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WELL-DELINEATED EXCEPTIONS, CLAIMS OF SHAM, AND FOURFOLD PROBABLE CAUSE

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INTRODUCTION

For nearly four decades specialized legal education for prosecutors, criminal defense attorneys and police officers has been central to Fred Inbau's efforts to improve criminal justice.[1] My role as an instructor in Inbau's training courses and, at his urging, in other programs and seminars, has taught me that perplexing problems of theory can quickly surface during attempts to organize and present the law in a manner which will serve the everyday needs of law enforcement officers and lawyers.[2] The unifying element in this essay's treatment of three fourth amendment topics is merely that the ideas presented were generated by my participation in Professor Inbau's programs.[3]

Lecturers foolish enough to tackle the entire subject of warrantless searches and seizures—the author included—often follow a common pattern. They begin with a sentiment borrowed from Supreme Court opinions: fourth amendment warrantless intrusions are per se unreasonable subject only to a few specially established, well-delineated exceptions.[4] They then list and discuss the various exceptions. My use of this approach, as discussed in Part I of this article, has convinced me that the well-delineated exception proposition not only fails to reflect present judicial practice but embodies bad theory as well.

Part II resulted from reflections upon my typical conclusion to a lecture to law enforcement officers: a vague, too pious admonition against police "misuse" of the exceptions to the warrant requirement. My uneasiness with pulpit-like denunciation of police sham led me to reevaluate various claims of sham in fourth amendment litigation and to assess different kinds of judicial responses to such claims.

Part III offers for consideration the "fourfold probable cause" concept, an organizational tool which I have found helpful in my presentations. After explaining the concept, the article argues that this analysis will aid our understanding of the legal requirements for search warrants and for searches under many of the exceptions to the warrant requirement. It will also reveal several fourth amendment issues

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[1] Inbau, for instance, founded and continues to direct the Northwestern University Law School Short Course for Prosecuting Attorneys, now in its thirty-second year, and the Northwestern University Short Course for Criminal Defense Attorneys, now in its twentieth year. Each summer approximately eight hundred attorneys attend these programs. Professor Inbau's emphasis upon training is consonant with what I view as a major theme of his life's work: a dedication to the improvement of the reliability of the fact-finding process in criminal litigation. Almost everything he has done in his career has manifested this same dedication: his work on scientific crime analysis, first at what is now the Chicago Police Crime Laboratory and later through publications such as A. MOENSSENS, R. MOSES & F. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (1973); his concern for eliminating fallible eye-witness identifications, *see* Inbau, *Book Review*, 57 J. CRIM. L.C. & P.S. 376 (1966); his emphasis upon interrogation methods which would prompt only the guilty to confess, *see* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 218–19 (2d ed. 1967); and his efforts to improve polygraph techniques. *See* J. REID & F. INBAU, TRUTH AND DECEPTION (2d ed. 1977).

[2] Inbau often has observed that interaction with attorneys is beneficial to law students and law teachers. He no doubt agrees with the observation that the law school of every great university should have several truly educated faculty members so as to justify its place in a university, *see* Kalven, *For M.P.S.*, 33 U. CHI. L. REV. 193, 194 (1966); but he also believes that every law school, including "national" law schools, should have on its faculty several persons who, by virtue of experience, can call themselves lawyers. On occasion he has been frankly disappointed by the devaluation of experience in the faculty-hiring process.

[3] Some of these ideas, although not developed, have been reflected in unpublished written materials distributed in connection with my lectures at the Northwestern Short Courses. Others are scattered through a handbook prepared in connection with a seminar for Illinois lawyers: J. HADDAD, ARREST, SEARCH AND SEIZURE (Ill. Inst. for Continuing Legal Education 1976).

[4] Vale v. Louisiana, 399 U.S. 30, 34 (1970): Chimel v. California, 395 U.S. 752, 763 (1969); Katz v. United States, 389 U.S. 347, 357 (1967).

which heretofore have been largely unexplored.

I. The Well-Delineated Exceptions Principle

A period of fourth amendment doctrinal development which increasingly emphasized the preference for search warrants culminated in 1967 when the Supreme Court proclaimed in *Katz v. United States*[5] that "searches conducted outside the judicial process, without prior judicial approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well delineated exceptions."[6] Since then a thousand state and federal reviewing court opinions have parroted the declaration.[7] Perhaps from any perspective, but certainly from the vantage point of a surveyor of the entire field of warrantless searches, the "well-delineated exceptions" principle appears at variance with reality. Exceptions to the warrant requirement are many, not few. Some of the most important, far from being specially established, have grown like weeds with barely any Supreme Court attention. Some recognized exceptions are not well delineated even in their broad outlines, much less in their fine details. Of greater significance to fourth amendment theory, the Court has departed from its stated principle by refusing to invalidate a search merely because it did not fit within one of the recognized exceptions. The Court's deviation from *Katz* ought not be lamented, however. The variance is more consonant with sound fourth amendment theory than is the well-delineated exception principle. What may be more difficult to defend on theoretical grounds is the Court's inversion of the rule, in accordance with which the Supreme Court has upheld as per se reasonable all searches falling within one of the recognized exceptions, without regard to all the circumstances of an individual case.

The Myth of the Well-Delineated Exception

Only through a disingenuous use of multiple sub-categories can distinct varieties of valid warrantless searches be reduced to few in number.[8] There are searches incident to arrest[9] and frisks following *Terry* stops.[10] There are jailhouse shakedowns[11] and inventory inspections.[12] There are warrantless searches authorized by consent[13] and warrantless searches authorized by grand juries.[14] At international borders there are "ordinary" searches and strip searches and body-cavity searches, each governed by different rules.[15] There are fixed-checkpoint searches[16] and roving-patrol searches.[17] There are emergency searches to protect health and life,[18] emergency searches to prevent the destruction of evidence,[19] and

[5] 389 U.S. 347 (1967).

[6] *Id.* at 357. The present article does not enter the debate over the extent to which the emphasis upon the need to utilize search warrants marks a fundamental departure from the concerns of the drafters of the fourth amendment. *Compare* T. Taylor, Two Studies in Constitutional Interpretation 21-43 (1969), *with* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 398-400, 410-12 (1974) [hereinafter cited as Amsterdam]. True to history or not, long before *Katz* the emphasis upon the search warrant requirement had become great. *See, e.g.*, Jones v. United States, 357 U.S. 493, 499 (1958), where the Court claimed, "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn. . . ."

[7] The figure of 1000 is a very rough estimate derived with the help of a fellow who was demonstrating computerized legal research.

[8] The listing which follows excludes warrantless seizures where no prior search took place (*e.g.*, certain plain view seizures, arrests, and stops), although the well-delineated exceptions principle sometimes is said to apply to seizures as well as to searches. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 464, 473 (1971).

[9] United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

[10] Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

[11] United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973).

[12] South Dakota v. Opperman, 428 U.S. 364 (1976).

[13] United States v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 U.S. 731 (1969).

[14] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 9 (1973).

[15] Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (dictum); United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974); Klein v. United States, 472 F.2d 847 (9th Cir. 1973); United States v. Shields, 453 F.2d 1235 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972).

[16] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[17] United States v. Ortiz, 422 U.S. 891 (1975).

[18] Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); People v. Smith, 47 Ill. 2d 161, 265 N.E.2d 139 (1970). *See also* Cady v. Dombrowski, 413 U.S. 433 (1973).

[19] Schmerber v. California, 384 U.S. 757 (1966); People v. Clark, 547 P.2d 267 (Colo. App. 1975).

emergency searches in quest of fleeing felons.[20] There are warrantless searches of open fields[21] and of vehicles stopped on open highways,[22] of probationers[23] and of parolees,[24] at courthouse doors[25] and at airport gates.[26] Courts have sanctioned warrantless searches and inspections under dozens of different regulatory schemes.[27] Additionally, whatever was true in the days of Pitt the Elder,[28] the poorest man in his ruined tenement may be required to permit government agents to enter for a caseworker inspection or under any one of a half-dozen other judicially-approved theories.[29]

Although there are many recognized exceptions to the warrant requirement, some of those most likely to affect our daily lives have not been "specially established" either at common law or by the United States Supreme Court. Citizens returning to this country may be searched at international borders or their functional equivalents under doctrines which the Supreme Court has never considered.[30] Nor has the Court ever considered the several kinds of warrantless searches at airports,[31] by now a familiar part of American life. In a single day a lawyer may have his person or effects subjected to a warrantless search at the entrance to a federal office building, the entrance to a county jail, and the entrance to a local court—all under exceptions to the warrant requirement which have never been specially established by the United States Supreme Court. Over the years doctrines have evolved in lower courts sanctioning the warrantless searches of lockers which contain the possessions of school children[32] and of soldiers,[33] of postal employees[34] and of jail guards.[35] Some lower courts have recently recognized a doctrine which probably is unfamiliar to most readers, the

[20] Warden v. Hayden, 387 U.S. 294 (1967).

