual hearing if the grounds for issuance of a warrant were controverted. Espionage Act of June 15, 1917, Title XI, ch. 30, 40 Stat. 217, 228.

<sup>67</sup>17 N.C. App. 269, 193 S.E.2d 755 (1973).

<sup>68</sup>*Id.* at 274, 199 S.E.2d at 758.

<sup>69</sup>The court said: "The affidavit was before the court and a *voir dire* hearing was not required in order for the court to find that the facts contained therein were sufficient to meet constitutional and statutory requirements." *Id.*

<sup>70</sup>18 N.C. App. 557, 197 S.E.2d 238 (1973).

magistrate, defendant should be given the opportunity to offer evidence for that purpose."<sup>71</sup> The next sentence is unclear:

However, if the affidavit is sufficient to establish probable cause, the defendant's objection does not impose the burden upon the State of going back through the testimony and the motions of the warrant issuing process for the purpose of allowing defendant an opportunity to pick out some insignificant and inconsequential inconsistency between the present testimony and the affidavit which was before the magistrate.<sup>72</sup>

That sentence might be understood either as withdrawing that right unless the defendant shows a substantial basis for a hearing or as merely repeating its holding that insignificant inconsistencies do not rebut the existence of probable cause. The next two sentences, on the other hand, seem to prohibit presenting any facts at the suppression hearing that were not before the magistrate:

Upon the motion to suppress, the inquiry is not whether probable cause to issue the search warrant exists at the time of the trial. The proper inquiry is whether there were sufficient facts before the magistrate at the time of issuing the search warrant to justify the magistrate's finding of probable cause, and whether the warrant complies with the statute.<sup>73</sup>

Dictum in *State v. McCoy*<sup>74</sup> also would deny a hearing: "The magistrate is entitled to rely upon the sworn statement of the affiant, a police officer, in concluding that the affiant was correctly reciting his own observations, and what had been told him by his informer."<sup>75</sup> Although

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<sup>71</sup>*Id.* at 558, 197 S.E.2d at 240.

<sup>72</sup>*Id.* at 558-59, 197 S.E.2d at 240.

<sup>73</sup>*Id.* at 559, 197 S.E.2d at 240.

<sup>74</sup>16 N.C. App. 349, 191 S.E.2d 897 (1972).

<sup>75</sup>*Id.* at 352, 191 S.E.2d at 899. See also *State v. Steele*, 18 N.C. App. 126, 196 S.E.2d 379 (1973). In that case, a police officer's affidavit for a search warrant authorizing the search of a home for narcotics was found to have contained erroneous information that the defendant had previously been convicted of a narcotics violation. The court held: "However, this error is immaterial because the trial court found that Officer Nesbitt's affidavit was nevertheless sufficient on its face to support a finding of probable cause for the issuance of the search warrant." *Id.* at 129, 196 S.E.2d at 381.

The apparent meaning of that holding is that if the error had been material to the establishing of probable cause, it would have vitiated the warrant, thus suggesting that a factual inquiry into the affidavit is proper. If the court did intend to authorize such a hearing, its decision raises another question: if the affidavit, expurgated of all false statements, still contains sufficient facts to meet the requirements of probable cause, should it be upheld on that basis? On the one hand, there is an argument that had the magistrate known that the statements were false, he might have withheld

some trial courts in this state have permitted challenges to the factual basis for the affidavit,<sup>76</sup> no appellate decision has yet held in favor of a right to such a factual hearing.

Thus North Carolina case law might be counted with a number of other state decisions<sup>77</sup> and some early unclear federal cases<sup>78</sup> that pre-

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a search warrant or at least demanded a further showing to satisfy himself that there was a legitimate basis for the search. On the other hand, there is an argument that if the question of probable cause can be contested in an adversary hearing, the judge presiding at that hearing should be able to make his own determination on all the facts: the test is "[w]hether there was sufficient evidence before the issuing magistrate to justify a finding of probable cause." *State v. McKoy*, 16 N.C. App. 349, 352, 191 S.E.2d 897, 899 (1972).

The decision is, however, open to a different interpretation. Because the court said the "affidavit was nevertheless sufficient on its face to support a finding of probable cause," *State v. Steele*, *supra* at 129, 196 S.E.2d at 381, the court may have meant that it was improper to go behind the face of the warrant at all. The term "nevertheless" suggests that the court was excluding the erroneous information from its calculation of probable cause. However, a reasonable interpretation is that the court found the erroneous information immaterial because the uncontested information was sufficient to establish probable cause.

<sup>76</sup>*State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973); *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966); *State v. Logan*, 18 N.C. App. 557, 197 S.E.2d 238 (1973); *State v. Steele*, 18 N.C. App. 126, 196 S.E.2d 379 (1973); *State v. Wrenn*, 12 N.C. App. 146, 182 S.E.2d 600 (1971), *cert. denied*, 405 U.S. 1064 (1972); *cf.* *State v. Rainey*, 236 N.C. 738, 74 S.E.2d 139 (1953). In *Miller* and *Upchurch*, the trial court received and the North Carolina Supreme Court considered testimony by the issuing magistrate about his failure to scrutinize the affidavit or search warrant. In *Logan* and *Steele*, the evidence showed that a police officer's affidavit contained erroneous information, but in each case the court held the error was immaterial. In *Wrenn*, the trial court did hold a *voir dire* inquiry into the factual basis for the search set out in the affidavit, and concluded that "[t]he evidence on *voir dire* only serves to strengthen the probable cause." 12 N.C. App. at 147-48, 182 S.E.2d at 601. In *Rainey*, the court apparently allowed evidence as to the circumstances of the administering of the oath to the officer applying for the search warrant. *Cf. State v. Peters*, 107 N.C. 876, 12 S.E. 74 (1890).

*See* discussion of *State v. Howell*, 18 N.C. App. 610, 197 S.E.2d 616 (1973), in note 146 *infra*.

<sup>77</sup>*United States v. Ketterman*, 276 A.2d 243 (D.C. App. 1971); *People v. Mitchell*, 45 Ill. 2d 148, 258 N.E.2d 345, *cert. denied*, 400 U.S. 882 (1970); *People v. Bak*, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970); *State v. Lamb*, 209 Kan. 453, 497 P.2d 275 (1972); *Tucker v. State*, 244 Md. 488, 224 A.2d 111 (1966), *cert. denied*, 386 U.S. 1024 (1967); *Smith v. State*, 191 Md. 329, 62 A.2d 287 (1948), *cert. denied*, 336 U.S. 925 (1949); *Dawson v. State*, 11 Md. App. 694, 276 A.2d 680 (1971); *State v. Petillo*, 61 N.J. 165, 293 A.2d 649 (1972); *Gaddis v. State*, 447 P.2d 42 (Okla. Crim. App. 1968); *Southard v. State*, 297 P.2d 585 (Okla. Crim. App. 1956); *Owens v. State*, 217 Tenn. 544, 399 S.W.2d 507 (1965) (dictum); *Poole v. State*, 467 S.W.2d 826 (Tenn. Crim. App. 1971); *Jackson v. State*, 365 S.W.2d 935 (Tex. Crim.), *cert. denied*, 375 U.S. 956 (1963).

<sup>78</sup>*Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946) (arrest warrant; the opinion does not indicate whether the defendant sought to challenge the affiant's truthfulness or that of his informers, if any); *Gracie v. United States*, 15 F.2d 644, 646 (1st Cir. 1926), *cert. denied*, 273 U.S. 748 (1927). (In dictum, the court said that the magistrate's determination of probable cause is conclusive, but left room for reversal if the magistrate's "judgment is arbitrarily exercised." The holding in the case was that unlawfully obtained information could not be used in an affidavit for a search warrant. To the extent that the court might have been saying in its dictum that the

clude any factual challenge to the probable cause that supported a search conducted pursuant to a warrant. Most of the modern federal decisions<sup>79</sup> and several recent state court opinions,<sup>80</sup> however, permit some inquiry into the facts behind the warrant. These decisions take a correct view of the nature of the suppression hearing. The seizure of evidence is subject to the fundamental notice and hearing requirements of due process because it is a taking of property as well as a critical stage of a criminal proceeding. The principal remedy that a defendant may hope for at the suppression hearing is that he regain some control over the property by excluding it from evidence in the criminal case against him.<sup>81</sup> In addition, if he is entitled to possession of the property, it will

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magistrate's determination is conclusive even if he finds probable cause on insufficient facts, the Supreme Court has clearly overruled that proposition. *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958); *United States v. Brunett*, 53 F.2d 219, 225 (W.D. Mo. 1931) (The court said the determination of the magistrate as to the facts was conclusive "unless arbitrary"); *United States v. Gianaris*, 25 F.R.D. 194, 194-95 (D.D.C. 1960) (The opinion did not indicate whether the defendant sought to attack the truth of the affiant's statement or that of his underlying information); *United States v. Doe*, 19 F.R.D. 1, 4 (E.D. Tenn. 1956) (The court said that the "[v]alidity of the warrant is to be determined as of the date of its issue" without stating whether the defendant attempted to raise questions of truthfulness). *But see* *United States v. Henderson*, 17 F.R.D. 1, 2 (D.D.C. 1954) (granting a motion to suppress on the ground that because of mistaken identity the affiant erroneously believed the defendant had a record, without considering whether the officer's mistaken belief was reasonable and could therefore still have been considered in determining probable cause).

<sup>79</sup>*United States v. Upshaw*, 448 F.2d 1218, 1221-22 & n.3 (5th Cir. 1971); *United States v. Dunning*, 425 F.2d 836, 840 (2d Cir. 1969) (dictum), *cert. denied*, 397 U.S. 1002 (1970); *United States ex rel. De Rosa v. La Vallee*, 406 F.2d 807, 808 (2d Cir. 1969) (dictum); *United States v. Roth*, 391 F.2d 507, 509 (7th Cir. 1967); *United States v. Bozza*, 365 F.2d 206, 222 (2d Cir. 1966) (dictum); *United States v. Freeman*, 358 F.2d 459, 463 n.4 (2d Cir. 1966) (dictum); *United States v. Bowling*, 351 F.2d 236, 241-42 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); *King v. United States*, 282 F.2d 398, 400 n.4 (4th Cir. 1960); *United States v. Pearce*, 275 F.2d 318, 321-22 (7th Cir. 1960); *United States v. Facarile*, 340 F. Supp. 1033, 1044 (D. Md. 1972), *aff'd sub nom.* *United States v. Giordano*, 469 F.2d 791 (4th Cir.), *cert. granted*, 411 U.S. 905 (1973) (No. 72-1057); *LeDent v. Wolff*, 334 F. Supp. 64, 71 (D. Neb. 1971) (dictum); *United States v. McDonnell*, 315 F. Supp. 152, 163 (D. Neb. 1970) (dictum); *United States v. Ortiz*, 311 F. Supp. 880, 884 (D. Colo. 1970) (dictum); *United States v. Gardner*, 308 F. Supp. 425, 427-28 (S.D.N.Y. 1969) (mem.) (dictum); *United States v. Halsey*, 257 F. Supp. 1002, 1005-06 (S.D.N.Y. 1966) (dictum); 3 C. WRIGHT, *FEDERAL PRACTICE & PROCEDURE* § 673 at 106-07 (1969). *See also* *United States v. Rael*, 467 F.2d 333, 336 (10th Cir. 1972); *Nez v. United States*, 365 F.2d 286, 287-88 (10th Cir. 1966).

<sup>80</sup>*Theodor v. Superior Court*, 8 Cal. 3d 77, 97-98, 501 P.2d 234, 248-49, 104 Cal. Rptr. 226, (1972); *Jones v. State*, 126 Ga. App. 841, —, 192 S.E.2d 171, 173 (1972); *State v. George*, — La. —, —, 273 So. 2d 34, 36 (1973) (dictum); *State v. Baca*, 84 N.M. 513, 515, 505 P.2d 856, 858 (1973) (dictum); *People v. Alfinito*, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

<sup>81</sup>Proposed § 15A-979(a).

be restored to him at the conclusion of the case.<sup>82</sup> Some illegally obtained evidence may not be returned to the defendant, such as contraband, property not belonging to him, and conversation captured by wiretapping. However, privacy is protected by the fourth amendment as well as the physical item seized.<sup>83</sup> While the defendant will not have the privacy that was taken from him redelivered if he prevails at the suppression hearing, an order prohibiting further use of the evidence will restore to him some privacy. In *Wisconsin v. Constantineau*,<sup>84</sup> the United States Supreme Court recognized that, like tangible property, the intangible interest in individual privacy may not be taken without the due process of notice and a hearing. Since a warrant issues and a seizure is undertaken as part of the criminal trial, the due process hearing should be available to the defendant in the same process.<sup>85</sup> It is the only hearing provided by law suitable for this purpose, and an independent action for damages is not an adequate substitute.<sup>86</sup>

Although ordinarily due process requires that the opportunity for an adversary hearing be provided before the taking of any property,<sup>87</sup> in some "emergency circumstances" the hearing may be postponed until promptly after the taking.<sup>88</sup> The fourth amendment specifically addresses the prerequisites for a search and seizure of property, and contains no requirement for a prior adversary hearing. Thus, for due process purposes as well, a valid search and seizure by law enforcement officers in pursuit of evidence of a crime should qualify as an "emergency circumstance" excusing a pre-taking adversary hearing.<sup>89</sup>

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<sup>82</sup>*Id.*

<sup>83</sup>*Katz v. United States*, 389 U.S. 347 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>84</sup>400 U.S. 433 (1971). In *Constantineau* the Court held unconstitutional a statute providing for the posting in retail liquor stores of notices forbidding the sale of liquor to certain persons determined to be problem drinkers. The Court held, "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 437.

<sup>85</sup>*Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

<sup>86</sup>*See Fuentes v. Shevin*, 407 U.S. 67, 77-78 (1972). *See also* note 24 *supra*, and accompanying text.

<sup>87</sup>*Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>88</sup>*Fuentes v. Shevin*, 407 U.S. 67, 90 (1972); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599-600 (1950); *Fahey v. Mallonee*, 332 U.S. 245, 253 (1947); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931).

<sup>89</sup>In *Fuentes v. Shevin*, the Court wrote:

The dispensation, however, is for a postponement of the hearing only, not relief from the hearing requirement altogether. In *Morrissey v. Brewer*<sup>90</sup> and *Gagnon v. Scarpelli*<sup>91</sup> the United States Supreme Court held that the arrest of an alleged parole or probation violator must be followed "as promptly as convenient"<sup>92</sup> with a preliminary hearing into the probable cause for holding the alleged violator. Since the arrest of a person, as well as the seizure of his property, is governed by the fourth amendment, it was reasonable for the Court to dispense with the requirement of an advance adversary hearing. Nevertheless, the Court held that due process requires a prompt hearing after arrest.<sup>93</sup>

Since all jurisdictions provide some kind of suppression hearing, the controversy in the cases focuses on the extent of the inquiry at the hearing. Due process, however, requires that all issues in dispute be subject to the hearing requirement. For example, in *Bell v. Burson*,<sup>94</sup> the Supreme Court reviewed the Georgia procedure under which a motorist involved in an accident was required to surrender his driver's license unless he (1) had adequate liability insurance to cover potential damages arising out of the accident, (2) posted similarly adequate security, or (3) presented a notarized release from liability and proof of future financial responsibility. The purpose of the law was to assure financial responsibility for automobile accident damages, but the penalty of loss of license resulted without regard to whether the motorist was at fault in the accident. The state provided a pre-forfeiture hearing on the question of financial responsibility but refused to entertain any questions of fault

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The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued.

407 U.S. 67, 93-94 n.30 (1972).

<sup>90</sup>408 U.S. 471 (1972).

<sup>91</sup>411 U.S. 778, 782 (1973).

<sup>92</sup>408 U.S. at 485; 411 U.S. at 782.

<sup>93</sup>See generally Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 Ky.

L. REV. \_\_\_\_\_ (1973).

<sup>94</sup>402 U.S. 535 (1971).

or liability. Although Georgia argued that fault and liability were irrelevant to its statutory scheme, the Court disagreed. "Since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing."<sup>95</sup> The hearing required must be "appropriate to the nature of the case,"<sup>96</sup> and therefore the Court held that "a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard."<sup>97</sup>

Similarly, in *Stanley v. Illinois*,<sup>98</sup> the Supreme Court held that the due process right to a hearing contemplates that all relevant issues be subject to litigation in the hearing. Relying on *Bell v. Burson*, *Stanley* held violative of this due process principle an Illinois law providing that the children of unwed fathers become wards of the State upon the death of the mother. Upon a hearing under the statute, the father might challenge the determination of illegitimacy but is not permitted to rebut the presumption of unfitness following from that determination. Although the state argued that fitness was irrelevant at the hearing, the Court concluded otherwise.

The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.<sup>99</sup>

These cases demonstrate that the scope of a hearing on a motion to suppress evidence seized under a warrant must include all issues relevant to the dispute. The issue, then, is simply what are the issues at such a hearing. Whatever policy arguments might be mustered to support a broad or a narrow hearing, due process must be accorded. If probable cause is an issue, the state may not foreclose inquiry into the factual or legal aspects of that issue by a presumption that the affiant is telling the truth, even if in most cases he is. The Supreme Court rejected a similar argument in *Stanley*:

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<sup>95</sup>*Id.* at 541.