[21] *See, e.g.,* United States *ex rel.* Saiken v. Bensinger, 489 F.2d 865 (7th Cir. 1973), *cert. denied,* 417 U.S. 910 (1974); Conrad v. State, 63 Wis 2d 616, 218 N.W.2d 252 (1974), which both involved extensive searches of fields. *See also* Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974); Hester v. United States, 265 U.S. 57 (1924).

[22] Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

[23] People v. Chinnici, 51 Misc. 2d 570, 273 N.Y.S.2d 538 (1966).

[24] United States *ex rel.* Santos v. New York State Board of Parole, 441 F.2d 1216 (2d Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972).

[25] Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).

[26] United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Epperson, 454 F.2d 769 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972).

[27] *See, e.g.,* United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); People v. Palkes, 52 Ill. 2d 472, 288 N.E.2d 469 (1972), *appeal dismissed,* 411 U.S. 923 (1973).

[28] Even a prosecutor lecturing other prosecutors, so as to set a lofty tone, sometimes begins with the familiar quotation from William Pitt (Earl of Chatham), the history of which is treated in E. FISHER, SEARCH AND SEIZURE 3 n.7 (1970):

> Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut, the wind may whistle around it, the rain may enter it, but the King cannot. . . . The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.

The lecturer's tone seem somewhat less noble at the place where he explains to his fellow prosecutors how a judge might be convinced to accept a life-health emergency theory if the officer entered the home amidst a storm like that described by Pitt. Some lectures would best be entitled, "Eight Ways the King Can Enter."

[29] Wyman v. James, 400 U.S. 309 (1971). Besides the welfare-home visit theory, some of the other theories justifying a warrantless entry into a home include entry-to-arrest [under emergency or perhaps non-emergency circumstances, *compare* People v. Johnson, 45 Ill. 2d 283, 259 N.E.2d 57, *cert. denied,* 407 U.S. 914 (1970), *with* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970)]; entry to prevent the destruction of evidence, see note 37 *infra*; and entry to protect life or health, *see* People v. Brooks, 7 Ill. App. 3d 767, 289 N.E.2d 207 (1972).

[30] The Supreme Court in Carroll v. United States, 267 U.S. 132, 154 (1925), and in Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), has made approving references to border searches. Never, however, has it considered what limits must be placed upon such searches. Special rules for strip-searches and body-cavity searches have been developed by lower courts with no Supreme Court guidance. See cases cited in note 15 *supra.*

[31] Airport searches are justified under a number of distinct theories. *See* Note, *The Constitutionality of Airport Searches,* 72 MICH. L. REV. 128 (1973). Thus, Supreme Court implied-consent decisions treating other regulatory schemes cannot be said to "establish" the scope and limitations of airport searches.

[32] *In re* Christopher W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973).

[33] *See* United States v. Roberts, 25 U.S.C.M.A. 39 (1976).

[34] United States v. Bunkers, 521 F.2d 1217 (9th Cir.), *cert. denied,* 423 U.S. 989 (1975).

[35] People v. Tidwell, 133 Ill. App. 2d 1, 266 N.E.2d 787 (1971).

"homicide scene exception" to the warrant requirement, even though neither that term nor the concept appears in any Supreme Court fourth amendment opinion.[36]

The Court has left unsettled even in major respects the scope and limitations of certain recognized exceptions. Under what circumstances can the police, without a warrant, enter a home to search for a suspected criminal? What circumstances would justify a warrantless entry to prevent the destruction of evidence? Although the Supreme Court has indicated that both types of warrantless intrusions are sometimes permissible, it has given almost no guidance as to the kind and quantum of data necessary to justify such searches.[37] As to these and other issues, lower courts have been left to debate the dimensions of particular exceptions to the warrant requirement. As a result, a single federal agency may vary its standard operating procedures from federal circuit to federal circuit.[38]

Some persons might argue that judicial poppycock about a few specially established, well-delineated exceptions does no real harm. Perhaps, indeed, the hyperbole serves as a salutary reminder that police officers should not be quick to substitute their opinions about probable cause for the judgment of neutral judicial officers and that trial judges should not be eager to ratify warrantless intrusions. Nevertheless, as even the Supreme Court has recognized implicitly while inverting the per se rule of *Katz*, the well-delineated exceptions principle is at odds with sound fourth amendment theory.

The Inversion of the Per Se Rule

The United States Supreme Court has utilized warrantless search exceptions as guidelines for judging the reasonableness of governmental intrusions, but it has not adhered to the *Katz* declaration that a warrantless search is per se unreasonable if none of the recognized exceptions can accommodate its facts. Two post-*Katz* decisions, *United States v. Edwards*[39] and *Cupp v. Murphy*,[40] demonstrate the truth of this proposition. In *Edwards* the police arrested a burglary suspect and placed him in a jail cell overnight. Ten hours after the arrest, authorities confiscated the arrestee's clothing to have it examined for paint traces which might link Edwards to the alleged crime. The only "well-recognized exception" arguably relevant to the situation was the doctrine of search incident to arrest.[41] That doctrine, however, did not fit the facts of the case because the search had not been substantially contemporeaneous with the arrest. A search ten hours after an arrest is simply not "incident" thereto.[42] A majority of the Court, nevertheless, upheld the search, asserting that the issue was simply whether the "search itself was reasonable."[43] Through a step-by-step analysis of the facts surrounding the search, the Court concluded that what had been done was no more an unreasonable intrusion than would have been permitted *if* the search had occurred incident to the arrest before Edwards was placed in the cell. In dissent, Mr. Justice Stewart, the author of the *Katz* decision, protested that the Court had violated the "well-delineated exceptions" principle by adjudging the intru-

[36] *See, e.g.*, State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971), *vacated sub nom.* Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); People v. Wallace, 31 Cal. App. 3d 865, 107 Cal. Rptr. 659 (1973); State v. Chapman, 250 A.2d 203 (Me. 1969); *contra* People v. Williams, 557 P.2d 399 (Colo. 1976). *See generally* Haddad, *Arrest, Search and Seizure: Six Unexamined Issues in Illinois Law*, 26 DEPAUL L. REV. 492, 505–10 (1977).

[37] In Johnson v. United States, 333 U.S. 10, 14–15 (1948), the Court suggested warrantless entries to prevent the destruction of evidence would be permissible under some circumstances. *Johnson*, however, invalidated a warrantless entry made by officers who before they entered had substantial reason to believe that evidence (opium) was going up in smoke. *Johnson* thus has been read to support both the approval and the disapproval of emergency entries to prevent the destruction of evidence. *See, e.g.*, Thomas v. Parett, 524 F.2d 779 (8th Cir. 1975). Similarly the Court has never determined when something less than hot pursuit will justify entry to arrest. Nor has it decided whether a warrantless search of a building can be made in quest of a suspect if there is less than probable cause to believe that the suspect is within. *See generally* Haddad, *supra* note 36, at 510–14.

[38] Practices of Immigration and Naturalization Service Agents have been altered to conform with the views of particular federal circuits. *See* Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82, 112–19 (1975).

[39] 415 U.S. 800 (1974).

[40] 412 U.S. 291 (1973).

[41] The government conceded that other theories were inapplicable. *See* 415 U.S. at 810 n.2 (Stewart, J., dissenting).

[42] *See* Preston v. United States, 376 U.S. 364, 367 (1964).

[43] 415 U.S. at 807.

sion reasonable in the absence of an applicable exception.[44] Of course Stewart was correct. The Court had violated the *Katz* principle for the very reason which Stewart recognized: the majority had concluded that, under all of the circumstances of the case, the search had not been unreasonable and, therefore, had not violated the fourth amendment.

Stewart himself had departed from the *Katz* principle a year earlier in writing for the majority in *Cupp v. Murphy*.[45] In that case Murphy had voluntarily appeared at the police station for questioning concerning the strangulation of his wife. Over his objection and without a search warrant, the police took scrapings from beneath Murphy's fingernails. They then allowed him to return home, not arresting him until one month later. The majority agreed that the taking of the scrapings had been a search within the meaning of the fourth amendment. It then upheld the intrusion as akin to a search incident to arrest.[46] The facts of the case, of course, did not fall within that exception. Where there is no arrest, there can be no search incident to arrest.[47] The Court, however, without suggesting that any other recognized exception fit the facts, engaged in a general calculation of reasonableness which took into account both the limited nature of the intrusion and the need for swift action before the evidence was destroyed.[48] The Court concluded simply that the officers had not engaged in an unreasonable search within the meaning of the fourth amendment.[49]

Edwards and *Murphy*, and lower court decisions like them,[50] are important to both practice and theory. They demonstrate that the defense has not necessarily triumphed if the prosecution, despite hauling-and-pulling, has failed to fit the facts of a particular search within one of the recognized exceptions. These decisions show that the familiar trial tug-of-war to place the facts inside or outside an exception may be unessential to a judicial determination of reasonableness.[51] *Edwards* and *Murphy* show that Mr. Justice Schaefer of the Supreme Court of Illinois was correct when, not long after *Katz*, he insisted that categories such as search incident to arrest and stop-and-frisk, while "helpful in establishing broad guidelines," do not by themselves place absolute limits upon the authority of law enforcement officers.[52] Finally, these cases demonstrate that adherence to the well-delineated exceptions principle, through a refusal to scrutinize all the facts of a particular search, would lead to intolerable results in some cases: the invalidation of reasonable searches. In *Edwards* and *Murphy* a majority of the Court, quite properly, was unwilling to invoke the exclusionary rule where, viewing all the facts, it concluded that the police officers had acted reasonably. Neither the need to uphold judicial integrity nor the hope to deter police misconduct can justify the exclusion of evidence which has been secured through reasonable police practices. To be true to the rationale of the exclusionary rule, and to adhere to the truism that the first clause of the fourth amendment prohibits only unreasonable searches and seizures, the Court in *Murphy* and *Edwards* was required, at least implicitly, to depart from the bad theory embodied in the well-delineated exceptions principle.

On the other hand, if the exceptions to the warrant requirement are merely guidelines to reasonable conduct, and not by themselves dispositive of fourth amendment claims, it logically follows that the availability of a recognized exception should not end all fourth amend-

[44] *Id.* at 809 (Stewart, J., dissenting).

[45] 412 U.S. 291 (1973).

[46] *Id.* at 295–96.

[47] Lustig v. United States, 338 U.S. 74, 79–80 (1949).

[48] 412 U.S. at 296. Assuming that "evidence emergency" by now constitutes a well-recognized exception, it is not clear that this category fits. Although there was probable cause to arrest Murphy, it is not clear that there was probable cause to believe that an emergency search would yield evidence. Thus *Murphy* was unlike Schmerber v. California, 384 U.S. 757 (1966), an emergency search case where exigent circumstances *plus* search probable cause (or, perhaps, a higher quantum of data) were held to justify a warrantless intrusion against a suspect's person. See text accompanying notes 189–91 *infra*.

[49] 412 U.S. at 296.

[50] *See, e.g.*, People v. Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968); People v. De Vito, 77 Misc. 2d 463, 353 N.Y.S.2d 990 (1974).

[51] This proposition is not as obvious as it may seem to some. Recently in oral argument before a distinguished federal reviewing court, a prosecutor met substantial resistance when he asserted that it was not essential for the court to characterize what had occurred either as an "arrest" or as a mere "stop." Some of the judges insisted that they had to pigeonhole the police conduct before they could evaluate its reasonableness. *Contrast* People v. Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968).

[52] *Id.* at 620, 237 N.E.2d at 462.

ment analysis. As Justice Schaefer has argued, the categories by themselves ought not circumscribe the rights of citizens any more than they should limit official authority.[53] If the search is unreasonable under all the facts, it should not be upheld simply because the facts fit within one of the well-recognized exceptions.

The United States Supreme Court, however, has not been true to this logic. It has never invalidated a warrantless search where the facts fit within one of the recognized exceptions, even where, under all the circumstances, the search appeared unreasonable. Two other post-*Katz* decisions, *Texas v. White*[54] and *United States v. Robinson,*[55] demonstrate this proposition. *White* involved the "automobile exception," which had been recognized over the years[56] and which had recently been reaffirmed in *Chambers v. Maroney*.[57] The rationale for the exception lies in the exigencies associated with mobility.[58] Under this doctrine police officers without a warrant can search a vehicle which has been stopped in transit if they have probable cause to believe that the vehicle contains contraband or evidence of a crime. The search can be made at the scene of the stop or delayed until the car has been transported to the police station or to some other convenient place.[59] If it had not done so earlier, in *Texas v. White* the United States Supreme Court made it clear that the reasonableness of an automobile search does not depend upon an assessment of all the surrounding circumstances. Even in situations where the rationale for the automobile exception is absent, namely exigencies associated with mobility, according to *White* a search under the exception is still proper.[60] All other factors are irrelevant once two elements are present: (1) a vehicle stopped in transit; and (2) search probable cause. After *White* we must assume that a warrantless search of a vehicle is permissible upon search probable cause even if the car is stopped just outside a building which houses both a police station and a court, even if the sole occupant of the vehicle is arrested, and even if a magistrate is available immediately to consider an application for a search warrant.[61]

The Supreme Court in *United States v. Robinson*[62] afforded similar treatment to the doctrine of search incident to arrest, creating another rule of per se reasonableness. The rationale for the search-incident exception rests upon the need to prevent the arrestee from securing a weapon or destroying evidence of the crime. Yet in *Robinson* the Court indicated that where the circumstances surrounding an arrest demonstrate no need to search the arrestee for either purpose, a search incident to arrest is still constitutionally proper. After *Robinson* we must assume that the Court would uphold the search of a rabbi—a pillar of the community—following a minor traffic arrest although a thorough frisk of the rabbi's person had yielded no weapon and although the crime was not of the type which is evidenced by any object which can be concealed on the person. Only a single element—a valid custodial arrest—is necessary to justify a contemporaneous warrantless search of the arrestee's person. All other surrounding circumstances are irrelevant to the fourth amendment determination of reasonableness.

As *Edwards, Murphy, White,* and *Robinson* indicate, the Court has inverted its pledge in *Katz* to invalidate, per se, all warrantless searches falling outside the traditional exceptions. While not adhering to the per se rule of unreasonableness, it has created rules of per se reasonableness. No doubt it has done the latter to serve two kinds of administrative convenience, police and judicial. Under *Texas v. White*, an officer need not weigh the exigencies of each situation to determine whether without a warrant he can search a vehicle stopped on the highway. Nor need an officer, following a valid arrest, make an individual calculation about the possibility that a full search will yield either a weapon or evidence of the crime. Per se rules somewhat simplify the task of the law enforcement officer. Similarly, trial and reviewing courts need not be bogged down by the necessity for making individual determinations of reasonableness.[63]

[53] *Id.*
[54] 423 U.S. 67 (1975).
[55] 414 U.S. 218 (1973).
[56] Carroll v. United States, 267 U.S. 132 (1925).
[57] 399 U.S. 42 (1973).
[58] *Id.* at 48–51.
[59] *Id.* at 47–52.
[60] 423 U.S. at 68.

[61] These, of course, were not the facts of the case, but under the decision's rationale, the warrantless intrusion would have been upheld if these had been the facts.
[62] 414 U.S. 218 (1973).
[63] United States v. Watson, 423 U.S. 411 (1976),

Of course, the well-delineated exception approach described in *Katz*, if adhered to, would also be simpler to administer than an approach which permits law enforcement to point to all the circumstances of a search in defending against a fourth amendment claim. Thus, it may be difficult to defend the logic of a system in which per se rules are conclusive only where they favor the prosecution. Without insisting that such a defense is impossible,[64] the author merely repeats his conclusion: by creating a system in which law enforcement, but not the citizenry, can rely upon per se rules, the Supreme Court has departed in a most fundamental way from its assertion that searches outside the judicial process are per se unreasonable, subject only to a few specially established, well-delineated exceptions.