<sup>96</sup>*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

<sup>97</sup>402 U.S. at 542.

<sup>98</sup>405 U.S. 645 (1972).

<sup>99</sup>*Id.* at 657-58.

Despite *Bell* . . . it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. . . . But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.<sup>100</sup>

The issue of whether there was probable cause for the warrant must therefore be subject to a hearing comporting with due process standards. But who has to have the probable cause—the issuing judicial officer, the affiant (police officer or private citizen), or the informer?<sup>101</sup> If the judicial officer is the one who has to have the probable cause, the hearing should go no further than into the good faith of his belief in the representations of the affidavit. If it is the affiant, his truthfulness is at issue. If it is the informer, the hearing must probe the truth of all the statements made to the magistrate for the purpose of securing a warrant.

The role of the judicial officer is merely to review the averments presented to him to determine whether he believes them and whether, if he does, they constitute probable cause. His function is passive; it depends upon his being disinterested in the ferreting out of evidence and therefore disassociated from the executive or law enforcement branch in its quest for probable cause.<sup>102</sup> Accordingly, he does not have probable cause—he passes on whether others do. Consequently, the probable cause issue in the suppression hearing must probe more deeply than merely into the honesty of the judicial officer's belief in the information presented to him.<sup>103</sup>

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<sup>100</sup>*Id.* at 656.

<sup>101</sup>Obviously the officer executing the warrant is not a candidate for shouldering the responsibility for probable cause. Often he knows little more about the case than that a warrant has been issued.

<sup>102</sup>*Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971); *Shadwick v. City of Tampa*, 407 U.S. 345 (1972); *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

<sup>103</sup>A recent article argued in favor of a right to challenge factual assertions in search warrant affidavits out of a concern that otherwise "a pliant and acquiescent official, and especially a friendly one, could issue warrants upon ridiculous applications, secure in the invulnerability of his determination . . . ." Forkosch, *The Constitutional Right to Challenge the Content of Affidavits Issued Under the Fourth Amendment*, 34 OHIO ST. L.J. 297, 308 (1973). Of course, to the extent that the ridiculousness of the application appears on its face and does not depend upon refutation of facts, a determination of probable cause would not be invulnerable. *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108



Ordinarily, it would seem that probable cause must be possessed by the government officers involved in the search or prosecution and not a private citizen. This assumption is challenged when a private citizen—perhaps even a police informer—makes the only affidavit presented to the judicial officer and does so on the basis of his own observations. If the magistrate is not the officer responsible for probable cause, that honor must devolve upon the citizen-affiant for default of any other candidate. Clearly in that situation the issue is the honesty of the affiant's report.

Typically, however, the issue arises with an affidavit based upon hearsay, and most commonly when the affiant is a police officer swearing to an informer's tip. The standard for issuance of a warrant is not certainty of guilt but probable cause.<sup>104</sup> That standard accommodates hearsay<sup>105</sup> and tolerates errors. By definition, official reliance in good faith on misinformation may constitute probable cause. As a result, probable cause cannot be defeated by proof that the information supplied to the officer-affiant and believed by him is false. Thus the truth of the informer's tip is simply not an issue. The only issue besides the sufficiency of the information on its face is the good faith of the officer with regard to the tip, or with regard to any personal observations included by the officer in the affidavit.<sup>106</sup> In order to test the officer's

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(1964): *Giordenello v. United States*, 357 U.S. 480 (1958). The author found "the probability of a logical and historical right of inquiry into the truthfulness and sufficiency of the papers upon which a warrant is issued, so as then possibly to denounce whatever occurs thereafter." Forkosch, *supra* at 329.

<sup>104</sup>In determining what is probable cause, we are not called upon to determine whether the offense charged has been committed. We are concerned only with the question whether *the affiant* had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched.

*Dumbra v. United States*, 268 U.S. 435, 441 (1925) (emphasis added). See also *United States v. Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972); Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405, 414-15; Kipperman, *Inaccurate Search Warrant Affidavits As a Ground For Suppressing Evidence*, 84 HARV. L. REV. 825, 827-28 (1971); Mascolo, *Impeaching the Credibility of Affidavits in Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9, 12-13 (1970).

<sup>105</sup>*United States v. Harris*, 403 U.S. 573 (1971); *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257, 269, 271 (1960); *State v. Spillars*, 280 N.C. 341, 349-50, 185 S.E.2d 881, 889-90 (1972); *State v. Bullard*, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966), *cert. denied*, 386 U.S. 917 (1967); *State v. Flowers*, 12 N.C. App. 487, 492, 183 S.E.2d 820, 824 (1971).

<sup>106</sup>See *Theodor v. Superior Court*, 8 Cal. 3d 77, 97, 104 Cal. Rptr. 226, —, 501 P.2d 234, 248-49 (1972):

[W]e conclude that only when the affiant has acted unreasonably in making factual

good faith, the defendant at a suppression hearing should be allowed to inquire into the identity of the informer<sup>107</sup> and the nature and circumstances of the tip just as he might probe any first hand observations reported in the affidavit. The purpose of such examination is not to attempt to expose the falsity of the tip because that is not in issue. The purpose is simply to attempt to expose that the officer did not in fact receive the described tip or that if he did receive it he did not reasonably believe it.<sup>108</sup> That is the scope of the probable cause issue, and under due process it must therefore also be the scope of the hearing into probable cause.

The argument is advanced, however, that a hearing on that issue was provided in advance of the search or seizure by the magistrate who issued the warrant and that promotion of the solemn judicial authority

mistakes must those errors be excised from the affidavit before testing the existence of probable cause. While undeniably misstatements impede the function of the magistrate, once it has been determined that the affiant has acted reasonably under the circumstances, little more can be required of him.

<sup>107</sup>The Commission would not require disclosure of the identity of an informer whose tip was used in applying for a search warrant (unless required by the Constitution):

In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

- (1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or
- (2) There is substantial corroboration of the informant's existence and reliability independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling decisions.

Proposed § 15A-978(b).

<sup>108</sup>The possibility of false assertions in search warrant affidavits signed by police officers is a sufficiently serious one that it cannot be ignored in formulating constitutionally adequate procedures for enforcing the fourth amendment. "The use of the exclusionary rule . . . creates the occasion and incentive for large scale lying by law enforcement officers." *Schneckloth v. Bustamonte*, 412 U.S. 218, 268 n.26 (1973) (Powell, J., with Burger, C.J., and Rehnquist, J. concurring), quoting Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 756-77 (1970); *United States v. Freeman*, 358 F.2d 459, 463 n.4 (2d Cir. 1966); Grano, *supra* note 104, at 408, 409, 411, 423; Kipperman, *supra* note 104, at 831; Note, *The Outwardly Sufficient Search Warrant: What If It's False?*, U.C.L.A.L. REV. 96, 111 (1971); Note, 67 COLUM. L. REV. 1529, 1531 (1967); cf. *McCray v. Illinois*, 386 U.S. 300, 313 (1967) ("Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury."); *State v. Petillo*, 61 N.J. 165, 173, 175-76, 293 A.2d 649, 653-55 (1972). It has been suggested that due process, as well as the fourth amendment's exclusionary rule, might protect against police perjury before a magistrate. Grano, *supra* note 104, at 423; see *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).

of the magistrate requires that binding effect be given to his determination.<sup>109</sup> Aside from the reply that the decisions of all judges in courts of first instance are subject to appellate review, and that that review has a similar effect on the authority and morale of the judge, the ready answer is that the *ex parte* character of the hearing before the magistrate does not satisfy due process. There is no notice to the person whose property is taken, and no opportunity for that person to be heard—either by presenting his own witnesses or by confronting those against him.<sup>110</sup> Although the formalities required of a hearing may vary with the circumstances,<sup>111</sup> these constitutionally established minima are not even approached in the *ex parte* hearing before a magistrate.<sup>112</sup>

Moreover, it is already clear that one critical aspect of the magistrate's determination is subject to review: his decision that on its face the affidavit established probable cause.<sup>113</sup> Even though a judicial mind has already passed on the quality of the evidence adduced in this respect, it is subject to review on the same record as was before the magistrate. Reversal of his judgment on this basis will likely have a greater impact on his morale than review on the basis of a claim that he was deceived or misled, and yet such review has been held necessary to effectuate the exclusionary rule in warrant cases. In fact, magistrates often do not scrutinize warrant applications.<sup>114</sup> In North Carolina, evidence has accu-

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<sup>109</sup>See *State v. Petillo*, 61 N.J. 165, 176, 293 A.2d 649, 655 (1972); Kipperman, *supra* note 104, at 830.

<sup>110</sup>In *Gagnon v. Scarpelli*, the Supreme Court last term listed the rudiments of a due process hearing in the context of probation or parole revocation: "At the preliminary hearing, a probationer or parolee is entitled to . . . an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." 411 U.S. 778, 786 (1973). See also *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

<sup>111</sup>*Board of Regents v. Roth*, 408 U.S. 564, 570 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970).

<sup>112</sup>"Able and conscientious as . . . magistrates may be . . . they cannot overcome the disadvantage, in terms of truth seeking, that they are obligated to decide on an *ex parte* showing." MODEL CODE, Commentary 226.

<sup>113</sup>*United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958).

<sup>114</sup>W. LA FAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); L. TIFFANY, D. McINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 119-20 (1967); La Fave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 993 nn.37-38 (1965); Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1, 4-7; Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 483 (1969).

mulated in the appellate courts that magistrates may issue warrants in a *pro forma* manner, "serving merely as a rubber stamp for the police."<sup>115</sup>

The validity of a search warrant depends upon the facts presented to the issuing magistrate. If those facts are insufficient on their face to establish probable cause, the warrant may not be augmented by a showing at the suppression hearing of other facts—whether known to the officers at the time when they sought the warrant or discovered in the course of the search or later.<sup>116</sup> It would be inconsistent with the warrant policy, which operates by requiring advance judicial approval of official invasions of privacy, to permit justification of the warrant on the basis of post-warrant disclosures or discoveries. The prosecution's inability to rely on facts other than those called to the attention of the magistrate should not similarly restrict the defendant who is in a different position: he had no chance to present *any* facts to the magistrate. Some courts have expressed the proposition that permitting the use of new evidence to discredit the assertions of the affidavit is an exception to the rule that review of a warrant is limited to the facts known to the magistrate.<sup>117</sup> Perhaps it would be more explanatory to say that the rule is that the prosecution is bound by the facts it presented to the magistrate while the defense, which was not invited to participate in that hearing, is for that reason not restricted by what the prosecution in its discretion chose to reveal to the magistrate.<sup>118</sup>

On the other hand, a policy argument is made that the inquiry is not broad enough unless it encompasses a hearing on the truthfulness of any underlying information including the information contained in informers' tips. This argument has its quarrel with the rule permitting hearsay accompanied by indicia of reliability to qualify as probable cause, a rule responsibly ensconced in the law of search and seizure,<sup>119</sup> not with the scope of review of the factual basis for a warrant. There

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<sup>115</sup>State v. Miller, 282 N.C. 633, 639, 194 S.E.2d 353, 358 (1973); State v. Upchurch, 267 N.C. 417, 418-19, 148 S.E.2d 259, 260-61 (1966).

<sup>116</sup>Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention."). See also Ker v. California, 374 U.S. 23, 40 n.12 (1963); Giordenello v. United States, 357 U.S. 480, 486 (1958).

<sup>117</sup>United States ex rel. DeRosa v. LaValle, 406 F.2d 807, 808 (2d Cir. 1969); United States v. McDonnell, 315 F. Supp. 152, 163 (D. Neb. 1970). *Contra*, United States v. Gianaris, 25 F.R.D. 194, 195 (D.D.C. 1960); United States v. Brunett, 53 F.2d 219, 225 (W.D. Mo. 1931).

<sup>118</sup>United States v. Roth, 391 F.2d 507, 509 (7th Cir. 1967).

<sup>119</sup>See cases cited note 105 *supra*.

would be no sense in receiving hearsay information as sufficient for the issuance of a warrant, subject, however, to later proof that though reasonably deemed reliable the hearsay was false. Such a procedure would undermine the concept of probable cause and in the process jeopardize reasonable police investigative activity by testing it unnecessarily on the basis of after-acquired information rather than the best information available to the police at the time of acting.

Consistent with this reasoning, the Commission has recommended the following legislation:

A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.<sup>120</sup>

This language clearly includes a right to inquire behind the warrant into the truthfulness of the affidavit. When a police officer makes the affidavit based on information supplied to him by an informer, according to the Commission's proposal, only the truthfulness of the officer-affiant's statements could be challenged; the truthfulness of the informer's report to the officer would not be in issue, but the honesty of the officer's belief in the report would be.<sup>121</sup> The Commission's proposal is broad enough to permit inquiry into the truthfulness of the informer's tip in order to probe the good faith of the officer's reliance on it. The language providing that the defendant may contest the truthfulness of the officer's testimony "by cross-examination or by offering evidence" contains no qualification as to who may be cross-examined or what evidence may be offered. Since no limitation is expressed, the provision should be interpreted to permit a defendant an opportunity to prove the falsity of the tip as a predicate of his challenge to the truthfulness of the officer's affidavit.

A number of courts have approved the procedure first suggested in *United States v. Halsey*<sup>122</sup> that "[u]ntil or unless the defendant has at least made some initial showing of some potential infirmities he proposes to demonstrate, the magistrate's acceptance of the affidavit as

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<sup>120</sup>Proposed § 15A-978(a).

<sup>121</sup>See COMMENTS 240.

<sup>122</sup>257 F. Supp. 1002 (S.D.N.Y. 1966).

truthful should be enough."<sup>123</sup> Any such prerequisite to a hearing need not be prohibitively burdensome. "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."<sup>124</sup> Thus, *Halsey* proposed that the required initial showing be minimal—"some suggestion of a basis or area of doubt."<sup>125</sup> *Halsey* was concerned only that "such a *de novo* trial of the issuing magistrate's determination . . . [not become] a routine step in every case",<sup>126</sup> and thus interfere with the necessity "that criminal charges be reached on their merits and resolved with a decent measure of expedition."<sup>127</sup>

However, the delays resulting from factual hearings into the probable cause for a search warrant should be negligible.<sup>128</sup> The Commission has provided efficient procedures for conducting such hearings. Moreover, a defendant in a case involving evidence obtained in a warrantless search has a right to a full factual hearing into probable cause.<sup>129</sup>

Nevertheless, the Commission has attempted to strike a balance with the *Halsey* suggestion by requiring that a motion to suppress "must be accompanied by an affidavit containing facts supporting the motion. The affidavit may be based upon personal knowledge, or upon information and belief, if the source of the information and the basis for the belief are stated."<sup>130</sup> As a method of asking a defendant to assert his good faith in making the motion, this requirement does not seem unrea-

<sup>123</sup>*Id.* at 1005.

<sup>124</sup>*Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). *See also Nardone v. United States*, 308 U.S. 338, 342 (1939):

[M]ischief would result were tenuous claims sufficient to justify the trial court's inquiry into the legitimacy of evidence in the Government's possession. . . . Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. *United States v. Cranson*, 453 F.2d 123, 126-27 (4th Cir. 1971).

<sup>125</sup>257 F. Supp. at 1006.

<sup>126</sup>*Id.* at 1005.

<sup>127</sup>*Id.*

<sup>128</sup>*See Grano, supra* note 104, at 415-17. Because current North Carolina law requires that the affidavit supporting a search warrant need not contain all of the information presented to the magistrate by the affiants, our courts are now required to hold evidentiary hearings to receive testimony about what the magistrate was told before he issued the warrant, for the purpose of *upholding* the warrant. *State v. Spillars*, 280 N.C. 341, 349, 185 S.E.2d 881, 886 (1972); *State v. Howell*, 18 N.C. App. 610, 611, 197 S.E.2d 616, 618 (1973); *State v. Logan*, 18 N.C. App. 557, 558, 197 S.E.2d 238, 239 (1973).

<sup>129</sup>*See, e.g., McCray v. Illinois*, 386 U.S. 300 (1967); Proposed § 15A-978(c).

<sup>130</sup>Proposed § 15A-977(a). *Compare MODEL CODE* § SS 290.3(1)(b), requiring an affidavit "setting forth substantial basis for questioning the good faith of the testimony, and such party shall have the burden of proving the lack of good faith."

sonable. It looms as an insuperable obstacle in many cases, however, in view of the proposal to permit the judge summarily to deny the motion on the basis of the affidavit.<sup>131</sup> Often, the defendant will not be in a position to know the facts himself. Without an opportunity to cross-examine the affiant at a deposition or other pre-trial discovery procedure, denial of a hearing may deny him access to the evidence with which to mount his challenge. Thus the use of the pre-trial motion procedure that is employed in civil litigation can succeed only if the civil deposition opportunities are also included. Since they are not,<sup>132</sup> summarily resolving an issue of constitutional significance against a defendant without enabling him to gather whatever useful evidence might exist is to render illusory in many cases any right to a hearing on this issue.