II. Claims of Sham

Criminal defense attorneys frequently allege potential or actual police abuse of various exceptions to the search warrant requirement. They complain, for instance, of police efforts to discover criminal evidence through timed arrests,[65] pretext license inspections,[66] and sham inventory searches.[67] Lower courts often have responded by examining the officer's motivation on a case-by-case basis, and by excluding evidence when the officer's true purpose has been deemed bad.[68] The United States Supreme Court on several occasions has reacted to claims of sham by narrowing a warrantless intrusion doctrine, so as to limit the possibility of abuse.[69] In other instances, without modifying the doctrine, the Court has held out the possibility that it, too, would use the "bad motivation" approach in individual cases.[70] On the other hand, Professor Anthony Amsterdam and other well respected fourth amendment experts have recommended an approach which I call "use-exclusion."[71] In the

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also created a rule of per se reasonableness. There the Court held that without regard to the surrounding circumstances (*e.g.*, the presence or absence of facts demonstrating the need for swift action), upon probable cause without a warrant an officer can arrest a suspected felon in a public place. I have not treated this case in the text because it involves a warrantless seizure rather than a warrantless search. See note 8 *supra*. One dissenter in *Watson* argued that the majority's rationale would also lead the Court to create a per se rule of reasonableness for warrantless entries into homes for purpose of arrest. *Id.* at 453–54 (Marshall, J., dissenting). Such a per se rule now exists in Illinois. *See* People v. Johnson, 45 Ill. 2d 283, 259 N.E.2d 57 (1970), *cert. denied*, 407 U.S. 914 (1972).

[64] If at trial the police are given an opportunity to argue that their conduct was reasonable even though it did not fit within any of the recognized exceptions, ordinarily this will pose no problem for citizens in deciding how they should act. If at trial the citizen has an opportunity to argue that the officer's conduct was unreasonable even though it fit within a recognized exception, officers will suffer uncertainty as to how they should conduct themselves. Thus because police officers have a greater need for fourth amendment certainty than do citizens, because officers' conduct varies with the rule of law, it could be argued that per se rules of reasonableness are more justified than per se rules of unreasonableness. Ideally, we should always consider all the circumstances in determining reasonableness, but the need for simplicity points to the use of per se rules of reasonableness more strongly than it does to the use of per se rules of unreasonableness.

Whether this justification is sound or not, it is certain that one who lectures prosecutors can urge them to argue the narrow rule, if a search fits within the rule, and the broad concept of reasonableness if the search does not fit within the rule. Because of the inversion of the per se rule of *Katz*, a lecturer can suggest no analogous approach to defense lawyers.

[65] United States v. Carriger, 541 F.2d 545 (6th Cir. 1976); United States v. Bradley, 455 F.2d 1181 (1st Cir. 1972), *aff'd*, 410 U.S. 605 (1973); People v. Rind, 57 Misc. 2d 349, 292 N.Y.S.2d 769 (1968).

[66] Swift v. State, 131 Ga. App. 231, 206 S.E.2d 51, *rev'd*. 232 Ga. 535, 207 S.E.2d 459 (1974); State v. Maynard, 114 N.H. 525, 323 A.2d 580 (1974); People v. Lilly, 38 Ill. App. 3d 379, 347 N.E.2d 842 (1976).

[67] People v. Martin, 48 App. Div. 2d 213, 368 N.Y.S.2d 342 (1975); State v. Boster, 217 Kan. 618, 539 P.2d 294 (1975).

[68] *See, e.g.*, United States v. Edmons, 432 F.2d 577 (2d Cir. 1970); People v. Martin, 48 App. Div. 2d 213, 368 N.Y.S.2d 342 (1975); Swift v. State, 131 Ga. App. 231, 206 S.E.2d 51, *rev'd*, 207 S.E.2d 459 (1974); State v. Cooley, 229 N.W.2d 755 (Ia. 1975); Brumley v. State, 484 P.2d 554 (Okla. Crim. App. 1971); O'Neil v. State, 194 So. 2d 40 (Fla. App. 1967); People v Nagel, 4 Cal. App. 3d 458, 84 Cal. Rptr. 353 (1970); People v. Rind, 57 Misc. 2d 349, 292 N.Y.S.2d 769 (1968); People v. Harr, 93 Ill. App. 2d 146, 235 N.E.2d 1 (1968); People v. Lilly, 38 Ill. App. 3d 379, 347 N.E.2d 842 (1976).

[69] See text accompanying notes 109–10 *infra*.

[70] See text accompanying notes 92–93 *infra*.

[71] Amsterdam, *supra* note 6, at 433–39; LaFave, *"Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Supreme Court Rev. 127, 156–57 [hereinafter referred to as LaFave]. Amsterdam's advocacy of use-exclusion is much more encompassing than LaFave's suggestion that it be used to govern searches incident to traffic arrests;

material which follows, after defining the problem, I describe and evaluate the different types of responses to claims of sham. I conclude that the use-exclusion approach is the least desirable method of dealing with this fourth amendment problem.

Defining the Problem

While adhering to the letter of a judicially-approved doctrine—such as search incident to arrest, stop-and-frisk, or inventory search—a police officer might use the authorized power for a purpose not intended by the court which originally sanctioned use of such power. For instance, the United States Supreme Court approved the *Terry* frisk in order to protect officers from the possible use of concealed weapons during lawful on-the-street questioning;[72] yet some officers, while staying within *Terry* boundaries, may employ stop-and-frisk procedures where their true motivation is the hope of discovering narcotics. Similarly, courts have sanctioned inventory searches in order to safeguard the property of citizens and to deter false claims of theft;[73] yet some officers may use an inventory search in quest of criminal evidence in cases where they have not, and perhaps, for want of probable cause, could not secure a search warrant. After relating several examples, Professor Amsterdam summarized the concern nicely:

> *First.* A power is claimed by a law enforcement officer to engage in conduct that intrudes upon the privacy of a citizen .... *Second.* The allowance of that power consistently with the fourth amendment is sought to be justified by the existence of a specific law enforcement need.... *Third.* The power may in fact be exercised for some other purpose than the one which is asserted to justify it.[74]

Although some courts would be troubled by the use of a judicially-approved doctrine for *any* improper purpose, in criminal cases defense counsel focus almost exclusively upon a single type of "bad" motivation: an officer's desire to discover criminal evidence.[75] In other words, claims of sham echo through the criminal court building only where the officer is pursuing what is normally considered a legitimate law enforcement objective. If Officer *A*, following a minor traffic violation, stops the offender in hope of spotting contraband in plain view, defense counsel will probably argue that the officer's motivation is reason enough to suppress any evidence discovered after the stop. If Officer *B* made a traffic stop because the offending driver was an attractive female, defense counsel probably will make no motion to suppress evidence found in plain view based upon the officer's improper motivation. Thus our sole concern is the use of fourth amendment doctrines as a guise for discovering criminal evidence where those doctrines were not approved for such purpose.

Keep in mind also that we are discussing pretext, not perjury. There is a difference between a "sham" and a "lie." In deciding whether to approve the use of stop-and-frisk procedures or ordinary traffic stops, a court may consider the possibility that an officer who is willing to fabricate data to justify such stops would be able to use judicially-approved doctrines as a means of discovering criminal evidence without a search warrant. But this is a different problem. For now we are concerned about cases where the officer is conforming to the letter of the law—where there are, for instance, judicially-approved grounds for a stop—but where the officer's motivation is alleged to be improper.

Alternative Responses to Claims of Sham

Again borrowing from Professor Amsterdam, we can classify various possible judicial responses to claims of sham.[76] A court can

nevertheless, even Amsterdam's endorsement of the approach is limited to select situations. See text accompanying notes 88-91 *infra*.

[72] Terry v. Ohio, 392 U.S. 1, 23-27 (1968).

[73] South Dakota v. Opperman, 428 U.S. 364, 369 (1976); People v. Smith, 44 Ill.2d 82, 88, 254 N.E.2d 492, 496 (1969); State v. Hock, 54 N.J. 526, 534-35, 257 A.2d 699, 703 (1969), *cert. denied*, 399 U.S. 930 (1970).

[74] Amsterdam, *supra* note 6, at 434.

[75] Occasionally a civil suit is brought to challenge a different type of bad motivation in the use of fourth amendment powers, namely, racially discriminatory motivation.

[76] Amsterdam, *supra* note 6, at 436-39. As does Amsterdam, I omit discussion of the "administrative-regulations" approach as a possible solution to the problem under discussion. Like Amsterdam, I believe that the administrative-regulations approach must be evaluated on broader criteria than its ability to end sham use of fourth amendment powers. The police-regulations concept by now has a lengthy history. *See* R. Fincher, Implementation of Administrative Rulemaking in the San Jose Police Department

react in one of several ways after assessing potential or actual abuses of a particular fourth amendment doctrine. (1) It can uphold use of power under the doctrine but exclude from a criminal trial *all* evidence discovered where such discovery was not within the doctrine's "reason for being." (2) It can uphold the doctrine but exclude from a criminal trial any evidence discovered where such discovery was not within the doctrine's "reason for being" *if* the possibility for such discovery motivated the officer's use of authority under the doctrine. (3) The court can uphold the doctrine and admit all evidence discovered as long as the officer, whatever his motivation, obeyed the letter of the law. (4) It can eliminate the doctrine or narrow its application so as to reduce the possibility of sham.

As I indicate below, I believe that, in reacting to claims of sham, courts generally should make the "hard choice" between the third and the fourth approaches. My greatest concern, however, is that courts should *not* use the first method, which I call "use-exclusion."

1. *The Use-Exclusion Approach*

Before pondering a definition, consider the use-exclusion method as applied in inventory-search and stop-and-frisk cases. Government officials could engage in inventory searches as heretofore approved. Because the rationale for the inventory search exception to the warrant requirement is not the possible discovery of criminal evidence, however, the prosecution could not introduce at trial any evidence discovered in an inventory search. Nor could it use as evidence anything derived from the search. The motivation for any particular inventory search would be irrelevant. This approach would satisfy the alleged need to protect property and to discourage false claims of theft. At the same time it would deprive the police of any motive to use an inventory search as a guise for searching for criminal evidence. The use-exclusion approach would also avoid the troublesome search for an individual police officer's true motivation.

Similarly, an officer would be permitted to frisk suspects in accordance with the principles of *Terry v. Ohio*.[77] The rationale for upholding the power to frisk is the need to discover if the suspect is armed. Therefore, if a frisk conducted within proper limits yielded some evidence other than a weapon, the court would not admit such evidence in a criminal trial. The use-exclusion compromise would satisfy the need to protect the officer, while making fruitless any use of stop-and-frisk procedures as guise for discovering narcotics or other criminal evidence.

To state the matter abstractly, use-exclusion would allow an officer to employ a particular search-and-seizure doctrine free of judicial scrutiny of his motive. His conduct would be deemed reasonable under the fourth amendment as long as he kept within the letter of the law. Without regard to the officer's good faith or bad faith, however, the prosecution could not use any criminal evidence discovered through the officer's exercise of authority, except where the rationale for the doctrine was the possibility that through the use of authority under the doctrine such criminal evidence might be discovered. In all other cases, the admission of evidence discovered through use of the power, and of anything derived from such discovery, would violate the fourth amendment.[78] Stated more crudely, the officer could "do it" but often the prosecutor could not "use it." This approach has at least one analogue in criminal procedure: decisions which permit governmental employers to ques-

12–18 (1975) (unpublished thesis in Northwestern University School of Law Library). The idea should now be judged according to its practicability, both as to drafting and implementation. For a list of various projects designed to make the concept a reality, *see id.* at 19–25. Further discussion without empirical data would not be very helpful.

For purposes of our present discussion, the administrative-law approach is somewhat like the third method discussed in this section, in that it would narrow search and seizure powers but then would allow admission of evidence discovered through the use of the power, without regard to police motivation. To the extent that the administrative-law approach eliminates discretion, it eliminates the officer's ability to use a particular power because of some individual motivation. Of course, the elimination of discretion also makes certain searches mandatory. Unless I were trying to get the citizenry to rise up and demand restrictions on police powers, I would not favor a rule which, for instance, required officers to make full searches of all traffic arrestees. The cure of mandatory searches is worse than the ill of improperly motivated searches.

[77] 392 U.S. 1 (1968).

[78] Amsterdam, *supra* note 6, at 437–39. One court seemingly has endorsed the use-exclusion method. *See* Mayfield v. United States, 276 A.2d 123 (D.C. App. 1971).

tion employees despite fifth amendment objections, but which prohibit prosecutors from using as evidence anything derived from such interrogation.[79] The common characteristic of all use-exclusion approaches is the exclusion from a criminal prosecution of evidence which has been lawfully acquired.[80]

The argument for fourth amendment use-exclusion can be stated simply. Such an approach is necessary to raise the *general* level of police conduct to the standard of reasonableness demanded by the fourth amendment.[81] The exclusion of some lawfully acquired evidence is the necessary price for such a result. For example, even if Officer *X*, motivated only by the proper purpose of protecting a citizen's property, conducted an inventory search within the letter of the law, we must exclude any criminal evidence which she came upon during the inventory—this to ensure that Officer *Y* and Officer *Z*, and all of *X*'s other brother and sister officers, will not abuse the inventory-search power by using it in quest of criminal evidence. In short, as Professor LaFave has summarized, use-exclusion "would appear to be a long overdue recognition of a 'regulatory' rather than an 'atomistic' view of the Fourth Amendment."[82]

I believe, however, that fourth amendment use-exclusion is neither theoretically sound nor politically feasible. My opposition rests on several grounds. *First,* the "costs" of such an approach, while depending upon chance, would inevitably be so enormous as to be intolerable, partly because of derivative evidence consequences. *Second,* in departing from present exclusionary philosophy by attenuating the relationship between misconduct and exclusion, the use-exclusion approach would breed disrespect for the judiciary and would not survive a brief experimental life. *Third,* I am convinced that use-exclusion is such a radical approach that even a zealous advocate would employ the method sparingly. Such an advocate would use it only to combat sham use of those fourth amendment powers which he would gladly see eliminated altogether. He would not propose use-exclusion to curb sham use of fourth amendment doctrines which he believes are legitimate on their face. Thus, like the rest of us, he would be required to turn elsewhere for a solution to the problem of fourth amendment sham.

In whatever area it were utilized, the costs of use-exclusion would depend upon chance. Consider, for example, a rule which permitted inventory searches but which excluded from a criminal trial, without regard to the officer's good faith, any evidence derived from an inventory search. Many such inspections would be free of charge to society, for they would produce no criminal evidence. In some cases, however, the inventory would result in the discovery of marijuana; in others, officers would discover the corpse of a homicide victim or other evidence of a murder. Because nothing found in the inventory could be used as criminal evidence, the costs to society would vary with the magnitude of the discovery.

Moreover, such exclusion would not merely leave the police where they would have been if they had not made the inventory search. Rather, under normal derivative evidence principles, which use-exclusion advocates may have overlooked,[83] chance discoveries could effectively bar *any* prosecution. If, for instance, an inventory search of a vehicle provided law enforcement with the first link between the car owner and a murder, no matter what evidence emerged thereafter, very likely the prosecutor would be unable to prove that his case had origins entirely independent of the inventory search. Unlike its fifth amendment analogue, fourth amendment use-exclusion does not lend

[79] *See* Gardner v. Broderick, 392 U.S. 273 (1968).

[80] Right or wrong, the author is consistent in his dislike for use-exclusion in *all* areas of criminal procedure. *See* F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PPROCEDURE (1974), 1977 SUPPLEMENT 57–58.

[81] LaFave, *supra* note 71, at 156–57; Amsterdam, *supra* note 6, at 437–38.

[82] LaFave, *supra* note 71, at 157. The words\"regulatory" and "atomistic" are borrowed from Amsterdam, *supra* note 6, at 437–39.