#### B. SEARCH WARRANT APPLICATIONS—RADIO WARRANTS

The Commission has proposed a procedure that makes it easier for police officers to obtain search warrants by telephone or radio. The proposal reads as follows:

In lieu of the written affidavit . . . the issuing official may take an oral statement under oath. The oral statement may be transmitted to the issuing official by radio, telephone, or other electronic communications device. The oral statement must be recorded and transcribed and the transcribed statement is an affidavit for the purposes of this Article. The recording of the sworn oral statement and the transcribed statement must be certified by the official receiving it and must be filed with the clerk of the court.

. . . .

The issuing official may orally authorize a law enforcement officer by radio, telephone, or other electronic communications device to sign the issuing official's name and title on a duplicate original warrant. The authorization must be recorded and transcribed, certified by the issuing official making it, and filed along with the recorded and transcribed application with the clerk. A duplicate original warrant is a search warrant for the purposes of this Chapter, and it must be returned to the clerk . . . . The clerk must file both the original warrant and the duplicated original warrant.<sup>133</sup>

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<sup>131</sup>Proposed § 15A-977(b).

<sup>132</sup>See *id.* §§ 15A-611 to -614, -901 to -910.

<sup>133</sup>*Id.* §§ 15A-244(b), -245(c).

The proposal was evidently based on similar California legislation adopted in 1970,<sup>134</sup> although the California statute refers only to "an oral statement" and does not specify that it may come over a radio or the telephone. The North Carolina Police Executives Association submitted a similar proposal to the 1973 legislature.<sup>135</sup>

The purpose of the proposal is to expedite the warrant process when time is critical in effecting a search. According to the North Carolina Police Executives Association, that is particularly true

where narcotics are concerned . . . . There simply isn't time to go through a formalized process of securing a search warrant when, literally, seconds and minutes mean the difference between effective law enforcement and frustration. The time it takes to leave the scene of illegal drug transactions or the source of narcotics information, go before a warrant-issuing officer, secure a search warrant and return to the scene to execute the warrant more often than not defeats the purpose of the warrant. Drugs and other contraband move about so fast that delay almost insures the success of those who move them.<sup>136</sup>

The suggested procedure for overcoming these delays enhances the requirement of prior judicial determination of probable cause and is consistent with the requirements of the fourth amendment. Under current law, a search warrant may be issued on the basis of hearsay if the magistrate is informed of the underlying circumstances establishing both the credibility of the hearsay declarant and a substantial basis for crediting the source.<sup>137</sup> "The police officer making the affidavit may do

<sup>134</sup>CAL. PENAL CODE §§ 1526(b), 1528(b) (West Supp. 1973).

<sup>135</sup>LEGISLATIVE PROGRAM OF THE NORTH CAROLINA POLICE EXECUTIVE'S ASSOCIATION 17 (1972). The text of the proposal, prepared by the North Carolina Association of Law Enforcement Legal Advisors, reads as follows:

An official authorized . . . to issue warrants may issue a search warrant based upon statements amounting to probable cause for a search warrant made to him under oath by a law enforcement officer which are transmitted to him directly by telephone or radio communication. Such telephone or radio communication shall be recorded or transcribed, and the recording or transcription shall be preserved and certified by the official receiving it. The official authorized to issue the search warrant shall authorize the law enforcement officer providing the information supporting probable cause for the search warrant to fill in the required warrant information and sign the name of such official to the search warrant, which warrant shall be valid for all purposes for which it was issued.

<sup>136</sup>*Id.* at 6.

<sup>137</sup>*United States v. Harris*, 403 U.S. 573 (1971); *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *Rugendorf v. United States*, 376 U.S. 528, 533 (1964); *Jones v. United States*, 362 U.S. 257, 269, 271 (1960); *State v. Spillars*, 280 N.C. 341, 349-50, 185 S.E.2d 881, 886-87 (1972); *State v. Bullard*, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966), *cert. denied*, 386 U.S. 917 (1967); *State v. Flowers*, 12 N.C. App. 487, 492, 183 S.E.2d 820, 823 (1971).



so in reliance upon information reported to him by other officers in the performance of their duties."<sup>138</sup> Thus, a police officer in the field could radio or telephone information constituting probable cause for a search to a desk officer. He could then prepare an affidavit reciting that information and identifying the field officer as his source, even though he has no personal knowledge of the facts. A valid warrant could then issue and be delivered to the field officer for execution. Since there is no requirement that the officer making the affidavit conduct the search,<sup>139</sup> this procedure could save time because the field officer would not have to leave the scene of the proposed search. In *State v. Banks*<sup>140</sup> the North Carolina Supreme Court upheld such a procedure under a statute authorizing searches for illegal liquor.<sup>141</sup> In that case, a police officer observed the defendants in their motor vehicle after seeing them carry large packages to it from a county liquor store. When the defendants refused to tell the officer what was in the packages and also refused to consent to a search, the officer radioed police headquarters. He told another officer what he had observed and asked him to get a search warrant for the car. The second officer did so on the basis of his own affidavit, and officers took the search warrant to the first officer.

The present procedure still has cumbersome aspects. The Commission's proposal would therefore modify existing law by (1) permitting the field officer to report to the magistrate in a recorded oral affidavit, and (2) permitting a magistrate who issues a warrant also to authorize the officer to sign as his agent a duplicate warrant.

The fourth amendment requires warrants to be "supported by oath or affirmation."<sup>142</sup> It does not require an affidavit or other writing.<sup>143</sup>

<sup>138</sup>*State v. Vestal*, 278 N.C. 561 576, 180 S.E.2d 755, 765 (1971); *accord*, *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."); *Rugendorf v. United States*, 376 U.S. 528, 529-31 (1964) (upholding a warrant issued on the basis of an affidavit by one FBI Agent reciting information from reliable informers that other FBI Agents had supplied to him); *United States v. Morin*, 250 F. Supp. 507, 509 (D. Conn. 1966). *See also* *Warden v. Hayden*, 387 U.S. 294, 297-98 (1967) (police officers could rely on information supplied by dispatcher and two drivers of a taxicab company who complained that the company has just been the victim of an armed robbery); *Jaben v. United States*, 381 U.S. 214, 225 (1965) (upholding a warrant based on the affidavit of an IRS agent reporting his examination of income tax returns, business records, and interviews).

<sup>139</sup>*State v. Tessnear*, 265 N.C. 319, 322, 144 S.E.2d 43, 46 (1965); *State v. Shermer*, 216 N.C. 719, 721, 6 S.E.2d 529, 530 (1940); Proposed § 15A-247.

<sup>140</sup>250 N.C. 728, 110 S.E.2d 322 (1959) (*per curiam*).

<sup>141</sup>Ch. 1235, § 3 [1957] N.C. Sess. Laws 1174-75 (repealed 1971); *see* *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 527 (1952).

<sup>142</sup>U.S. CONST. amend. IV.

<sup>143</sup>*State v. Milton*, 7 N.C. App. 425, 427-28, 430, 173 S.E.2d 60, 61-62, 63 (1970).

"The procedure for the establishment of probable cause is not provided by the Constitution, and the United State Supreme Court has not mandated that any particular procedure is constitutionally required."<sup>144</sup> Indeed, present North Carolina law requires only that an affidavit "indicating"—and not necessarily establishing—"the basis for the finding of probable cause must be a part of or attached to the warrant."<sup>145</sup> Thus, the affidavit need not contain all of the information relied on by the magistrate, and there is no current requirement for preserving, by recording, transcription or otherwise, any additional information presented to him.<sup>146</sup>

The Commission's proposal would improve this situation by requiring that for all search warrants the issuing official may consider information only if it is contained in an affidavit or "recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official."<sup>147</sup> This accomplishes what the North Carolina Court of Appeals has recognized as the "better practice"<sup>148</sup> of making a record of the facts necessary to support probable cause for a warrant. This provision protects the integrity of judicial review of the validity of warrants at a suppression hearing.

To obviate the delay in delivery of the warrant to the field officer

<sup>144</sup>*Id.* at 428, 173 S.E.2d at 62.

<sup>145</sup>N.C. GEN. STAT. § 15-26(b) (Supp. 1971).

<sup>146</sup>*State v. Spillars*, 280 N.C. 341, 349, 185 S.E.2d 881, 887 (1972). In *State v. Howell*, 18 N.C. App. 610, 197 S.E.2d 616 (1973), the affiant, who was a law enforcement officer, and the issuing magistrate gave testimony at the suppression hearing that the officer had told the magistrate under oath certain information beyond what was contained in the affidavit. The court found the additional information essential to the validity of the warrant because the affidavit did not "contain a statement of the underlying circumstances from which the affiant concluded that the undisclosed information is reliable . . ." The court upheld the warrant on the basis of that information even though part of it contradicted the affidavit in a material respect.

The affidavit said: "On Thursday morning, August 3, 1972, affiant received information from a confidential source that that affiant has been found [sic] to be accurate and reliable in the past." At the suppression hearing, however, the officer testified "that while the informant had not given in the past any information leading to the arrest of any persons, he had given the agent names of people in the drug business, with which names the agent was familiar." That testimony is inconsistent with the statement in the affidavit that the informer had been found to be reliable in the past; in fact, his reliability was untested. Concerned in its opinion only with showing that it could consider that testimony even though not presented in written form to the magistrate, the court did not even consider that the testimony was not helpful but instead demonstrated a deficiency of probable cause.

<sup>147</sup>Proposed §§ 15A-244(a), -245(a), -297(b).

<sup>148</sup>*State v. Flowers*, 12 N.C. App. 487, 493, 183 S.E.2d 820, 824 (1971); *State v. Milton*, 7 N.C. App. 425, 431-32, 173 S.E.2d 60, 63-64 (1970) (Graham, J., concurring). See also *Sherrick v. Eymann*, 389 F.2d 648, 654-55 (9th Cir. 1968) (Ely, J., dissenting).

for execution, the Commission's proposal authorizes the issuing official to instruct the officer to sign his name on a duplicate warrant. In the ensuing search, the officer will be able to serve the duplicate warrant but not the original warrant signed personally by the issuing official or the recorded statement of probable cause. These deficiencies should not impair the validity of the search. The fourth amendment does not require that a copy of the warrant invariably be served at the time of the search.<sup>149</sup> Yet the proposal does require that:

Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant *and warrant application* to the person to be searched, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent or responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant *and warrant application* affixed to the premises or vehicle.<sup>150</sup>

Compliance with the requirement as far as the warrant itself is concerned may be accomplished by service of the duplicate warrant, which "is a search warrant for the purposes of this Chapter."<sup>151</sup> The proposal for radio and telephone warrants does not, however, provide any method for serving a warrant application with the warrant. Perhaps a copy of the transcription of the sworn oral statement upon which the radio or telephone warrant was based should be served as soon as possible after the search. Also a notice to that effect should be placed in the duplicate warrant. This procedure would probably satisfy the need for communicating this information to the subject of the search. In any event, under the proposals by the Commission concerning the exclusionary rule, the rule will be invoked only if a violation of this provision were "substantial".

Any relaxation of the requirement that the radio application be served with the warrant would give rise to a potential danger in the new procedure. Protection against officers applying for a search warrant only after conducting the search is rendered more difficult. As the Commission observed, "one of the central functions of the warrant process

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<sup>149</sup>Katz v. United States, 389 U.S. 347, 355 n.16 (1967); United States v. Leftwich, 461 F.2d 586, 592 (3d Cir. 1972) (arrest warrant); United States v. Woodring, 444 F.2d 749, 751 (9th Cir. 1971); Sherrick v. Eyman, 389 F.2d 648, 652 (9th Cir. 1968); United States v. Averell, 296 F. Supp. 1004, 1014 (E.D.N.Y. 1969); United States v. Gross, 137 F. Supp. 244, 248 (S.D.N.Y. 1956); State v. McDougald, 18 N.C. App. 407, 408-09, 197 S.E.2d 11, 12 (1973).

<sup>150</sup>Proposed § 15A-252 (emphasis added).

<sup>151</sup>*Id.* § 15A-245(c).

[is] the maintaining of a factual record of the basis for the search recorded *before* the search occurs.”<sup>152</sup> Perhaps a requirement that the issuing official note the time of issuance of the warrant on the original<sup>153</sup> and the officer do the same on the duplicate warrant before serving it might have a discouraging effect on submitting after-the-search applications for warrants. Nevertheless, if the affidavit or its equivalent cannot be presented before the search, there is no real assurance that the warrant was not applied for after the search has yielded incriminating evidence and also specific information subsequently included in the warrant application.<sup>154</sup>

Another potential risk in the radio or telephone warrant is that the issuing official may act in haste because of the insistence upon speed in a radio or telephone application. The tendency of the magistrates to rubber stamp warrant applications without subjecting them to independent judicial scrutiny<sup>155</sup> might be more difficult to resist when time pressures are urged by the field officer. On the other hand, a conscientious magistrate might be better equipped to examine the facts when communicating directly with the field officer rather than when receiving the hearsay affidavit of his desk officer. An informer might also be able to testify directly to the magistrate under circumstances affording an assurance of anonymity.

Resort to the warrant procedure<sup>156</sup> would be increased by the adoption of the proposal. The use of warrants might be more appealing to law enforcement officers if warrants did not necessarily involve frustrating delays. Indeed, rapid availability of a warrant could mean that some search situations now considered sufficiently exigent to justify dispensing with a warrant—such as some searches of mobile vehicles<sup>157</sup>—might no longer carry their emergency character.<sup>158</sup> As a result, the reason for excusing the failure to obtain a search warrant in those situations would no longer exist.

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<sup>152</sup>COMMENTS 196.

<sup>153</sup>See N.C. GEN. STAT. § 15-26(c) (Supp. 1971).

<sup>154</sup>See *Adams v. Williams*, 407 U.S. 143, 152 (1972) (Brennan, J., dissenting).

<sup>155</sup>See notes 114, 115 *supra*.

<sup>156</sup>*Coolidge v. New Hampshire*, 403 U.S. 443, 453-73 (1971).

<sup>157</sup>See *Cady v. Dombrowski*, 93 S. Ct. 2523 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-64 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>158</sup>See *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *United States v. Davis*, 461 F.2d 1026, 1030-31 (3d Cir. 1972); *State v. Banks*, 250 N.C. 728, 110 S.E.2d 322 (1959).

## C. CONSENT SEARCHES

“[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”<sup>159</sup> If two persons are in joint possession of or jointly using property either may consent to a search of that property,<sup>160</sup> but not even a husband or wife may consent to a search of the other’s separate property,<sup>161</sup> nor may the owner of property consent to its search if possession and control of it have been yielded to another such as by a lease.<sup>162</sup> A common example of permissible third-party consent is the search of an automobile with the consent of the driver that yields evidence used against a non-consenting passenger.<sup>163</sup>

In order to authorize a search, the consent must be given voluntarily.<sup>164</sup> It may “not be coerced, by explicit or implicit means, by implied threat or covert force.”<sup>165</sup> For example, consent obtained upon representation by the searching officers that they had a warrant constitutes only “acquiescence to a claim of lawful authority,” not valid consent.<sup>166</sup> The

<sup>159</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); Proposed § 15A-221(a).

<sup>160</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 246 & n.34 (1973); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (“Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.”); *State v. Ray*, 274 N.C. 556, 570-72, 164 S.E.2d 457, 467 (1968) (“The apparent owner of the property who has equal rights to the use of the premises and has equal access to the premises may legally authorize a search of those premises.”); *State v. Fowler*, 172 N.C. 905, 911-12, 90 S.E. 408, 410 (1916); Proposed § 15A-222(a)(3) (“by a person who by ownership or otherwise is apparently entitled to give or withhold consent to a search of premises.”); cf. *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Amos v. United States*, 255 U.S. 313 (1921).

<sup>161</sup>*State v. Hall*, 264 N.C. 559, 562-63, 142 S.E.2d 177, 179-80 (1965). On the other hand, if a husband or wife retrieves property belonging to the other and delivers it to law enforcement officers, no search is involved as long as the husband or wife did not act as an agent for the police. *Coolidge v. New Hampshire* 403 U.S. 443, 486-89 (1971); *State v. Reams*, 277 N.C. 391, 396-401, 178 S.E.2d 65, 68-71 (1970), *cert. denied*, 404 U.S. 840 (1971); *State v. Mizelle*, 15 N.C. App. 583, 584, 190 S.E.2d 277, 278 (1972). See also *State v. Ray*, 274 N.C. 556, 569-73, 164 S.E.2d 457, 465-66, 468 (1968).

<sup>162</sup>*Stoner v. California*, 376 U.S. 483, 487-89 (1964); *Chapman v. United States*, 365 U.S. 610, 616-18 (1961); *State v. Mills*, 246 N.C. 237, 242-43, 98 S.E.2d 329, 333-35 (1957).