[83] Practically, use-exclusion advocates could not eliminate derivative evidence consequences by excluding the "original" evidence but admitting its "fruits." There really is no such thing as use-exclusion without fruits-exclusion. One cannot very well exclude a gun but permit testimony about discovery of the gun. To the extent that one drew an arbitrary line between use and fruits and admitted the latter, to that same extent would officers be permitted to benefit by using a fourth amendment power for an improper purpose. Therefore, in patching up use-exclusion by modifying derivative evidence principles, use-exclusion advocates would undermine their own purpose.

itself to the institutionalization of procedures which can safeguard a prosecution from taint.[84] The officer who discovers evidence during an inventory search of a vehicle can hardly be expected to keep his knowledge from detectives who are investigating a murder. If a court effectively mandated such secret-keeping (lest the use-exclusion approach fatally taint a prosecution), it would create enormous public outrage. Imagine, for instance, reaction to the requirement that an officer keep secret his discovery of a small child's body in an automobile trunk. And even if a police officer testified that he had kept from homicide detectives his knowledge of a link between a car owner and a murder which they were investigating, a trial court's understandable skepticism might prevent the prosecution from meeting its burden of proving lack of taint.

The use-exclusion method would thus attach an unknown but potentially enormous price to the officer's decision to conduct an inventory search, or to utilize any other fourth amendment power not designed for the discovery of criminal evidence. It would present law enforcement with difficult choices: frisk a suspect at the risk of jeopardizing a burglary prosecution if the hard object turns out to be stolen jewelry rather than a weapon; curb a vehicle for a traffic offense at the risk of barring a homicide prosecution if the stop leads to the discovery of murder evidence in plain view within the car; inventory an automobile at the risk of immunizing its owner from criminal prosecution. The choice is between two legitimate objectives, protecting an officer's life or enforcing the burglary statute; enforcing the traffic code or prosecuting for murder; safeguarding the property of citizens or enforcing the criminal code. The Constitution should not and, as Justice Frankfurter said, in a related context, the "Constitution does not require that honest law enforcement should be put to an unavoidable choice between two recourses of the Government."[85]

I also believe that the use-exclusion method's "regulatory" approach to exclusionary principles is too subtle and too lacking in emotional appeal to command widespread public or judicial support. At least some substantial segment of the judiciary and of the public, even if they cannot establish it empirically, *feel* a need to deprive the prosecution of evidence in case *M* if such evidence has been discovered through a violation of the defendant's rights by an officer who was investigating crime *M*. But once the relationship between misconduct and exclusion is attenuated—once, so as to serve some remote purpose, we exclude evidence in a case where the officers have done nothing wrong—we have destroyed the tit-for-tat emotional base needed to support exclusionary principles.

The point can be illustrated by a story which never made the West reports and by discussion of a common theme of a small series of reported decisions. After he had killed eight women, but before he was arrested, Richard Speck's fourth amendment rights were violated in connection with an "investigation" wholly unrelated to the women's deaths. Acting on the tip of a prostitute, relayed through several hearsay sources, a police officer, without a search warrant, entered a hotel room which had been rented by Speck under an assumed name and, in Speck's absence, confiscated a gun.[86] Later it appeared that this weapon probably had been the gun which Speck had used to threaten the women as he tied their hands behind their backs. Despite an abundance of prosecutorial precaution to safeguard fourth amendment rights in the investigation of the eight slayings, the prosecution was deprived of an important piece of evidence.[87] To many

[84] If, for instance, police officials compel answers from an officer who is the subject of a departmental excessive-force investigation, a prosecutor can decline to examine the police internal file, at least until he has completed his investigation and "sealed" his evidence. Thus the prosecutor may have some chance of demonstrating that his criminal case is untainted by the officer's compelled answers in the internal investigation.

[85] Abel v. United States, 362 U.S. 217, 229 (1960).

[86] Record, C. 568–75, People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968). Having illegally seized the weapon, the officer, perhaps to avoid paperwork and court appearances, made no arrest and kept the weapon rather than inventorying it.

[87] The prosecution acknowledged the illegality of the seizure and made no offer of the weapon. Record, C. 730. Despite the survivor's testimony about a gun, the State's inability to introduce Speck's gun has apparently contributed to the myth, spread in S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 361 (1975), that nine women (victims of our culture, perhaps) bypassed an opportunity to attack a lone man who was armed only with a knife. Elsewhere in the *Speck* homicide investigation, prosecutors took such precautions as allowing Speck's one-week tenancy of a certain boarding house room to expire before searching it with the owner's consent, although Speck had clearly abandoned the premises.

persons such a result was intolerable. Because the beat officer who had entered the room was not a part of the homicide investigative team, these persons felt that the *Speck* prosecution should not have been the vehicle for punishing the officer's misconduct. An "atomistic" view of the fourth amendment, perhaps, but one which must be reckoned with.

In what I call the "going-too-far" sequence of opinions, the attenuation between wrong and exclusion is much greater than in *Speck*, but still not nearly as great as the attenuation under the use-exclusion approach. A single example illustrates these decisions.[88] Let us suppose that the police receive a tip that *D* was the offender in a recent burglary. Unfortunately, the informer is an unreliable one who has not disclosed how he got his information. Fortunately, *D* was arrested and fingerprinted five years earlier, so that the police can compare his prints to fingerprints found at the scene. Unfortunately, the arrest five years ago was illegal. If illegally obtained fingerprints led to *D's* arrest, current exclusionary principles would make his arrest unlawful and would taint evidence immediately derived from that arrest (perhaps including another fingerprint card, a statement, an identification, and the proceeds of the crime). Some courts, however, have refused to apply the exclusionary rule in such a case. Right or wrong, they have been emotionally unable to penalize the prosecution in *this* case for what an officer did in an unrelated matter years earlier. The relationship between the misconduct and the exclusion of evidence is too distant.

If the urge to limit application of the exclusionary rule where there is attenuation between misconduct and result is widespread—and I suspect it is—it is impossible to envision broad support for a rule which punishes police misconduct in such an indirect fashion, namely through the exclusion, under some circumstances, of evidence which has been lawfully acquired. Accordingly, I do not believe that the use-exclusion approach would survive its initial strong test. The first time a judge was called upon to effectively bar prosecution for some notorious crime, in a case where an officer in all good faith had conducted a routine inventory search, would also be the last time that use-exclusion would be applied to inventory searches.

Finally, it appears that advocates of use-exclusion support this response to claims of sham only when they believe that the doctrine under which the initial intrusion is made should either be abolished or significantly limited. Consider the power to stop an automobile under two distinct theories: (1) to initiate prosecution following observation of a minor traffic violation; and (2) to make an inspection of the driver's license even though no offense has been observed. Either power could be abused; that is, either power could be used as a pretext for placing an officer in a position to observe plain-view evidence which may be within the car. Courts must respond to claims of sham following either type of stop. Yet we have not heard advocacy of use-exclusion in traffic stop cases, but only in license-inspection cases. Such selective advocacy appears uniform. Professor Amsterdam endorses use-exclusion in license-check and stop-and-frisk cases,[89] I respectfully suggest, because he believes that the fourth amendment balance would be better struck if officers had neither the stop-and-fisk nor the license-check power to intrude against a citizen's liberty and privacy. If the threat of use-exclusion led police to abandon license-checks or stop-and-frisk procedures (or, I suspect, inventory searches) lest officers provide citizens with an "immunity bath" in random fashion, Amsterdam would probably say, "So be it." I suspect, however, that he does not endorse use-exclusion following traffic stops because he believes such stops serve a legitimate law enforcement purpose which outweighs the driver's interest in liberty and privacy. Similarly, Professor LaFave tentatively endorses use-exclusion following searches incident to routine traffic arrests only, I believe, because he prefers that the police not have the power which was sanctioned in *United States v. Robinson*.[90]

[88] *See, e.g.,* United States v. Scios, (D.C. Cir. No. 75-1619 Aug. 23, 1976); Taylor v. State, 547 P.2d 674 (Nev. 1976); Commonwealth v. Fredericks, 235 Pa. Super. 78, 430 A.2d 498 (1975).

[89] Amsterdam, *supra* note 6, at 434. Since Amsterdam has not purported to list all instances where he would utilize use-exclusion, my conclusions are admittedly speculative. I think, however, that his parenthetical speaks volumes about when he would advocate use-exclusion: "I would apply the exclusionary rule as I have suggested to stop-and-frisk, and also to other search-and-seizure practices—such as driver's license checks, *if they are to be permitted at all. . . .*" *Id.* at 438 (emphasis added).

[90] *See generally* LaFave, *supra* note 71.

Utilization of use-exclusion to meet all claims of sham would result in some major alterations of fourth amendment doctrine which responsible critics of the present system would be unwilling to accept. As the automobile stop examples indicate, use-exclusion, uniformly applied, would radically alter plain view doctrines. Plain view observations and evidence seized in plain view would *always* be excluded where an officer's right to be at his vantage point depended upon some prior valid intrusion (such as entry-to-arrest or stop-to-ticket), the rationale for which intrusion is not the possibility of discovering criminal evidence. If this result did not follow, then how, for instance, could use-exclusion be a solution for pretext license checks or pretext traffic stops? Similarly, the use-exclusion approach, applied unselectively, would greatly alter the doctrine of search incident to arrest. The purpose of a search incident to arrest is to prevent the arrestee from destroying evidence of *this* crime or from securing a weapon. The rationale of "search-incident" does not include the possible discovery of evidence of an unrelated crime through a warrantless search conducted without probable cause to believe that such evidence will be discovered. Thus, under the use-exclusion doctrine, only a weapon or evidence of *this* crime could be admitted. The cost of a search incident to arrest would be creation of an "immunity shield" for unrelated evidence discovered in such a search and for any evidence derived through such discovery. If this result did not follow, how would the use-exclusion doctrine discourage an officer from using a lawful marijuana arrest as a pretext for searching the arrestee's person in quest of evidence of a murder? Use-exclusion is advocated selectively because its proponents are not willing to accept the major modifications which would flow from uniform application.

From these observations two conclusions follow. First, any disclaimers to the contrary, the real concern of advocates who selectively propose use-exclusion is judicial recognition of a particular fourth amendment doctrine, not the potential or actual abuse of the doctrine. What is wrong with license checks, in their view, is not that an officer might use the power as a guise to catch a criminal, but rather that, with no such purpose in mind, he can use it against *any* motorist. The solution then is to eliminate or to narrow in scope the license-check power (or the doctrine of inventory search or stop-and-frisk procedures or the power to search traffic arrestees). To this theme the article shall return shortly.[91] Second, because advocates of use-exclusion would use this method only to meet *some* claims of sham, and because even in those situations it would lead to intolerable results, we must turn to alternative methods of responding to claims of sham.

2. *The Ulterior Purpose or Bad Motive Approach*

Under a second approach to meeting claims of sham, courts would examine an officer's predominant motivation for utilizing authority under a particular fourth amendment doctrine. If the doctrine's reason for being was not the possible discovery of criminal evidence, and if the court found that an officer had used that power primarily motivated by a desire to discover evidence, it would exclude any evidence discovered through the use of the power. Consider, for example, the stop of a vehicle following a minor traffic violation. If the court determined that the officer's true purpose was not to initiate a traffic prosecution but, rather was to discover "plain view" evidence, it would suppress any such evidence as well as testimony derived from observation of such evidence. In *Abel v. United States*[92] and, to a lesser extent, elsewhere,[93] the United States Supreme Court in dictum left open the possibility of using this approach, although it has never actually excluded evidence because of an officer's ulterior motive. Lower courts have used this apporach on many occasions.[94]

The most frequent criticism of the motivation approach is that a judicial search for an officer's true motive is often difficult.[95] To use the words of Justice Fortas, spoken in a slightly different context, the quest may be "as elusive as an attempt to capture last night's moonbeam,"[96] at least absent the officer's judicial confession of his true motive. There are, how-

[91] See text following note 115 *infra*.

[92] 362 U.S. 217, 230 (1960).

[93] United States v. Robinson, 414 U.S. 218, 221 n.1 (1973); South Dakota v. Opperman, 428 U.S. 364 (1976).

[94] *See* decisions cited in note 68 *supra*.

[95] *See* Amsterdam, *supra* note 6, at 436–37.

[96] Massachusetts v. Painten, 389 U.S. 560, 562 (1968) (Fortas, J., concurring). *See also id.* at 564–65 (White, J., dissenting).

ever, in some cases objective factors which demonstrate that the officer's true motive was the discovery of criminal evidence.[97] The homicide detective who in the midst of an investigation arrests a suspect on a valid disorderly conduct charge, searches the suspect, and then interrogates him about the homicide has probably revealed his true motive.[98] So also has the officer who, responding to a robbery in progress, stops a vehicle which has run a red light near the scene of the reported robbery. Thus in some clear cases, where we are sure that an officer used a fourth amendment power as a pretext to discover criminal evidence, we could use the ulterior-purpose test.

There are, however, more significant problems with the motivation test. In the first place, the use of "objective" criteria to gauge motive (for example, the fact that the officer was responding to a robbery in progress when he made a traffic stop) would lead to an anomalous result. Consider two hypotheticals. Officer *A* observes a traffic offense. No objective facts suggest to him that anything more serious is involved. Officer *B* observes the same traffic offense. She knows some additional facts which suggest that the vehicle's driver has just committed a murder, but her data falls just short of the reasonable suspicion necessary to stop the car under *Terry* or *Brignoni-Ponce*.[99] Under the ulterior purpose approach, *A*'s stop of the vehicle will be upheld, but *B*'s will perhaps be condemned as a pretext. A similar result would follow in an inventory search situation following the removal of a vehicle from the scene of an accident. The more data suggesting that a search of the trunk will yield criminal evidence (as long as the data does not provide probable cause for a search under the *Carroll-Chambers*[100] doctrine), the more likely will the search be condemned as a pretext. Justice Brennan noted the dubious wisdom of such results when in disassociating himself from the individual motivation test in his *Abel* dissent, he wrote: "[I]t would appear a strange test as to whether a search which turns up criminal evidence is unreasonable, that the search is the more justifiable the less there was antecedent probable cause."[101]

This brings us to another shortcoming of the ulterior-motivation test. If an officer has legal grounds to stop two traffic offenders, one of whom he suspects may have been involved in a recent homicide and one of whom he has no reason to suspect of anything serious, would not most of us prefer that the officer follow his suspicions and pursue what may be a serious matter? As Justice Brennan has indicated in an analogous situation, we expect zealous conduct from officers.[102] We expect them to use their judicially approved powers to achieve the legitimate law enforcement purpose of discovering criminal evidence. As Mr. Justice Douglas added in the same case, it makes no sense to accuse an officer of "bad faith" under such circumstances.[103]

As the ulterior motive test has been administered, in *Abel* and in lower court decisions, under my reading of the cases, at least, an ulterior motive to discover criminal evidence has been insufficient to merit exclusion of evidence.[104] Instead, courts have excluded evidence only where, in addition to finding an ulterior motive, the court concluded that officers have acted in "bad faith." This highly subjective concept seems to be a function of at least two variables. A judge who is troubled by judicial recognition of a particular search and seizure power is more likely to find that it was exercised in bad faith than is a judge who approves the doctrine. Phrased another way, we will probably find more cases condemning license stops as pretexts than we will find cases condemning traffic stops as pretexts.[105] Sec-

[97] Elsewhere in fourth amendment law, trial courts have been required to explore the minds of police officers. In some jurisdictions, after Jones v. United States, 357 U.S. 493 (1958), a search which slightly precedes an arrest can be deemed incident to arrest only if the officer intended to arrest without regard to whether the search proved fruitful. *See* People v. Cox, 49 Ill. 2d 245, 274 N.E.2d 45 (1971), and State v. Baker, 112 N.J. Super. 351, 271 A.2d 435 (1970), both of which show that objective facts may demonstrate what an officer was thinking when he decided to utilize a fourth amendment power.

[98] *See, e.g.*, People v. Clark, 8 Ill. App. 3d 700, 291 N.E.2d 33 (1972).

[99] 422 U.S. 873 (1975).

[100] See text accompanying notes 54–61 *supra*.

[101] 362 U.S. at 253 (Brennan, J., dissenting).