<sup>163</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Grant*, 279 N.C. 337, 340, 182 S.E.2d 400, 402 (1971); *State v. Raynes*, 272 N.C. 488, 490-91, 158 S.E.2d 351, 353 (1968); *State v. Bishop*, 272 N.C. 283, 297-98, 158 S.E.2d 511, 521 (1968); *State v. Craddock*, 272 N.C. 160, 168-69, 158 S.E.2d 25, 31-32 (1967); *State v. Belk*, 268 N.C. 320, 322-24, 150 S.E.2d 481, 483-84 (1966); *State v. Dawson*, 262 N.C. 607, 608, 138 S.E.2d 234, 235 (1964).

<sup>164</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *State v. Vestal*, 278 N.C. 561, 578-79, 180 S.E.2d 755, 767 (1971); *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967); Proposed § 15A-221(b).

<sup>165</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *State v. Vestal*, 278 N.C. 561, 578-79, 180 S.E.2d 755, 767 (1971); *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967).

<sup>166</sup>*Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

voluntariness standard for consent searches is of critical importance for the preservation of the privacy values embodied in the fourth amendment. On the one hand, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."<sup>167</sup> Yet tolerance of the coercive elements that produce unwilling consents may dissipate the protections of the fourth amendment. That tolerance would provide as a ready alternative to the cumbersome process of applying to a magistrate for a warrant, the handy process of applying to a citizen some pressure to induce him to consent to an invasion of his privacy. "For no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."<sup>168</sup>

Last term, in *Schneckloth v. Bustamonte*,<sup>169</sup> the United States Supreme Court expounded on the voluntariness standard for consent searches. Borrowing from the coerced confession cases,<sup>170</sup> the Court held that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."<sup>171</sup> The Court held that the voluntariness standard did not require as a constitutional matter that the state prove that the person giving the consent was aware that he had a right to refuse to do so.<sup>172</sup> But it did specify that one factor to consider in the overall assessment of voluntariness is whether the searching officers advised the person whose consent was sought of his constitutional right to withhold it.<sup>173</sup>

The North Carolina Supreme Court has also ruled that a police officer need not advise a person of his constitutional rights before obtaining his consent to a search.<sup>174</sup> The Commission has recommended, however, that the statute require that a law enforcement officer first "inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken

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<sup>167</sup>*Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971). See also *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973).

<sup>168</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 223-27.

<sup>171</sup>*Id.* at 227.

<sup>172</sup>*Id.* at 231, 245.

<sup>173</sup>*Id.* at 227, 229-30, 249.

<sup>174</sup>*State v. Vestal*, 278 N.C. 561, 576, 180 S.E.2d 755, 767 (1971); *State v. Virgil*, 276 N.C. 217, 228, 172 S.E.2d 28, 35 (1970).

or used in evidence."<sup>175</sup> That recommendation was submitted before *Schneckloth* was decided but with an awareness of the decisions of the North Carolina Supreme Court on the question.

The evaluation of the voluntariness of a consent, made in the deliberative calm of a later judicial proceeding, will consider a variety of factors<sup>176</sup> including the characteristics of the person whose consent is sought—such as his age, his intelligence, his familiarity with police investigation, his use of alcohol or drugs—and the circumstances surrounding the consent—including whether the citizen was in custody, how long he was questioned, what he was told about the authority of the officers, and what demonstrations of force the officers made. The police officer must weigh these factors on the spur of the moment. Moreover, the factors that cause a court ultimately to find that police advice was necessary to counteract “subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents,”<sup>177</sup> might not have been apparent to the officer at the time.

One objectively defined category of circumstances in which advice of the right to refuse may always be constitutionally required is when the person whose consent is sought is in custody. *Schneckloth* declared that an open question<sup>178</sup> but added: “We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the ‘consent’ to a search was given by a person in custody.”<sup>179</sup> Accordingly, the Commission recommended that before ob-

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<sup>175</sup>Proposed § 15A-222(b). The Commission has also recommended a provision that “[a] search conducted pursuant to the provisions of this Article may not exceed, in duration or physical scope, the limits of the consent given.” Proposed § 15A-223(a). Also, the consent “may be withdrawn or limited at any time prior to the completion of the search and, if so withdrawn or limited, the search authorized by the consent must cease, or be restricted to the new limits, as the case may be.” Proposed § 15A-223(c).

This provision seems to be consistent with existing North Carolina law. See *State v. Belk*, 268 N.C. 320, 323, 150 S.E.2d 481, 483 (1966). See also *State v. Mills*, 246 N.C. 237, 242, 98 S.E.2d 329, 333 (1957).

The American Law Institute has made similar recommendations in its Model Code of Pre-Arrest Procedure. MODEL CODE §§ SS 240.2(2), (3), 240.3(1), (3).

<sup>176</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

<sup>177</sup>*Id.* at 229.

<sup>178</sup>*Id.* at 238 n.29, 247 n.36.

<sup>179</sup>*Id.* at 247 n.36. The North Carolina courts have upheld searches based on the consent of a person in custody who was not advised of his right to refuse. *State v. Brown*, 271 N.C. 250, 261, 156 S.E.2d 272, 280 (1967); *State v. Hauser*, 257 N.C. 158, 159-60, 125 S.E.2d 389, 390 (1962) (per curiam); cf. *State v. Bishop*, 272 N.C. 283, 297-98, 58 S.E.2d 511, 521 (1968). See also *State v. Little*, 270 N.C. 234, 237, 154 S.E.2d 61, 63-64 (1967).

In *State v. Accor*, 277 N.C. 65, 175 S.E.2d 583 (1970), however, the defendant was taken to

taining consent to search from a person in custody the officers advise him not only of his right to refuse but also "that he has the right to consult an attorney, either retained or appointed, before deciding whether to grant or withhold consent."<sup>180</sup>

Since other consent situations that require advice of the right to refuse may not be so easy to anticipate, state legislative policy should guide the officer by requiring him, as the Commission proposes, to advise a citizen routinely of his right to refuse a search before obtaining his consent.<sup>181</sup> In this way, the citizen may be protected against overreaching, the officer may be assured that he is not unintentionally invading the reasonable expectation of privacy of a citizen, and at the same time the state may be assured the use of any evidence discovered in the search. Unless law enforcement officers give such advice as a matter of course, a certain number of consensual searches will probably be overturned because of a judicial finding of involuntariness in the consent. Since the prosecution has the burden of proving voluntariness by clear and convincing evidence,<sup>182</sup> the straightforward advice recommended by the Commission will assist the prosecution in meeting that burden.<sup>183</sup> Since the advice is relatively simple to deliver and could form a part of the officer's standard procedure,<sup>184</sup> the Commission's recommendation should be welcome guidance to the police—freeing them from a complex field inquiry into voluntariness<sup>185</sup> and establishing a prophylac-

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police headquarters without probable cause or a warrant and there asked if he had any objections to being photographed and fingerprinted. When he said that he did not, his photograph was taken. The court held:

Although the Miranda warnings were read to him, he was not advised he was free to leave police headquarters without submitting to the taking of his fingerprints and photographs. Nothing else appearing it would seem unreasonable under these circumstances to infer that Moore's response "was sufficiently an act of free will to purge the primary taint" . . . .

*Id.* at 83, 175 S.E.2d at 594-95.

<sup>180</sup>Proposed § 15A-222(b). Because the request for consent there constitutes a "custodial interrogation," providing the broader advice required by *Miranda v. Arizona*, 384 U.S. 436 (1966), is well advised.

<sup>181</sup>MODEL CODE, Commentary 193.

<sup>182</sup>*Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971); *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967).

<sup>183</sup>*See Schneckloth v. Bustamonte*, 412 U.S. 218, 230 (1973).

<sup>184</sup>MODEL CODE, Commentary 194.

<sup>185</sup>In *Schneckloth*, the Court observed that the "traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was in fact



tic against the hazard of compelling a consent in circumstances inadvertently "instinct with coercion."<sup>186</sup>

Moreover, the reasons that persuaded the Supreme Court in *Schneckloth* to eschew a constitutional command that the advice be given in every case of a consent search should not have any force in the development of a suitable state policy. The *Schneckloth* Court assumed that if it were to hold that consent to a search constituted a waiver of constitutional rights, consent could be valid only under the strict standard for waiver of "an intentional relinquishment or abandonment of a known right or privilege" established in *Johnson v. Zerbst*.<sup>187</sup> The Court held that from a constitutional perspective a diluted form of waiver would be unacceptable.<sup>188</sup> The Court decided that "[i]t would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*."<sup>189</sup> Therefore *Schneckloth* ruled that the strict standard of waiver should apply only to trial safeguards<sup>190</sup> and to those pre-trial safeguards that "are similarly designed to protect the fairness of the trial itself" such as post-indictment lineups and custodial interrogation.<sup>191</sup> The Court observed

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voluntarily given." 412 U.S. at 248.

*See State v. McPeak*, 243 N.C. 243, 90 S.E.2d 501 (1955), *cert. denied*, 351 U.S. 919 (1956). In that case, a police officer stopped the defendant's automobile on a routine check. He told the defendant that he would like to search his car, but advised him that "'he didn't have to let us search his car if he didn't want to.'" *Id.* at 244, 90 S.E.2d at 502. The defendant agreed to the search and in upholding the validity of his consent, the court relied in part on the fact that the defendant had been advised of his right to refuse. *Id.* at 246, 90 S.E.2d at 504. *But see State v. Craddock*, 272 N.C. 160, 163, 169, 158 S.E.2d 25, 27-28, 31-32 (1967) (Two officers with guns drawn stopped the defendants' automobile, ordered the defendants out of the car and frisked them. After holstering their weapons, the officers requested and received permission to search the trunk. Even after such a show of force and in the absence of any advice of a right to refuse, the court upheld the consent.); *State v. Williams*, 267 N.C. 424, 426, 148 S.E.2d 209, 210 (1966) (At night seven police officers went to the defendant's house, some to the front and some to the back. The defendant testified that he was intimidated and frightened. Nevertheless, without explanation the court upheld a search based on consent given by the defendant at the time without having been advised of his right to refuse.); *cf. State v. Hall*, 264 N.C. 559, 562, 142 S.E.2d 177, 179 (1965) ("There is some question as to the extent the officers left the wife free to consent to the search, or whether the number of officers had a coercive effect sufficient to make her consent involuntary. The circumstances did not suggest to her anything better that she could do in the presence of so much 'law' at a time when they had her husband in jail.").

<sup>186</sup>*Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

<sup>187</sup>304 U.S. 458, 464 (1938).

<sup>188</sup>412 U.S. at 245.

<sup>189</sup>*Id.*

<sup>190</sup>*Id.* at 237.

<sup>191</sup>*Id.* at 239.

that the protections of the fourth amendment do not qualify for such treatment because they "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."<sup>192</sup> Therefore the strict standard of *Zerbst* need not apply.

The legislature may, however, be more flexible. Unrestricted by a single demanding form of inquiry upon waiver, it may adapt the waiver procedure to suit "the informal, unstructured context of a consent search." The Commission's proposal is carefully designed for that context. It demands for the routine search the basic advice of a right to refuse the search and a statement that anything found may be used in evidence. More elaborate advice is required if the person whose consent is sought is in custody. *Schneckloth* did reaffirm the voluntariness standard as the test for the validity of a search based on consent and said that in deciding voluntariness in any particular case it would take into consideration any advice given in advance of procuring consent. Accordingly, it is in the interest of the state to take precautions to assure that when its officers do act in reliance upon such consent, the consent was voluntarily given. The Commission's recommendation would, when followed, produce evidence tending to establish voluntariness in every consent search.

#### D. STOP AND FRISK AND QUESTION

The investigative authority of law enforcement officers to "stop and frisk and question" involves four legal issues, and the Commission's proposals treat each separately. The first question is whether and under what circumstances an officer may stop a person against his will for investigation. In this regard, the Commission proposal is as follows:

A law enforcement officer lawfully present in any place may, in the following circumstances, order a person to remain in the officer's presence near such place:

- (1) Persons in suspicious circumstances relating to felonies and certain misdemeanors.
  - a. The officer observes circumstances that cause him reasonably to suspect that the person has just committed or is about to commit any felony or a misdemeanor involving danger of bodily injury, and
  - b. Such action is reasonably necessary to identify the

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<sup>192</sup>*Id.* at 242.

person, account for his presence or conduct, or determine whether to arrest him.

(2) Suspects sought for certain previously committed offenses.

- a. The officer has probable cause to believe that a misdemeanor involving danger of bodily injury, an escape from custody, or any felony has been committed, and
- b. He reasonably suspects the person may have committed it; and
- c. The action is reasonably necessary to identify the person to determine whether to arrest him for the crime.

. . . [N]o officer may stop a person who the officers should reasonably know has previously been stopped under this Article unless, in the period following the prior stop, new circumstances independently sufficient to authorize a stop have arisen.

. . . A law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.<sup>193</sup>

The second question is under what circumstances the person stopped is entitled to be released from that detention. The proposal specifies:

A stop authorized by this Article may continue for a period of time reasonably necessary to accomplish the purposes authorized by this Article, but in no case for more than 20 minutes . . . .

Unless an officer acting under the authority of this Article arrests a person before the expiration of 20 minutes, the officer must at the end of that time, release the person and inform him that he is free to go.<sup>194</sup>

The third and fourth questions relate to what extent the officer may search and interrogate the person stopped. The proposal provides for no investigative search incident to the detention but does authorize a frisk for dangerous weapons in certain circumstances:

A law enforcement officer who has stopped any person pursuant to this Article may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an external patting of the person's outer clothing. If in the course of such a frisk he feels an object which he reasonably believes

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<sup>193</sup>Proposed §§ 15A-211, -212, -213.

<sup>194</sup>*Id.* §§ 15A-212, -217.

to be a dangerous weapon, he may take possession of the object.<sup>195</sup>

The Commission's proposal authorizes questioning of the person stopped with the following limitations on "sustained questioning":

If a law enforcement officer stops any person who he suspects or has reasonable cause to suspect may have committed a crime, the officer must identify himself and advise the person before engaging in any sustained questioning:

- (1) That the person is not obliged to say anything, and anything he says may be used in evidence against him,
- (2) That he will not be questioned unless he wishes, and that he may consult a lawyer or have a lawyer present during questioning, and that if he is unable to afford a lawyer, one will be furnished to him prior to questioning, and
- (3) That within 20 minutes he will be released unless he is arrested.<sup>196</sup>

The crime prevention function of the stop and frisk authority was performed until recently under the auspices of vagrancy laws.<sup>197</sup> In order to provide a flexible response for the officer on the street, however, most vagrancy statutes employed language that under modern standards is unconstitutionally vague.<sup>198</sup> North Carolina has been without an enforceable vagrancy law since 1969 when a three-judge federal court declared the state's vagrancy statute unconstitutional.<sup>199</sup> The North Carolina Supreme Court has found a common law authority, however, for police officers "to stop suspicious persons for questioning (field interrogation and to search those persons for dangerous weapons."<sup>200</sup>

<sup>195</sup>*Id.* § 15A-214.

<sup>196</sup>*Id.* § 15A-215.

Section 2 of the Uniform Arrest Act provides as follows:

- (1) A peace officer may stop any person abroad whom he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.
- (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated.
- (3) The total period of detention provided for by this section shall not exceed two hours. Such detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942).

<sup>197</sup>See LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 124 (1968).

<sup>198</sup>*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

<sup>199</sup>*Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969).

<sup>200</sup>*State v. Streeter*, 283 N.C. 203, 209, 195 S.E.2d 502, 506 (1973). In 1969, the North

In *Terry v. Ohio*<sup>201</sup> and *Adams v. Williams*<sup>202</sup> the United States Supreme Court upheld a police officer's self-protective "stop and frisk" but held that it was subject to the constraints of the fourth amendment. In *Terry*, the attention of a plainclothes officer patrolling an area for shoplifters and pickpockets was attracted to defendant Terry and a companion who "didn't look right to me at the time."<sup>203</sup> He observed them while they appeared to be "casing" a store window, met briefly with a third man, and followed him to the front of a store. Suspicious, the officer "considered it his job as a police officer to investigate further. He added that he feared 'they may have a gun.'"<sup>204</sup> He approached the three, identified himself as a police officer and asked their names. When they mumbled a response, the officer grabbed defendant Terry "and patted down the outside of his clothing."<sup>205</sup> He felt a gun and took off Terry's overcoat to remove it. Terry was convicted of unlawful possession of the concealed weapon.

In *Adams v. Williams*, the police officer was patrolling alone in a high crime area at 2:15 a.m. Instead of observing suspicious behavior himself, he was approached by a person he knew who told him that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. After calling for assistance, the officer approached the car, tapped on the window, and asked the defendant to open the door. Instead, he rolled down the window. When he did, the officer reached into the car and removed a loaded revolver from his waistband. The officer arrested the defendant, searched him, and found heroin.

The Court in *Terry* held that:

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Carolina General Assembly adopted a constitutionally suspect stop and frisk law for riot situations and for curfew violators. N.C. GEN. STAT. § 14-288.10 (1969). It provides as follows:

(a) Any law enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he has reasonable grounds to believe that the person is or may become unlawfully involved in an existing riot and when the person is close enough to such riot that he could become immediately involved in the riot. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

(b) Any law enforcement officer may frisk any person he finds violating the provisions of a curfew . . . in order to discover whether the person possesses any dangerous weapon or substance. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

<sup>201</sup>392 U.S. 1 (1968).

<sup>202</sup>407 U.S. 143 (1972).

<sup>203</sup>392 U.S. at 5.

<sup>204</sup>*Id.* at 6.

<sup>205</sup>*Id.* at 7.

[T]he Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. . . . [A] careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is . . . a search . . . . It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."<sup>206</sup>

Having established constitutional control over stop and frisk, *Terry* employed alternative rationales for upholding the frisk of Terry and the subsequent search for the gun. The rationales are important because they establish the constitutional limits on this kind of intrusion. The first rationale was based not on the standards of the fourth amendment but on the Court's perception of the limitations of the exclusionary rule.<sup>207</sup> Because the objective of the officer in conducting a frisk for weapons is not to obtain admissible evidence but to protect his own safety, the Court reasoned, the exclusionary remedy could not have any deterrent effect.<sup>208</sup>

The Court's second rationale rested on the reasonableness standard of the fourth amendment. In determining that the frisk was compatible with substantive constitutional standards, the Court balanced the need to search against the invasion that the search entails.<sup>209</sup> A similar balancing test under the fourth amendment was later used by the Court in *Wyman v. James*<sup>210</sup> to uphold a warrantless welfare search conducted without probable cause by a caseworker investigating the eligibility of a recipient family and the health of a child. The common thread in these cases is that the search in both was conducted for a purpose other than discovering evidence of crime. In *Wyman*, the governmental interest

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<sup>206</sup>*Id.* at 16-17. "This inestimable right of personal security belongs as much to the citizen on the streets as to the homeowner closeted in his study to dispose of his secret affairs." *Id.* at 8-9.

<sup>207</sup>"[T]he issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure." *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

<sup>208</sup>*Id.* at 14-15.

<sup>209</sup>*Id.* at 20-21.

<sup>210</sup>400 U.S. 309 (1971). The Court first held that there was no search, *id.* at 317-18, then that even if there was a search it did "not descend to the level of unreasonableness." *Id.* at 318. See generally Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973).

was the protection and aid of a dependent child.<sup>211</sup> In both *Terry* and *Williams*, the Court emphasized that the immediate purpose of the frisk was the protection of the officer and not the investigation of crime.<sup>212</sup> A welfare search and a frisk might incidentally uncover criminal evidence, but doing so is not their objective.<sup>213</sup>

Since both rationales for the frisk are based on its character as a "limited protective search for concealed weapons,"<sup>214</sup> it

must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.<sup>215</sup>

For example, in *Sibron v. New York*,<sup>216</sup> the Supreme Court held that heroin that a police officer found in the defendant's pocket after he saw the defendant talking with drug addicts was inadmissible evidence. The Court found the search invalid not only because merely talking to addicts does not afford a reasonable basis to intrude upon an individual's personal security, but also because the search was not limited to "the

<sup>211</sup>400 U.S. at 318-20, 322-23.

<sup>212</sup>*Adams v. Williams*, 407 U.S. 143, 147 (1972); *Terry v. Ohio*, 392 U.S. 1, 23, 29 (1968).

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

*Terry v. Ohio*, *supra* at 23. See also *id.* at 24, 29, "[S]uch a search . . . is not justified by any need to prevent the disappearance or destruction of evidence of crime. . . . The sole justification for the search in the present situation is the protection of the police officer and others nearby . . . ." (citations omitted.)

In *Williams* the Court reemphasized that point: "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . ." *Adams v. Williams*, *supra* at 146.

However, any evidence uncovered will be admissible at trial. *Adams v. Williams*, 407 U.S. 143, 148 (1972); *Sibron v. New York*, 392 U.S. 40, 67, 79 (1968); *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>213</sup>*Wyman v. James*, 400 U.S. 309, 323 (1971); *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

<sup>214</sup>*Adams v. Williams*, 407 U.S. 143, 146 (1972).

<sup>215</sup>*Terry v. Ohio*, 392 U.S. 1, 26 (1968).

<sup>216</sup>392 U.S. 40 (1968).

protection of the officer by disarming a potentially dangerous man".<sup>217</sup> The better practice is probably for the officer to engage in a patdown search before entering the suspect's clothing,<sup>218</sup> and to intrude only if he feels something resembling a weapon and then only to seize that item.<sup>219</sup> In *Williams*, however, the officer reached directly into the defendant's waistband where he had been told the gun was being carried, and the Court held that action to be a reasonably limited intrusion.<sup>220</sup>

Stop and frisk is new to North Carolina and was judicially sanctioned only this year.<sup>221</sup> The North Carolina Supreme Court in *State v. Streeter*<sup>222</sup> upheld a search under a stop and frisk theory as an alternative to its principal holding that the search was justified as incident to a lawful arrest. About 2:45 a.m. two police officers on routine patrol observed the defendant walking on a highway in a business area. They stopped their car and began talking to the defendant when one of the officers saw something bulging from under the defendant's shirt:

The officer then told him 'not to move,' and, thinking the bulging object was a revolver, touched it. It felt like metal. Believing defendant possessed a gun, the officer reached under defendant's shirttail and found one pair of gloves, one screwdriver, one hammer, one pry bar, a flashlight, and one green Wachovia money bag.<sup>223</sup>

The officer testified that the object he had touched was the screwdriver.<sup>224</sup> All of the items were admitted in evidence, and the defendant was convicted of possession of housebreaking tools.

Although there was no evasive action by the defendant upon the approach of the officer, such as the mumbling response of Terry or the rolling down of the window instead of opening the door of Williams, the court upheld the frisk as a limited self-protective search for weapons.

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<sup>217</sup>*Id.* at 65.

<sup>218</sup>*Id.* at 46, 65, 67; *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

<sup>219</sup>See *People v. Collins*, 1 Cal. 3d 658, 463 P.2d 403, 83 Cal. Rptr. 179 (1970). In that case, on a pat-down frisk the officer felt a lump in the defendant's pants pocket. He reached into the pocket and removed marijuana. The court held that the search exceeded lawful bounds because the officer did not feel an object that reasonably resembled a weapon. *Id.* at 660-61, 463 P.2d at 404-05, 83 Cal. Rptr. at 180-81. See *Cook, The Art of Frisking*, 40 *FORDHAM L. REV.* 789, 797 (1972); Note, *Criminal Procedure—Search and Seizure—The Permissible Scope of a Frisk*, 48 *N.C.L. REV.* 110, 115-21 (1969).

<sup>220</sup>*Adams v. Williams*, 407 U.S. 146, 147-48 (1973). See also *State v. Stanfield* 19 N.C. App. 622, 624-25, 199 S.E.2d 741, 743-44 (1973).

<sup>221</sup>See note 200 *supra*.

<sup>222</sup>283 N.C. 203, 195 S.E.2d 501 (1973).

<sup>223</sup>*Id.* at 205, 195 S.E.2d at 504.

<sup>224</sup>*Id.* at 211, 195 S.E.2d at 507 (dissenting opinion).



The bulge was the specific evidence that entitled the officer to conclude that the defendant was armed.<sup>225</sup> The stop in this case, like those in *Terry* and *Williams*, was inextricably a part of the frisk, yet the court in dictum sanctioned it independently, reasoning that "if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot, he may temporarily detain the suspect."<sup>226</sup> The court then held, "if, after the detention, his personal observations confirm his apprehension that criminal activity may be afoot and indicate that the person may be armed, he may then frisk him as a matter of self-protection."<sup>227</sup>

In a dissenting opinion, Justice Higgins, joined by Chief Justice Bobbitt, argued that once the officer removed the screwdriver that had given him cause to initiate a limited search, he should have desisted from any further invasion of the defendant's privacy. Thereafter, the dissenters reasoned, the search became exploratory and therefore unconstitutional.<sup>228</sup>

The reasoning in *Terry* and *Williams* would not support a forcible stop—independently of a frisk—on less than probable cause.<sup>229</sup> The opinions in both cases concerned themselves with the validity of the frisks and not separately with the validity of a detention of *Terry* or *Williams*.<sup>230</sup> The officer did not forcibly stop *Terry* until he spun him

<sup>225</sup>*Id.* at 208, 210, 195 S.E.2d at 505, 507.

<sup>226</sup>*Id.* at 210, 195 S.E.2d at 507.

<sup>227</sup>*Id.*

<sup>228</sup>*Id.* at 211-12, 195 S.E.2d at 507-08.

<sup>229</sup>In *Sibron v. New York*, 392 U.S. 40 (1968), the Court declined to consider the question whether a police officer may use force to stop a pedestrian on the basis of a probable cause standard less demanding than for an arrest when it refused to test a detention provision in the New York stop and frisk law. The Court explained:

It is not apparent, for example, whether the power to "stop" granted by the statute entails a power to "detain" for investigation or interrogation upon less than probable cause, or if so what sort of durational limitations . . . are contemplated. And while the statute's apparent grant of a power of compulsion indicates that many "stops" will constitute "seizures," it is not clear that all conduct analyzed under the rubric of the statute will either rise to the level of a "seizure" or be based upon less than probable cause . . . .

We cannot tell, for example, whether the officer's power to "demand" of a person an "explanation of his actions" contemplates either an obligation on the part of the citizen to answer or some additional power on the part of the officer in the event of a refusal to answer, or even whether the interrogation following the stop is "custodial."

*Id.* at 60 n.20.

<sup>230</sup>*Id.* at 23. See also *id.* at 35 (White, J., concurring); Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 302, 303 (1971); LaFave, *supra* note 197, at 63-64; Note, *The Limits of Stop and Frisk—Questions Unanswered by Terry*, 10 ARIZ. L. REV. 419, 423 (1968).

around for the frisk. At that time the officer had only identified himself and asked Terry to do the same. He had not exercised any restraint of Terry's movements although Terry probably understood simply from the officer's approach that he was expected to remain in the officer's presence. In *Williams* the officer used even less restraint on the defendant before thrusting his hand into his waist. In both cases the Court recognized that an officer with a suspicion of criminal activity not amounting to probable cause may have a duty to investigate short of conducting an arrest or body search. In *Williams* the Court said "[a] brief stop of a suspicious individual in order to determine his identity or maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."<sup>231</sup> In neither case did the Court hold that an officer could use force for that purpose.

Those cases authorized a frisk only for the purpose of disarming an apparent threat to the safety of the officer. In *Williams* the Court reiterated its emphasis in *Terry* that the frisk procedure won constitutional approval because it did not have as its objective the investigation of crime. The Court first decided—for reasons strictly related to the non-investigatory nature of the search—that a limited intrusion would be permitted. It then carefully circumscribed the scope of the intrusion in accordance with its protective purpose. The limited nature of the intrusion was not the reason for permitting it—that was just the scope of the search that the Court's rationale would tolerate. By contrast, an investigative detention is subject to the sanction of the exclusionary rule because the police objective is to develop evidence of criminal activity. Also in such a situation the balance of the fourth amendment favors the state's interest in investigation only when it is weighted with probable cause. The Court indicated its concern in this direction in *Sibron v. New York*,<sup>232</sup> a companion case to *Terry*. In *Sibron* the Court declined to evaluate the stop authority in a New York statute, in part on the ground that "it is impossible to tell whether the standard of 'reasonable suspicion' connotes the same sort of specificity, reliability, and objectivity which is the touchstone of permissible governmental action under the Fourth Amendment."<sup>233</sup>

Several members of the Court, including two presently sitting Jus-

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<sup>231</sup>*Adams v. Williams*, 407 U.S. 143, 146 (1972).

<sup>232</sup>392 U.S. 40 (1968).

<sup>233</sup>*Id.* at 60-61 n.20.

tices, had occasion to express their individual views on this subject in *Wainwright v. City of New Orleans*.<sup>234</sup> The Court dismissed the writ of certiorari as improvidently granted, but Justices Harlan, Fortas, and Marshall, in concurring opinions, and Chief Justice Warren and Justice Douglas, in dissenting opinions, indicated that the traditional standard of probable cause is required even for the temporary detention of a person if it is effected forcibly.

In *Wainwright*, two police officers noticed the petitioner about midnight and thought he fit the description of a man wanted for murder known to have a tattoo on his arm reading "born to raise hell". When the officers approached him, petitioner identified himself and his purpose for being on the street. He refused, however, to show them his forearm. He "was then suffering from a skin ailment which he apparently regarded as unsightly and which would have been exposed had he removed his jacket, though he did not communicate this to the police."<sup>235</sup> Peacefully petitioner tried to walk away three times. The officers prevented him from doing so and arrested him for vagrancy, resisting arrest, and reviling the police. At the police station, petitioner again refused to remove his jacket, and a scuffle ensued as the officers removed it. Petitioner had no tattoo on his arm, but he was convicted of charges arising out of the station house incident, the only charges pursued against him.

Justice Harlan concurred in the dismissal of the petition because the record was "too opaque" to permit a decision as to "whether the petitioner used an unreasonable amount of force in resisting what on this record must be regarded as an illegal attempt by the police to search his person."<sup>236</sup> If the original detention of the petitioner had been lawful, however, his resistance would have justified the officers in arresting him and removing his jacket at the station. Therefore, Justice Harlan must have questioned the validity of the stop on the street.

Justice Fortas, writing an opinion in which Justice Marshall joined, was more explicit. "I should want to know," he wrote, "whether, in fact, there was constitutionally adequate cause for the police to suspect that the pedestrian was the man sought for murder."<sup>237</sup> In his judgment the record was too sketchy to decide that question, and he therefore voted to dismiss the writ. He did not define "constitutionally adequate cause."

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<sup>234</sup>392 U.S. 598 (1968).

<sup>235</sup>*Id.* at 600 (Warren, C.J., dissenting).

<sup>236</sup>*Id.* at 598.

<sup>237</sup>*Id.* at 599.

Chief Justice Warren wrote that probable cause was necessary for the initial detention.<sup>238</sup> Justice Douglas agreed.<sup>239</sup>

The Commission's proposal authorizes the use of force to stop a vehicle as well as a pedestrian. *Terry* and *Sibron* involved only persons on foot; *Williams* involved the frisk of a person sitting in a parked car without the motor running. The Supreme Court cases involving automobile detentions are even more clear in their insistence upon probable cause.

Because of the exigent circumstances, a search of a mobile vehicle may be conducted without a warrant. Every United States Supreme Court case approving such a warrantless search, however, has emphasized the need for probable cause.<sup>240</sup> In a number of cases, the Court has held the probable cause requirement applicable to the halting of a car as well as the search of it.<sup>241</sup> The 1949 decision in *Brinegar v. United States*<sup>242</sup> in an instructive example.

In *Brinegar*, two federal officers saw the defendant drive past them at a point five miles west of the Missouri-Oklahoma line. The officers knew that Missouri was a ready source of supply for liquor and the dry state of Oklahoma was a good market for it. One of the officers had arrested the defendant on an earlier occasion for the illegal transportation of liquor, knew his reputation for hauling liquor, and had seen him loading liquor in Missouri twice during the previous six months. On this occasion, the defendant's car appeared weighted down. As it passed the

<sup>238</sup>*Id.* at 604, 606.

<sup>239</sup>*Id.* at 612-13, 615.

<sup>240</sup>*Almeida-Sanchez v. United States*, 93 S. Ct. 2535, 2537-38 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 458 (1971); *Chambers v. Maroney*, 399 U.S. 42, 47-48, 49 (1970); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221-22 (1968); *Brinegar v. United States*, 338 U.S. 160, 170, 176-77 (1949); *Husty v. United States*, 282 U.S. 694, 700 (1931); *Carroll v. United States*, 267 U.S. 132, 159-60 (1925). *See also* *State v. Simmons*, 278 N.C. 468, 471, 180 S.E.2d 97, 99 (1971).

<sup>241</sup>This principle was expressed in a classic statement in the landmark case of *Carroll v. United States*, 267 U.S. 132 (1925):

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection . . . . But those lawfully within the country, entitled to use the public highways, have a right to free passage *without interruption or search* unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

*Id.* at 153-54 (emphasis added).

<sup>242</sup>338 U.S. 160 (1949).

officers it sped up and attempted to elude them. When the officers finally stopped the defendant's car, the defendant told them he was carrying liquor. The officers searched and found it.

The Court held that the information available to the officers before stopping the car constituted probable cause<sup>243</sup> after saying that "[t]he troublesome line posed by the facts in . . . this case is one between mere suspicion and probable cause."<sup>244</sup> Concurring specially, Justice Burton took a position supporting authority to stop a car for investigation on less than probable cause. He then believed that the defendant's admission of his contraband cargo during the inestigative interrogation established the probable cause for the search. The majority, however, declined that approach and in its painstaking analysis of the facts giving rise to probable cause eschewed reliance on the admission obtained after the stop.

In dissent, Justice Jackson, joined by Justices Murphy and Frankfurter, disagreed with the finding of probable cause and amplified on the lack of a stop authority short of probable cause:

I do not, of course, contend that officials may never stop a car on the highway without the halting being considered an arrest or a search. Regulations of traffic, identifications where proper, traffic census, quarantine regulations, and many other causes give occasion to stop cars in circumstances which do not imply arrest or charge of crime.<sup>245</sup> And to trail or pursue a suspected car to its destination, to

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<sup>243</sup>*Id.* at 176-77.

<sup>244</sup>*Id.* at 176.

<sup>245</sup>Justice Jackson's examples are consistent with the balancing test rationale of *Terry* and *Wyman* crediting the government's interest more heavily on the scales if its objective is unrelated except incidentally to a criminal investigation.

In *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973), the North Carolina Supreme Court upheld under motor vehicle regulations an investigative detention of an automobile without requiring it to conform to probable cause standards. The officers had reason to be suspicious of the occupants of the vehicle, having seen them run to a car from behind bushes in a deserted business area at 2:00 a.m. After stopping the car, the officers frisked the occupants for weapons and found none. With the consent of the driver one of the officers started to look for the registration card in the glove compartment and saw a money bag with the name of a nearby business on it. When the officer mentioned finding the bag, the driver started running. He was caught and both defendants were arrested.

The court upheld the stop of the vehicle only on the theory that the officers were attempting "to determine the validity and presence of the driver's license and registration card. G.S. 20-183 (a); G.S. 20-57 . . . ." *Id.* at 507, 194 S.E.2d at 13. Those statutes provide that an automobile registration card must at all times be carried in the vehicle, N.C. GEN. STAT. § 20-57 (1965), and that law enforcement "officers within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the state for the purpose of determining whether the same is being operated in violation of any of the provisions of this article." N.C. GEN. STAT. § 20-183(a)

observe it and keep it under surveillance, is not in itself an arrest nor a search. But when a car is forced off the road, summoned to stop by a siren, and brought to a halt under such circumstances as are here disclosed, we think the officers are then in the position of one who has entered a home: the search at its commencement must be valid and cannot be saved by what it turns up.<sup>246</sup>

The Court reiterated that rule in *Henry v. United States*.<sup>247</sup> The

(1965). Reasoning that "a routine license check and the concomitant delay does not constitute an arrest in the legal sense," *State v. Allen*, *supra* at 509, 194 S.E.2d at 14, the court held that the statute constitutionally authorized a stop for that purpose without probable cause.

In *Cady v. Dombrowski*, 93 S. Ct. 2523, 2527-28 (1973), the United States Supreme Court said:

The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle

.....

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

In *Cady*, the Court upheld the search of an automobile that had been involved in an accident, was in a position constituting a nuisance on the highway, and whose owner was intoxicated and later comatose because it was done for motor vehicle safety purposes unrelated to criminal investigation.

In *Allen*, the North Carolina Supreme Court purported to apply a similar principle: "We believe the provisions of G.S. 20-183(a) when balanced with the State's highway obligation to preserve order and enforce safety on its streets and highways, do not constitute such an encroachment on the individual's constitutional rights as to render the statute invalid." *State v. Allen*, *supra* at 511, 194 S.E.2d at 15. The difficulty with this holding in *Allen* is that the court was not as careful as the Supreme Court in *Cady* to explain why the detention of the automobile was for non-criminal-investigation purposes. On the facts of *Allen*, it is evident that the officers were investigating suspected burglaries and not a motor vehicle offense. By applying a statute authorizing detention of a car for motor vehicle purposes to uphold an investigative search, the North Carolina Supreme Court was approving a ruse that would enable a police officer to detain any car for a crime investigation. See *People v. Superior Court*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968).

<sup>246</sup>338 U.S. at 188.

<sup>247</sup>361 U.S. 98 (1959).

employer of a man named Pierotti gave FBI agents information of an undisclosed nature implicating Pierotti with thefts from interstate shipments. The agents saw Pierotti and the defendant drive from a bar to a house, pick up cartons, put them in their car, return to the bar, and then repeat the process. The officers stopped the car. As they approached they heard the defendant say, " 'Hold it; it is the G's.' This was followed by, 'Tell him he [you] just picked me up.' " <sup>248</sup> Upon searching the car, the agents found cartons of stolen merchandise. The Court held:

The prosecution conceded . . . that the arrest took place when the federal agents stopped the car. That is our view on the facts of this case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this particular case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. <sup>249</sup>

To emphasize the point the Court added: "Under our system suspicion is not enough for an officer to lay hands on a citizen." <sup>250</sup>

These cases reinforce the conclusion that a street as well as a vehicle stop may not be forcibly effected without probable cause. <sup>251</sup> "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" <sup>252</sup> The constitutional minimum of probable cause for a detention does not mean that police officers must solve the case before they can investigate it or that the frisk authority is useless. Police officers may approach any person on the street, suspect or witness, and direct questions to him. <sup>253</sup>

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<sup>248</sup>*Id.* at 99.

<sup>249</sup>*Id.* at 103. Justice Clark and Chief Justice Warren dissented from the statement that the stopping of the car amounted to an arrest. *Id.* at 106. See also *Rios v. United States*, 364 U.S. 253 (1960).

The commentary to the Model Code of Pre-Arrest Procedure argued that *Henry* is not authoritative because of the Government's concession. MODEL CODE, Commentary 108 n.14. The Court's quoted language clearly establishes, however, that it accepted the concession only to fortify a conclusion it had reached independently.

<sup>250</sup>*Henry v. United States*, 361 U.S. 98, 104 (1959). See also *State v. Robinson*, 15 N.C. App. 155, 156, 189 S.E.2d 567, 568 (1972).

<sup>251</sup>But see *Cook*, *supra* note 230, at 292-94.

<sup>252</sup>*Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969).

<sup>253</sup>In *Miranda v. Arizona*, 384 U.S. 436, 477 (1966), the Supreme Court approved "the traditional function of police officers in investigating crime [by] [g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process . . . ." *Terry v. Ohio*, 392 U.S. 1, 35 (1968) (White, J., concurring); Note, 10 ARIZ. L. REV., *supra* note 230 at 424, 427.

Most persons will feel a civic responsibility to cooperate with the officers, but those who find it intrusive, inconvenient, embarrassing, disturbing,—or incriminating—need not do so. To protect himself in such an encounter, the officer may conduct a frisk if he has reason to believe such a precaution is necessary for his safety. Beyond that, however, he may not detain a citizen against his will unless he has probable cause to arrest.

The Model Code of Pre-Arrest Procedure recommended a stop authority<sup>254</sup> even though the empirical research discussed in its commentary demonstrated that

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<sup>254</sup>The Model Code makes the following recommendations regarding stop and frisk:

(1) *Cases in Which Stop is Authorized.*

A law enforcement officer, lawfully present in any place, may, in the following circumstances, order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in this subsection, but in no case for more than twenty minutes:

(a) *Persons in suspicious circumstances relating to certain misdemeanors and felonies.*

(i) Such person is observed in circumstances such that the officer reasonably suspects that he has just committed, is committing, or is about to commit a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or damage to property, and

(ii) such action is reasonably necessary to obtain or verify the identification of such person, to obtain or verify an account of such person's presence or conduct, or to determine whether to arrest such person.

(b) *Witnesses near scene of certain misdemeanors and felonies.*

(i) The officer has reasonable cause to believe that a misdemeanor or felony, involving danger of forcible injury to persons or of appropriation of or damage to property, has just been committed near the place where he finds such person, and

(ii) the officer has reasonable cause to believe that such person has knowledge of material aid in the investigation of such crime, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person, or to obtain an account of such crime.

(c) *Suspects sought for certain previously committed felonies.*

(i) The officer has reasonable cause to believe that a felony involving danger of forcible injury to persons or of appropriation of or damage to property has been committed, and

(ii) he reasonably suspects such person may have committed it, and

(iii) such action is reasonably necessary to obtain or verify the identification of such person for the purpose of determining whether to arrest him for such felony.

. . . .

(3) *Use of Force.* In order to exercise the authority conferred in subsections (1)



[T]here is solid factual basis for the belief that where the stop (and also less clearly coercive exercises of authority such as harsh and peremptory demands for information) are widely used, this is a source of great resentment and a major cause of hostile attitudes towards the police.<sup>255</sup>

The Reporters concluded, however, that there was no "objective empirical evidence as to (1) the degrees of such abuse, (2) the situations in which such abuse occurs, or (3) the situations in which the stop and frisk

and (2) of this section, a law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence.

(4) *Frisk for Dangerous Weapons.* A law enforcement officer who has stopped any person pursuant to this section may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapon by an external patting of such person's outer clothing. If in the course of such search he feels an object which he reasonably believes to be a dangerous weapon, he may take such action as is necessary to examine such object.

(5) *Questioning of Suspects.*

(a) *Warnings.* If a law enforcement officer stops any person who he suspects or has reasonable cause to suspect may have committed a crime, the officer shall warn such person as promptly as is reasonable under the circumstances, and in any case before engaging in any sustained questioning

(i) that such person is not obliged to say anything, and anything he says may be used in evidence against him,

(ii) that within twenty minutes he will be released unless he is arrested. [,]

(iii) that if he is arrested he will be taken to a police station where he may promptly communicate by telephone with counsel, relatives or friends, and

(iv) that he will not be questioned unless he wishes, and that if he wishes to consult a lawyer or have a lawyer present during questioning, he will not be questioned at this time, and that after being taken to the stationhouse a lawyer will be furnished him prior to questioning if he is unable to obtain one.]

(b) *Limitations on Questioning.* No law enforcement officer shall question a person detained pursuant to the authority in this section who he suspects or has reasonable cause to suspect may have committed a crime, if such person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.

(6) *Action to Be Taken After Period of Stop.* Unless an officer acting hereunder arrests a person during the time he is authorized by subsections (1) and (2) of this section to require such person to remain in his presence, he shall, at the end of such time, inform such person that he is free to go.

(7) *Records Relating to Persons Stopped.* In accordance with regulations to be issued pursuant to Section 10.03, a law enforcement officer, who has ordered any person to remain in his presence pursuant to this section, shall with reasonable promptness thereafter make a record of the circumstances and purposes of the stop.

MODEL CODE § 110.2.

<sup>255</sup>MODEL CODE, Commentary 114.

are clearly necessary and reasonable.”<sup>256</sup>

Even if a forcible stop on information short of probable cause might be constitutionally permissible in emergency circumstances, the Commission's proposal is not carefully drawn for such circumstances and is broad enough to install the forcible stop as a routine procedure. The forcible stop is authorized for investigation of “any felony or a misdemeanor involving danger of bodily injury,”<sup>257</sup> not only if such an offense has just been committed or is about to be committed,<sup>258</sup> but also if it is a stale crime.<sup>259</sup> The “any felony” standard would include not only crimes immediately threatening to life or property, but also crimes such as narcotics offenses.<sup>260</sup> The Model Code of Pre-Arrest Procedure concluded from its empirical studies “that the stop and frisk is not as useful an enforcement technique in respect to narcotics offenses as it might be in respect to”<sup>261</sup> crimes “involving in the particular case a direct threat to persons or property.”<sup>262</sup> *Terry* approved a frisk in the course of an investigation of possible burglaries. *Sibron* involved two cases: the Court approved a frisk in an investigation of a possible burglary; it disapproved a frisk in an investigation of a possible narcotics offense, although not expressly for that reason. *Williams* approved a frisk in an investigation of a possible narcotics offense but at the same time a possible weapons offense. The dissenting justices in *Williams* argued that even the frisk authority of *Terry* should not apply to narcotics offenses.

The Commission's proposal would allow a stop in all cases on the basis of “reasonable suspicion.”<sup>263</sup> The Supreme Court has already criticized that standard in the forcible stop context because of uncertainty whether it “connotes the same sort of specificity, reliability, and

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<sup>256</sup>*Id.* at 116-17.

<sup>257</sup>Proposed § 15A-211(1)(a), 2(a).

<sup>258</sup>*Id.*

<sup>259</sup>*Id.* § 15A-211(2)(a).

<sup>260</sup>*See* La Fave, *supra* note 197, at 65-66.

Even in the context of a frisk rather than a stop the Supreme Court in *Terry* demanded a “narrowly drawn authority.” *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>261</sup>MODEL CODE, Commentary 118.

<sup>262</sup>MODEL CODE, Commentary 117.

<sup>263</sup>The actual language is, “circumstances that cause him reasonably to suspect,” Proposed § 15A-211(1)(a), and “reasonably suspects,” *id.* § 15A-211(2)(b). If the stop is for a previously committed offense, the officer must have probable cause to believe that the offense was committed. *Id.* § 15A-211(2)(a). If the stop is for a recent offense, the reasonable suspicion standard applies. *Id.* § 15A-211(1)(a). In both cases, only the reasonable suspicion standard applies to the involvement of the suspect in the crime. *Id.* §§ 15A-211(1)(a), (2)(b).

objectivity which is the touchstone of permissible governmental action under the Fourth Amendment."<sup>264</sup> Probable cause is not an exacting standard; it is workable and flexible. It does not demand conclusive proof; its concern is with reasonableness.<sup>265</sup> It is not a casual phrase but is engraved in the fourth amendment as the only standard for a search endorsed by the Constitution. Since probable cause calls for an appraisal of whether a confluence of facts justify an assessment of criminal activity made by a reasonable man, what can "reasonable suspicion" be? Probable cause may be found in the word of an underworld informer only if it is reliable or corroborated; may "reasonable suspicion" be found without indicia of reliability?<sup>266</sup> Are "area detentions" of persons in high crime areas at prime crime times contemplated?<sup>267</sup> The constitutional standard authorizes police investigation whenever there is probable cause. Yet when investigation is the purpose of an intrusion into privacy, probable cause is a prerequisite; even a frisk "is not justified," as the Court said in *Terry*, "by any need to prevent the disappearance or destruction of evidence of crime."<sup>268</sup>

The proposed procedure for questioning detained suspects illustrates the confusion about the stop authority. It requires that the *Miranda* advice be delivered to a suspect before the officer engages "in any sustained questioning."<sup>269</sup> This vagary betrays the Commission's

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<sup>264</sup>*Sibron v. New York*, 392 U.S. 40, 59 (1968). *But see* reference to "the 'reasonable suspicion' found sufficient for a street detention and weapons search in *Terry v. Ohio* . . . and *Adams v. Williams* . . ." in *Almeida-Sanchez v. United States*, 93 S. Ct. 2535, 2537 (1973).

<sup>265</sup>*Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). *See also* *Berger v. New York*, 388 U.S. 41, 55 (1967).

<sup>266</sup>*Cf. Adams v. Williams*, 407 U.S. 143, 146-48 (1972). The officer in *Williams* relied on a highly specific tip by an informer known to him who had previously given information regarding homosexuality, not drugs or guns. In addition, however, the Court relied in approving the frisk on the fact that the defendant, when asked to open his door, rolled down his window instead. Although this might be explained because the defendant did not hear the officer and rolled down the window to remove that obstruction to communication, the Court held that the officer reasonably considered that as a result his safety was more precarious because he could not readily see the defendant's movements.

<sup>267</sup>*See Almeida-Sanchez v. United States*, 93 S. Ct. 2535, 2542-43, 2545 (1973). In a concurring opinion, Justice Powell suggested that "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas," *id.* at 2542-43, "where the concentration of illegally-present aliens is high," *id.* at 2542. Justice Powell, it is important to note, emphasized that this is another search situation not involving crime investigation, *id.* at 2542, and thus believed this to be another appropriate case for the *Terry-Wyman* balancing approach, *id.* at 2545. *See also* *See v. City of Seattle*, 387 U.S. 541, 543 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967). *But see* *Davis v. Mississippi*, 394 U.S. 721, 726-27, 728 (1969).

<sup>268</sup>*Terry v. Ohio*, 392 U.S. 1, 29 (1968).

<sup>269</sup>Proposed § 15A-215. The Model Code contains a similar provision. *See* MODEL CODE § 110.2(5)(a).

confusion about what kind of concept it is creating with its stop authority.

*Miranda* requires that its advice be given in every case of "custodial interrogation,"<sup>270</sup> that is, "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way."<sup>271</sup> This may occur in a person's own home as well as in the police station.<sup>272</sup> *Terry* held that in fourth amendment contemplation "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."<sup>273</sup> Thus, the conclusion appears inescapable that if a forcible stop under the Commission's proposal is to be followed by questioning, the *Miranda* advice must be given before any interrogation begins.<sup>274</sup> "Sustained questioning" is therefore an irrelevant consideration; the advice is required before any questioning. The Commission seems to have been struggling with a hybrid characterization of the forcible stop: at its inception and during preliminary questioning, though forcibly restrained the suspect is not in custody. At some hazily conceived juncture defined in terms of the duration of the questioning alone and without regard to any other circumstances in the encounter—such as the display of force, the resistance or resentment expressed by the suspect, or the nature of the information being gathered by the officers—the stop is either abruptly converted or gradually develops into a custody.

This formulation illustrates that the objective of the Commission would be more comfortable in a different posture, one abandoning reliance on any variety of actionable information less than probable cause. A police officer who approaches an individual on the street with less than probable cause need not deliver the *Miranda* advice before talking to him. Neither may he communicate any coercive restraints upon that person's freedom. If that person at any time chooses to depart the officer's company, the officer must permit him to do so unless he arrests him and has probable cause for that action. If an officer approaches an individual on the street with probable cause he would be well-advised to recite the *Miranda* advice to the suspect before embarking on any interrogation,<sup>275</sup> whether he arrests the person at that time or not. If the

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<sup>270</sup>*Miranda v. Arizona*, 384 U.S. 436, 444, 467, 469, 471 (1966).

<sup>271</sup>*Id.* at 478.

<sup>272</sup>*Oro/co v. Texas*, 394 U.S. 324 (1969). *See also* *Mathis v. United States*, 391 U.S. 1 (1968).

<sup>273</sup>*Terry v. Ohio*, 392 U.S. 1, 16 (1968).

<sup>274</sup>*Cf. La Fave, supra* note 197, at 95-101.

<sup>275</sup>*See* MODEL CODE § 110.2(5).

suspect attempts to leave, the officer may arrest him and thus force him to stay in his presence. The officer need not remove the suspect to the police station immediately<sup>276</sup> but may continue his investigation on the street. If the officer desires to investigate by further interrogation of the suspect, he must provide the *Miranda* advice and afford the suspect his rights to silence and to counsel if he desires to exercise them. If after continuing his investigation, the officer's belief in the suspect's guilt of a crime has been assuaged, he may forthwith release him.

The commentary to the Model Code of Pre-Arrest Procedure argued that a stop authority was necessary because in confused, emergency situations a police officer needs an "opportunity to 'freeze' the situation for a short time, so that he may make inquiry and arrive at a considered judgment about further action to be taken."<sup>277</sup> Furthermore, the Commentary argued that

the arrest decision has important consequences. The arrested person is taken to a police station and his arrest recorded; he may be detained for a period of hours or he may be held to appear in court. The Code, following existing law, requires a substantial degree of certainty for this decision. Such a requirement of substantial certainty is sensible only in view of the availability of the authority in this section, for it is unrealistic to expect a police officer in the field to exercise a reasonable judgment as to whether or not to make an arrest always the very moment that he is first aware that he is in the presence of a critical situation. Without a limited "stop" power there will surely be pressure to relax the "reasonable cause" standard for arrest to enable the police to exercise some authority in suspicious circumstances, circumstances which should not give rise to the range of serious consequences of an arrest but which will do so in the absence of a more limited available alternative. Without an authority to stop, there are likely to be more arrests on a lesser basis, and what is more important more arrests of innocent persons.<sup>278</sup>

The concerns expressed in that argument are legitimate, but their persuasiveness is undermined when it is realized that not all arrests need involve the inconvenience to the suspect and the officer of a trip to the station house. Arrest need not abort the investigation at the scene either. In this perspective, the fourth amendment already provides for the law enforcement needs pressuring for a stop authority and does so within

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<sup>276</sup>*Cf.* Proposed § 15A-302 (providing for a citation in lieu of arrest for a misdemeanor).

<sup>277</sup>MODEL CODE, Commentary 112-13.

<sup>278</sup>*Id.* at 113.

its standard probable cause procedure. Thus, if a police officer does not have probable cause to detain a person, it is unreasonable to allow him to do so. If he does have probable cause, he may effect a detention that, under the fourth amendment, is a "seizure" or an "arrest". Yet he still retains all the flexibility of a "stop" since he may release the suspect upon satisfying himself of his innocence. In that situation and also in connection with any non-coercive citizen contact, if the officer has a reasonable basis for belief that his safety may be in jeopardy because the person with whom he is dealing is armed and dangerous, he may conduct a limited frisk to protect himself. Legitimate law enforcement needs are therefore satisfied while individual privacy is respected.

### E. NO-KNOCK ENTRIES

The requirement<sup>279</sup> that law enforcement officers announce their authority and purpose before making a forcible entry into private premises (popularized by the Hollywood call to "Open up in the name of the law") encourages courteous police conduct and enables a person in possession of the premises to admit the officers peaceably. It thereby protects the privacy of the occupants<sup>280</sup> and mitigates the risk of violence<sup>281</sup> and property damage.<sup>282</sup>

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<sup>279</sup>For a history of the law regarding the requirement of notice of authority and purpose before entering a dwelling to conduct a search and seizure, see *Miller v. United States*, 357 U.S. 301, 306-08 (1958); *Accarino v. United States*, 179 F.2d 456, 460-63 (D.C. Cir. 1949); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 500-08 (1964); Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 139-44 (1970).

<sup>280</sup>"The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress . . . has declared . . . the reverence of the law for the individual's right of privacy in his house." *Miller v. United States*, 357 U.S. 301, 313 (1958). See also *Ker v. California*, 374 U.S. 23, 49 (1963) (dissenting opinion); *State v. Covington*, 273 N.C. 690, 697, 161 S.E.2d 140, 145 (1968); Note, 80 YALE L.J., *supra* note 279, at 141.

<sup>281</sup>*Sabbath v. United States*, 391 U.S. 585, 591 (1968) ("[A]nother facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there."); *Ker v. California*, 374 U.S. 23, 57-58 (1963) ("[T]he requirement of awareness also serves to minimize the hazards of the officers' dangerous calling."); *Miller v. United States*, 357 U.S. 301, 313 n.12 (1958) ("[C]ompliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."); *McDonald v. United States*, 335 U.S. 451 (1948) (Jackson & Frankfurter, JJ., concurring). In that case Justice Jackson wrote:

Many homeowners in this crime-beset city doubtless are armed. When a woman sees a man in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun drawn on him might shoot first. Under

It has been argued that the announcement rule does not afford any substantial protection to privacy because once the notice is given, entry must always be permitted:

If the door is locked, he may be able to avoid a broken door by responding to the demand for entry. If he is engaged in private activities, perhaps of a carnal nature, or is otherwise indisposed, he may have time to avoid embarrassment—but not interruption. Or if he is asleep, he will be spared the possible shock of awakening to the sight of a stranger in his home (entry by stealth), or of awakening to the sound of a breaking door.<sup>283</sup>

The surprise character of the entry may not be as great an intrusion upon privacy as the entry itself, but the frightening aspects of the invasion are exacerbated by its forcible or stealthy nature. The recent highly publicized drug raids in which members of a federal drug abuse law enforcement "strike force" reportedly terrorized two innocent families in Collinsville, Illinois with evening "no-knock" searches dramatize that point.<sup>284</sup> The unannounced searches were apparently conducted on the basis of uncorroborated tips, without warrants, and at the wrong houses. But the rude and brutal manner in which they were allegedly carried out constituted an invasion of privacy beyond that accomplished by the fact of the search alone.<sup>285</sup>

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the circumstances of this case, I should not want the task of convincing a jury that it was not murder.

*Id.* at 460-61. *State v. Covington*, 273 N.C. 690, 697, 161 S.E.2d 140, 145 (1968); Siegel, *New York Frisk and Knock-Not Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274, 278 (1968); Note, 80 YALE L.J., *supra* note 279, at 141.

In *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973), fourteen or fifteen plainclothes Charlotte police officers conducting a gambling raid entered through an open rear door without any announcement. As they entered the card room, the police claimed one of them said, "Police, police. Sit down." The defendant, who said he never heard the word "police" mentioned, testified that he heard a noise like a door being kicked down and saw men enter with guns. Thinking a robbery was in progress, he pulled a pistol and said, "hold it." One officer pointed a gun at the defendant and the defendant heard a shot. He then ducked into a bathroom and started shooting, killing one officer. When he heard the officers say they were police, he came out of the bathroom.

After the defendant's conviction for murder was reversed for other reasons by the North Carolina Supreme Court, he was retried and acquitted. *Charlotte Observer*, June 12, 1973, at 1A, col. 1. Superior Court Judge Frank W. Snapp, who presided at the retrial, criticized the police from the bench for failing to identify their authority and purpose before entry, and also for brutal beatings they inflicted afterwards on the suspected gamblers. *Id.* at 1A, col. 1, 6A, col. 1.

<sup>283</sup>Note, 80 YALE L.J., *supra* note 279, at 142.

<sup>284</sup>Sonnenreich & Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 647 (1970).

<sup>285</sup>NEWSWEEK, May 14, 1973, at 45; N.Y. Times, May 2, 1973, at 8, col. 3.

<sup>285</sup>After the raids, an aide to Senator Charles Percy of Illinois told the press that "there

The potential for violence further aggravates the invasion of privacy. A householder is lawfully entitled to defend his home against an unannounced police intrusion, if he is unaware of the authority of the intruders.<sup>286</sup> In such a situation the householder must persuade a jury that he was under a reasonable apprehension of death or serious bodily harm at the hands of the intruding officer and that he did not use excessive force in repelling the intrusion.<sup>287</sup> The householder's right to privacy encompasses a right to security from police search techniques that are unnecessarily fraught with potential for violence.<sup>288</sup>

On the other hand, dispensing with the requirement of notice reduces the time in which occupants might escape, destroy or dispose of evidence, or mount a violent response to the attempted entry.<sup>289</sup> The time saved will usually be less than a minute, the time it takes to make the announcement and allow a reasonable opportunity for the occupants to grant admittance.<sup>290</sup> "The burden of making an express announce-

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appears to be growing Senate support for the view that 'the mere existence' of legal authority for no-knock raids encourages abuse." Asheville Times, July 17, 1973, at 5, col. .

<sup>286</sup>Ker v. California, 374 U.S. 23, 49 (1963) (dissenting opinion).

When a trespasser enters upon a man's premises, makes an assault upon his dwelling and attempts to force an entrance into his house in a manner such as would lead a reasonably prudent man to believe that the intruder intends to commit a felony or to inflict some serious personal injury upon the inmates, a lawful occupant of the dwelling may legally prevent the entry even by the taking of the life of the intruder . . . . The rules governing the right to defend one's *habitation* against *forcible entry by an intruder* are substantially the same as those governing his right to defend himself.

State v. Miller, 267 N.C. 409, 411, 148 S.E.2d 279, 281-82 (1966). See also State v. Baker, 222 N.C. 428, 430, 23 S.E.2d 340, 342 (1942).

This principle has been applied where the intruder was a law enforcement officer and there was evidence that the officer did not give notice of his authority or purpose. State v. Sparrow, 276 N.C. 499, 512, 173 S.E.2d 897, 905-06 (1970), *cert. denied*, 403 U.S. 940 (1971); State v. Heckstall, 268 N.C. 208, 209, 150 S.E.2d 213, 215 (1966). See also Starr v. United States, 153 U.S. 614 (1894); Booth v. State, 22 Ala. App. 508, 177 So. 492 (1928); State v. Lowman, 134 S.C. 485, 133 S.E. 457 (1926); Farmer v. Sellers, 89 S.C. 492, 72 S.E. 224 (1911); Lauder v. State, 119 Tex. Crim. 438, 44 S.W.2d 719 (1931).

<sup>287</sup>State v. Miller, 267 N.C. 409, 411, 148 S.E.2d 279, 281 (1966); State v. Baker, 222 N.C. 428, 431, 23 S.E.2d 340, 342 (1942); Morris v. Commonwealth, 411 S.W.2d 678, 680 (Ky. 1967).

<sup>288</sup>The right to privacy also includes restrictions on the scope of a search once one is lawfully undertaken. Cupp v. Murphy, 93 S. Ct. 2000, 2003-05 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1, 17-18, 25-26, 29-30 (1968).

<sup>289</sup>E.g., United States v. Garcia Mendez, 437 F.2d 85, 86 (5th Cir. 1971). The officers surrounded the defendant's house and through his bedroom window saw him asleep with an automatic revolver inches from his side. One officer maintained a watch on the defendant, while the others broke in. The court held that the failure to give notice was justified by the peril to the officers caused by the drawn weapon.

<sup>290</sup>"The length of time an officer must wait before breaking in to serve a valid warrant must



ment is certainly slight."<sup>291</sup> There are, however, circumstances in which the Constitution and the common law recognize the need for unannounced entries and permit searching or arresting officers the advantage of surprise.

In *Ker v. California*<sup>292</sup> the United States Supreme Court had its only opportunity to discuss "no-knock" on a constitutional level. The issue in *Ker* was whether the facts established a constitutionally acceptable exception to the notice requirement. The Court implied that ordinarily failure to comply with the notice requirement would violate the fourth amendment's proscription of "unreasonable searches and seizures,"<sup>293</sup> but held that the flexibility in the reasonableness standard permitted dispensing with the notice requirement under the facts in that case.<sup>294</sup>

In *Ker*, police officers observed one of the defendants under circumstances giving them probable cause to believe that he had just been involved in a marijuana transaction. "Soon thereafter Ker drove away and the officers followed him but lost him when he made a U-turn in the middle of the block and drove in the opposite direction."<sup>295</sup> The officers proceeded to the defendant's apartment building after obtaining the address through motor vehicle registration records and saw the car that they had been following in the building parking lot.

The officers obtained a passkey from the manager. "Officer Berman unlocked and opened the door, proceeding quietly, he testified, in order to prevent the destruction of evidence. . . ."<sup>296</sup> The officers found both defendants and also marijuana in the apartment. A plurality<sup>297</sup> of

be reasonable under the circumstances as they appear to him." *State v. Watson*, 19 N.C. App. 160, 166, 198 S.E.2d 185, 189 (1973).

<sup>291</sup>*Miller v. United States*, 357 U.S. 301, 309 (1958).

<sup>292</sup>374 U.S. 23 (1963).

<sup>293</sup>*Id.* at 37-38. The dissenting justices explicitly held that "the Fourth Amendment is violated by an unannounced police intrusion into a private home" except under narrow exceptions. *Id.* at 47.

<sup>294</sup>*Id.* at 38-41.

<sup>295</sup>*Id.* at 27.

<sup>296</sup>*Id.* at 28. See also *State v. Watson*, 19 N.C. App. 160, 166, 198 S.E.2d 185, 188-89 (1973).

In *Ker* as in *Watson* the officers were worried that the narcotics would be flushed down toilets. The concern of narcotics officers with bathroom disposal of contraband led political humor columnist Art Buchwald to propose "that the 'no-knock' law be stricken from the books and replaced with a 'no-flush' law"; flushing a toilet during a raid would constitute prima-facie evidence of guilt. *Washington Post*, Nov. 24, 1970, § B at 1, col. 1.

<sup>297</sup>On this issue, Justice Clark wrote a plurality opinion, in which Justices Black, Stewart and White joined. Justice Harlan wrote a separate concurring opinion. A dissenting opinion was filed by Justice Brennan with the concurrence of Chief Justice Warren and Justices Douglas and Goldberg.

the Supreme Court held that the exigent circumstances in this case created an exception to the notice requirement.<sup>298</sup>

Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.<sup>299</sup>

The Court therefore approved as a sufficient reason for dispensing with the notice requirement a reasonable concern for the destruction of evidence. Moreover, the Court necessarily held that a police officer may rely on this reason without prior judicial approval, at least where he is undertaking a warrantless arrest or search.

While the plurality was content merely to approve this reason for not giving notice, the dissenters described three circumstances in which an unannounced police intrusion into a private home would win their approval and said that the courts should refuse to recognize exceptions in other situations.<sup>300</sup> Their list of three is as follows:

(1) where the persons within already know of the officers' authority and purpose,<sup>301</sup> or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.<sup>302</sup>

Common to both opinions was an acceptance of a reasonably per-

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<sup>298</sup>374 U.S. at 39-41.

<sup>299</sup>*Id.* at 40. In a footnote the plurality acknowledged that:

[a] search of the record with the aid of hindsight may lend some support to the conclusion that, contra the reasonable belief of the officers, petitioners may not have been prepared for an imminent visit from the police. It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may concern ourselves only with what the officers had reason to believe *at the time of their entry*.

*Id.* at 40-41 n.12.

<sup>300</sup>*Id.* at 55.

<sup>301</sup>Some federal courts have developed a practical view of the "useless gesture" exception to excuse the failure of officers to announce their purpose when they have announced their identity in circumstances suggesting that their purpose is known. See *United States v. Wylie*, 462 F.2d 1178, 1186, 1188-89 (D.C. Cir. 1972); *United States v. Davis*, 461 F.2d 1026, 1034 (3d Cir. 1972); *United States v. Singleton*, 439 F.2d 381, 385-86 (3d Cir. 1971); *Bosley v. United States*, 426 F.2d 1257, 1263 (D.C. Cir. 1970). *But see United States ex rel. Ametrane v. Gable*, 401 F.2d 765, 766 (3d Cir. 1968).

<sup>302</sup>374 U.S. at 47. The dissenters elaborated as follows: "[I]n the absence of a showing of awareness by the occupants of the officers' presence and purpose, 'loud noises' or 'running' within would amount, ordinarily, at least, only to ambiguous conduct." *Id.* at 57.

ceived need to protect against the destruction of evidence as a sufficient reason for "no-knock." The opinions diverged only on the basis of the standard for establishing that need.<sup>303</sup> Significantly, neither opinion was satisfied that notice could be automatically dispensed with just because marijuana—readily disposable contraband—was the object of the search.<sup>304</sup> Both required additional evidence. The plurality accepted evidence of a possibly routine maneuver to elude anyone who might be following even though engaged in at a place remote from the apartment to be searched. Applying a stricter proof standard, the dissent demanded at least a reasonable basis to believe that the persons within the apartment had knowledge of the presence of someone outside, and were either aware of the authority and purpose of those outside or were seen or heard by the officers to be engaging in activity capable of accomplishing the destruction of the evidence.

Current North Carolina law is consistent with the basic common law and constitutional rule that

[o]rdinarily, a police officer, absent invitation or permission, may not enter a private home to make an arrest or otherwise seize a person unless he first gives notice of his authority and purpose and makes a demand for and is refused entry. Without special or emergency circumstances, an entry by an officer which does not comply with these requirements is illegal.<sup>305</sup>

This principle applies to entries to conduct a search as well as to effect an arrest.<sup>306</sup> It apparently does not apply to entry through an open door<sup>307</sup> although the court of appeals has accepted the federal rule "that the question of whether there was an actual breaking of the door is not determinative of the issue."<sup>308</sup> North Carolina cases have implied that one reason that might justify an unannounced intrusion is to prevent the escape of a suspect,<sup>309</sup> but they have made clear that this reason can

<sup>303</sup>See Note, 80 YALE L.J., *supra* note 279, at 148.

<sup>304</sup>See *Ker v. California*, 374 U.S. 23, 38, 61-62 (1963).

<sup>305</sup>*State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), *cert. denied*, 403 U.S. 940 (1971). The decision was based primarily on N.C. GEN. STAT. § 15-44 (1965), which authorizes forcible entry to make an arrest for a felony or other dangerous crime "admittance having been demanded and denied."

<sup>306</sup>*State v. Howard*, 274 N.C. 188, 202, 162 S.E.2d 495, 505-06 (1968); *State v. Heckstall*, 268 N.C. 208, 209, 150 S.E.2d 213, 214-15 (1966); *State v. Shue*, 16 N.C. App. 696, 701, 193 S.E.2d 481, 484-85 (1972); *cf. Miller v. United States*, 357 U.S. 301, 306 (1958).

<sup>307</sup>*State v. Howard*, 274 N.C. 188, 202, 162 S.E.2d 495.

<sup>308</sup>*State v. Turnbull*, 16 N.C. App. 542, 544, 192 S.E.2d 689, 691 (1972).

<sup>309</sup>*State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), *cert. denied*, 403 U.S. 940 (1971); *State v. Covington*, 273 N.C. 690, 697, 161 S.E.2d 140, 145 (1968).

only be used if there is particular information establishing a risk that notice would prompt an escape that could not easily be thwarted by the officers.<sup>310</sup> A recent court of appeals opinion stated that the notice requirement may be excused "under special and emergency conditions when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruction of [sic] disposition of critical evidence."<sup>311</sup> North Carolina recognizes that where notice would be a useless gesture because the circumstances warrant a belief that the occupants of the house already know the authority and purpose of the officers, an entry may be made without giving notice. Thus sometimes lack of notice of authority and purpose is forgiven if there is at least notice by the officers of their presence and a demand for entry.<sup>312</sup>

The Commission's proposal in this regard is contained in proposed sections 15A-249 and 15A-251:<sup>313</sup>

Except as provided in G.S. § 15A-250, an officer executing a search warrant<sup>314</sup> must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give notice in a manner likely to be heard by anyone who is present.<sup>315</sup>

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<sup>310</sup>State v. Sparrow, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), *cert. denied*, 403 U.S. 940 (1971); State v. Covington, 273 N.C. 690, 697, 161 S.E.2d 140, 145 (1968).

<sup>311</sup>State v. Watson, 19 N.C. App. 160, 165, 198 S.E.2d 185, 188 (1973).

<sup>312</sup>State v. Hoffman, 281 N.C. 727, 730-31, 736, 190 S.E.2d 842, 845-46, 848 (1972); State v. Harvey, 281 N.C. 1, 11, 187 S.E.2d 706, 713 (1972); State v. Shue, 16 N.C. App. 696, 701, 193 S.E.2d 481, 484-85 (1972); State v. Basden, 8 N.C. App. 401, 406, 174 S.E.2d 613, 616 (1970). In State v. Turnbull, 16 N.C. App. 542, 545, 192 S.E.2d 689, 692 (1972), the court of appeals upheld a search in which the officer identified himself and his authority as he stepped into the house through a slightly ajar door. The court ruled that the trial court's findings supported the validity of the search but did not say what those findings were. *See also* State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973).

<sup>313</sup>The recommendation of the Model Code of Pre-Arrest Procedure is stated in less specific terms. It would authorize dispensing with the notice requirement if compliance "would endanger the successful execution of the warrant with all practicable safety." MODEL CODE § SS 220.3(2), (3).

<sup>314</sup>No provision is made for a notice requirement in the case of warrantless searches. Undoubtedly that omission represents a judgment by the Commission that all such searches may be lawfully conducted only under exigent circumstances when the subjects of the search will likely be aware of the authority and purpose of the officers as a result of the facts creating the exigency, and that such searches will rarely involve an entry into a building. *But see* Ker v. California, 374 U.S. 23 (1963); State v. Covington, 273 N.C. 690, 697, 161 S.E.2d 140, 145 (1968).

<sup>315</sup>Because this language may be misunderstood as authorizing an unannounced entry if the

An officer may execute a search warrant without the prior notice required by G.S. § 15A-249 if:

(1) The officer has probable cause to believe that the notice required by G.S. § 15A-249 would endanger the life or safety of any person; or

(2) An order authorizing execution without notice has been obtained from any judge.<sup>316</sup> The application by any officer for such an order must include a statement of facts establishing probable cause to believe that the notice required by G.S. § 15A-249 is likely to endanger the life or safety of any person or the notice required by G.S. § 15A-249 is likely to result in the disposal of items subject to seizure. If the judge finds that there is probable cause to believe that either of these conditions is met, he may issue an order permitting execution of the warrant without notice. The fact that the items subject to seizure are easily destructible or disposable does not in itself constitute an independently sufficient basis for concluding that there is probable cause to believe that the giving of notice will result in destruction or disposal. The order permitting execution without notice and the application for such order must be attached to the search warrant, and copies of the order and application must be attached to all copies of the search warrant and warrant application.<sup>317</sup>

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officer believes the premises are unoccupied, it should be clarified, perhaps by striking the words, "If it is unclear whether anyone is present at the premises to be searched . . ." If the premises are in fact empty, none of the reasons for dispensing with notice are present. Therefore the officer should announce his authority and purpose in case he is mistaken and someone is inside the premises to be searched.

<sup>316</sup>Proposed § 15A-243, basically paralleling existing law as established in N.C. GEN. STAT. § 15-25(a) (Supp. 1971) and N.C. GEN. STAT. §§ 7A-180, -181, -273, -291 (1969), provides that the following officials may issue search warrants: a Justice of the Supreme Court (warrant valid throughout the state); a judge of the court of appeals or of the superior court (warrant valid throughout the state); a judge of the district court (warrant valid throughout the district); a clerk (warrant valid throughout the county); and a magistrate (warrant valid throughout the county). By contrast, only a "judge" may issue an order permitting execution of a warrant without notice. Proposed § 15A-250(2). The Commission explained that "[t]his provision is designed to prevent such requests from becoming part of standard form warrant applications." COMMENTS 197.

In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the United States Supreme Court upheld the authority of municipal clerks employed by the judicial branch of the city government to issue arrest warrants for persons charged with ordinance violations. The Court held that an issuing official "must meet two tests. He must be neutral and detached and he must be capable of determining whether probable cause exists for the requested arrest or search." *Id.* at 350. The warrant authority need not reside exclusively in a lawyer or a judge. *Id.* at 349. But, "it requires severance and disengagement from activities of law enforcement." *Id.* at 350.

The recommendation of the Model Code of Pre-Arrest Procedure would not require advance judicial approval in any case. MODEL CODE § SS 220.3(2), (3).

<sup>317</sup>Proposed §§ 15A-249, -250. Proposed § 15A-251 then provides:

An officer may break and enter any premises or vehicle when necessary to the

This proposal was the subject of newspaper editorial controversy when he Commission's proposals were publicly released.<sup>318</sup> The controversy has been highly exaggerated, probably because the subject has been widely misunderstood and because of the national controversy that attended the "no-knock" provisions in the District of Columbia Court Reform and Criminal Procedure Act of 1970<sup>319</sup> and the Federal Controlled Substances Act of 1970.<sup>320</sup>

"No-knock" does not alter the basic search and seizure law defining the constitutionally required circumstances in which a police intrusion upon a person's reasonable expectation of privacy may be author-

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execution of the warrant if:

- (1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or
- (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person; or
- (3) An order has been obtained pursuant to G.S. 15A-250 permitting execution of the search warrant without notice.

The Commission's proposal therefore requires notice in advance of entry regardless of whether the entry requires a breaking or the use of force. The United States Supreme Court has interpreted federal statutes requiring notice to apply even if the officers only open a closed but unlocked door, *Sabbath v. United States*, 391 U.S. 585, 586, 589, 590 (1968), or force open a chain lock on a partially open door. *Miller v. United States*, 357 U.S. 301, 303, 313 (1958). On the other hand, an officer obtaining entry by ruse may not be required to announce his authority and purpose. *Sabbath v. United States*, *supra* at 590 n.7; *United States v. Beale*, 445 F.2d 977, 978 (5th Cir. 1971), *cert. denied*, 404 U.S. 1026 (1972) (After a hotel manager, at the request of police officers, knocked on the defendant's door and announced only his own presence, the defendant opened the door and the officers entered and arrested him.); *United States v. Syler*, 430 F.2d 68, 70 (7th Cir. 1970) (At the door of the defendant's house, an officer called out "gas man" and, as the defendant began to open the door, pulled the door open and entered); *Ponce v. Craven*, 409 F.2d 621, 626 (9th Cir. 1969) (Officers asked a hotel manager to announce a call for the girl sharing a room with the defendant, and when she opened the door, the officers immediately entered and arrested the defendant). These decisions suggest that a requirement that the officers give notice of their authority and purpose is not violated if they give notice of a false identity and suggest a false purpose. While the ruse might mitigate the potential for violence, in some circumstances, Chief Judge Tuttle argued in dissent in *Beale* that such use of deceit is inconsistent with the reverence for privacy which is the basic principle of the fourth amendment. *United States v. Beale*, *supra* at 978-79. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court held that flight of the suspect did not justify an unannounced entry in the ambiguous circumstances of that case: "Agent Wong did eventually disclose that he was a narcotics officer. However, he affirmatively misrepresented his mission at the outset, by stating that he had come for laundry and dry cleaning. And before Toy fled the officer never adequately dispelled the misimpression engendered by his own ruse." *Id.* at 482-83.

<sup>318</sup>Charlotte Observer, Feb. 8, 1973, § A at 18, col. 1; Greensboro Daily News, Feb. 6, 1973, § A at 6, col. 1; News & Observer, Feb. 6, 1973, at 4, col. 1.

<sup>319</sup>D.C. CODE ANN. § 23-591 (1973).

<sup>320</sup>21 U.S.C. § 879(b) (1970).

ized. It only provides that under certain conditions a law enforcement officer, who is otherwise lawfully entitled to embark upon such an intrusion, may do so without giving advance notice of his authority or purpose. Thus, it does not serve as an independent basis for an invasion of privacy; it does not excuse a failure of probable cause or justify the absence of a warrant. It operates only with regard to the method of entry when the right to enter is established under other principles.

The discussion of "no-knock" authority should focus on the nature of the exceptions to the notice requirement and the standard of acceptable evidence to support a conclusion that an exceptional circumstance is present. The Commission's proposal requires notice of identity and purpose before execution of a search warrant except in two situations: one, when the notice might endanger the life of the officer or some other person, and, two, when the notice might result in the destruction or disposal of evidence. The notice may be dispensed with if a judge finds "probable cause" that either situation "is likely". Such a determination would be based upon an application including a statement of facts filed by an officer. Notice may be dispensed with without prior judicial approval only if an officer has probable cause that notice would endanger life or safety. Unless a judge so orders, no provision is made for an officer to dispense with the notice requirement on the ground that compliance is likely to alert the suspect to destruction or disposal of the evidence. In this regard the Commission's proposal considerably restricts the circumstances under which "no-knock" may be justified for the purpose of preventing the destruction of evidence from that which has been permitted in other jurisdictions. The possibility of "no-knock" being utilized by police officers because they hear scurrying or flushing noises on approaching a house is thereby eliminated. Such noises are ordinarily ambiguous without a showing that the occupants are aware that police officers lurk outside, a showing best accomplished by their giving notice to that effect.<sup>321</sup>

In addition the proposal avoids the controversial aspect of the federal laws. Those laws provide for advance judicial authorization of a "no-knock" without limits on the quality of evidence on which the judge must base his decision. They are arguably subject to an interpretation that they authorize forcible, unannounced entries on a blanket basis in all cases in which the evidence is of a kind that is readily disposable,

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<sup>321</sup>Ker v. California, 374 U.S. 23, 56, 60-61 (1963) (dissenting opinion); Wong Sun v. United States, 371 U.S. 471, 482 (1963); Miller v. United States, 357 U.S. 301, 311 (1958).

for example, in all narcotics or gambling offenses. The Commission would prohibit that practice. Its proposal specifies that the officer may not ask a judge to issue a "no-knock" order in anticipation that notice might stimulate destruction activity simply because the evidence sought is readily destructible. More specific evidence is required, and the Commission in its report suggested as examples of such evidence "information that quickly disposable 'flash' paper is being used in a particular gambling operation, or that specific plans have been made for quick disposal of narcotics."<sup>322</sup> As the California Supreme Court has explained:

Under the Fourth Amendment, a specific showing must always be made to justify any police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard—the requirement of particularity—would be lost. Just as the police must have sufficient particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.<sup>323</sup>

Although the Commission's proposal is narrowly drawn, the North

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<sup>322</sup>COMMENTS 197. In *People v. Dumas*, 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973), the California Supreme Court upheld an unannounced entry to serve a search warrant based on a reliable informer's warning "that defendant possessed several firearms in his apartment and that he invariably answered the door with a loaded gun in his hand." *Id.* at \_\_\_\_, 512 P.2d at 1212, 109 Cal. Rptr. at 308. In *Parsley v. Superior Court*, \_\_ Cal. 3d \_\_\_\_, 513 P.2d 611, 109 Cal. Rptr. 563 (1973), that court interpreted its no-knock statute to forbid advance judicial authorization of unannounced entries. The court said:

While a search warrant must necessarily rest upon previously obtained information, unannounced entry is excused only on the basis of exigent circumstances existing at the time an officer approaches a site to make an arrest or execute a warrant. Facts existing at the time of obtaining a warrant may no longer exist at the time of entry. Such an emergency, therefore, can be judged only in light of circumstances of which the officer is aware at the latter moment. Previously obtained information may at that time be taken into account in determining the necessity of dispensing with ordinary announcements . . . but a more significant factor in this decision is perception and knowledge the officer acquires on the scene immediately prior to effecting entry.

*Id.* at \_\_\_\_, 513 P.2d at 614, 109 Cal. Rptr. at 566. A dissenting justice argued that that reasoning "is equally true of the facts justifying issuance of the warrant itself as it is of the facts justifying excusal of the announcement requirement." *Id.* at \_\_\_\_, 513 P.2d at 617, 109 Cal. Rptr. at 569.

<sup>323</sup>*People v. Gastelo*, 67 Cal. 2d 586, 588-89, 432 P.2d 706, 708, 63 Cal. Rptr. 10, 12, (1967). *See also Jones v. United States*, 362 U.S. 257, 272 (1960); *Meyer v. United States*, 386 F.2d 715, 718 (9th Cir. 1967).

The United States Supreme Court has said: "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968).



Carolina Police Executives Association would like it to be narrower still. The Association has advised the legislature that the “‘preventing destruction of evidence’ exception . . . is inherently dangerous and beyond our immediate needs in all but the most extreme situations.”<sup>324</sup> It therefore recommended that police officers be permitted to enter unannounced only when “immediate entry is necessary to prevent danger to life,”<sup>325</sup> defined as existing in two situations: when “(1) [a] criminal offense jeopardizing the life or safety of any person is being committed on the premises; or (2) [t]he giving of such notice of authority and demand of entry would jeopardize the life and safety of the officer.”<sup>326</sup> Because of that police assessment of the situation in North Carolina, the Commission’s proposal for allowing a “destruction of evidence” exception would incur serious dangers without serving any purpose. For that reason, it should be deleted. The rest of the proposal, however, permitting an unannounced entry when notice would provoke rather than prevent danger to life, deserves to be retained with the addition of a specificity proviso.

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<sup>324</sup>LEGISLATIVE PROGRAM OF THE NORTH CAROLINA POLICE EXECUTIVES ASSOCIATION 4 (1972).

<sup>325</sup>*Id.*

<sup>326</sup>*Id.* at 12.