[102] *Id.* at 252.

[103] *Id.* at 245 (Douglas, J., dissenting).

[104] The generalizations which follow are based upon my examination, over the years, of perhaps 75 to 100 decisions where claims of sham have been raised, including those cited in notes 65–68 *supra*.

[105] For example, I know of no Illinois appellate

ondly, "bad faith" is more likely to be found where a judge is not greatly concerned by the need to discover the *type* of criminal evidence which the officer had in mind. Let a narcotics detective enter a home ostensibly to execute a traffic arrest warrant, and we may witness a finding of sham.[106] Let a homicide investigator use the same means of entering a home, and we probably will not witness the suppression of the murder weapon found in plain view within the home.

The fact that the ulterior-motive test is rarely used in a pure form, but rather is diluted by a subjective "bad faith" component, suggests that many persons are unwilling to penalize zealous law enforcement. Agreeing with Mr. Justice Brennan that such conduct is readily understandable, they are unwilling to condemn officers who, while staying within the letter of a judicially-approved doctrine, have used the doctrine for a purpose not originally intended, namely, the discovery of criminal evidence. Rather than denouncing an officer who pursues this legitimate objective through a means judicially approved on some other rationale, these persons would reexamine the doctrine which makes the misuse possible.[107] If they conclude that use for an improper purpose is both likely and intolerable, they would eliminate or narrow the doctrine which makes the abuse possible. In short, they would pursue the familiar practice of reforming a law which is subject to use for the "wrong" purpose rather than reacting to misuse on a case-by-case basis.

3. *The "Hard Choice" Approach*

Under a third method of meeting claims of sham, a court reevaluates the search and seizure doctrine which law enforcement agents allegedly have misused. The court once more balances the societal need for the particular governmental power against the intrusions on privacy and liberty which are occasioned by the use of the doctrine. If it sees that a particular power is rarely used *except* as a guise for discovering evidence, then it is not very likely to be impressed by the argument that the government needs the power for some other purpose. In weighing the citizen's interests, the court includes in its calculation such intrusions under the particular doctrine as may be motivated by a purpose other than the one which originally was used to gain judicial acceptance of the doctrine. The court then either reaffirms the doctrine, rejects the doctrine, or narrows its scope.

Let us exemplify this approach as it would be used by a court which is faced with the claim that officers frequently make arrests for minor violations as a pretext for possible discovery, through a search incident to arrest, of evidence of more serious crimes. After balancing societal interests against personal liberty and privacy, and calculating whether serious abuse is likely to be frequent, a court could decide to leave present law unchanged. Alternatively, it could modify either the officer's power to make custodial arrests for minor offenses or modify an officer's power to search incident to arrests for minor offenses. Thus, for instance, for most traffic offenses the police might be required to use a notice-to-appear method of initiating prosecution.[108] Or, for instance, the scope of the search incident to a traffic arrest might be limited to a *Terry*-type frisk.

This approach—making a difficult choice between reaffirming a fourth amendment doctrine or narrowing its scope—is the one which the United States Supreme Court has used most frequently in meeting claims of sham, although admittedly where it has refused to modify a doctrine, it has left open the possibility of utilizing the bad motivation approach on a case-by-case basis.[109] In *Chimel v. California*,[110] for example, the Court was confronted by the claim that arrests will be delayed until the

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opinion in which a stop following an actual traffic violation has led to the suppression of evidence under a pretext theory. The same cannot be said of license-inspection stops. *See, e.g.* People v. Harr, 93 Ill. App. 2d 146, 235 N.E.2d 1 (1968); People v. Lilly, 38 Ill. App. 3d 379, 347 N.E.2d 842 (1976).

[106] Harding v. State, 301 So. 2d 513 (Fla. App. 1974). More than any other decision, this case made me ask myself what is wrong with an officer's using an approved fourth amendment doctrine to achieve a legitimate law enforcement objective, albeit not one contemplated within the doctrine's rationale. *Contrast* People v. McNamara, 33 Ill. App. 3d 216, 338 N.E.2d 202 (1975) (same facts but no discussion of sham).

[107] This was Brennan's approach in *Abel*. *See* 362 U.S. at 254 (Brennan, J., dissenting).

[108] This possibility was left open in Gustafson v. Florida, 414 U.S. 260, 267 (1973) (Stewart, J., concurring). *See also* LaFave, *supra* note 71, at 158–61.

[109] See text accompanying notes 92–93 *supra*.

[110] 395 U.S. 752, 767 (1969).

suspect is at home, so as to allow officers to make a warrantless search under the broad search-incident authority which had been recognized in *United States v. Rabinowitz.*[111] The Court reacted by restricting the permissible scope of a search incident to arrest to the area within the arrestee's reach. In so doing, the Court eliminated part of an officer's motivation to delay an arrest until the suspect is at home. No doubt the possibility of sham was just one factor in the Court's reassessment of the proper societal-individual balance to be struck vis-a-vis the doctrine of search incident to arrest. Similarly in *Coolidge v. New Hampshire,*[112] a plurality of the Court, by adding an "inadvertence" requirement to the plain view doctrine, narrowed an officer's opportunity to use fourth amendment power (for example, the power to enter for purposes of arrest) as a pretext to put the officer in a position where he could make a plain view seizure.

On the other hand, in cases where the Court has been confronted by claims of potential or actual use of a fourth amendment power for an improper purpose, the Court has reaffirmed, without modification, certain fourth amendment doctrines: search incident to arrest in *Robinson*[113] and *Gustafson*[114] and inventory search in *South Dakota v. Opperman.*[115] The Court concluded in both cases that societal interests outweighed individual interests, even taking into account the possible use of these doctrines for a purpose not intended. Accordingly, it refused to narrow the scope of either doctrine.

Although I might prefer that the Court had resolved the "hard choice" differently in both *Robinson-Gustafson* and *Opperman*, I believe that the Court used the correct approach in both cases. If I am troubled by doctrines which permit the police to arrest and search minor traffic offenders, and which permit the police to completely inspect any property which falls into their lawful custody, it is not primarily because I fear use of these doctrines as pretexts in the hope of discovering criminal evidence. It is rather because the powers on their face are too broad. The Court has struck the balance in both cases in a fashion which I think gives too much weight to societal interests.

Realizing that the hard-choice method may win out merely because it is the least undesirable alternative, let me summarize my reasons for favoring this approach to meeting claims of sham:

1. Unlike the use-exclusion doctrine, the suggested approach is consonant with the prevailing rationale of the exclusionary rule. It would not breed disrespect by requiring the exclusion of lawfully acquired evidence.

2. Unlike use-exclusion, the hard-choice approach does not make law enforcement choose between exercising a legitimate power and possibly fatally tainting, on a random basis, an otherwise proper criminal prosecution.

3. As distinguished from the ulterior-purpose test, the rule is easy to administer. Courts decide what police conduct is permissible and find a fourth amendment violation only when officers violate the letter of the law. A judge need engage in no exploration of an officer's motive.

4. Unlike the ulterior-purpose test, the hard-choice approach does not penalize an officer for using a judicially-sanctioned power to achieve a legitimate law enforcement objective: namely, the discovery of criminal evidence. Why should we hail as an effective advocate the lawyer who uses to his client's advantage a law which was intended for some other purpose, while pointing the finger of shame at an officer who has used search-and-seizure powers to best advantage without violating the letter of the law?

5. The true concern of proponents of both the use-exclusion approach (as selectively advocated) and the ulterior-purpose test (as administered so as to exclude evidence only when bad faith is found), is the *existence* of certain governmental powers—and not their abuse by officers who are seeking criminal evidence. This focus is

[111] 339 U.S. 56 (1950).

[112] 403 U.S. 443 (1971). Concerning possible limitations upon the inadvertency requirement, *see generally* J. HADDAD, ARREST, SEARCH AND SEIZURE §§ 10.25–10.30 (Ill. Inst. for CLE, 1976). To the extent that the inadvertency requirement may make warrantless plain view seizures permissible only if there was a *lack* of antecedent probable cause, see *id.* at § 10.28 and State v. Davenport, 510 P.2d 78 (Alas. 1973), the doctrine suffers from the same fault as does the bad motivation approach. See text accompanying notes 99–101 *supra.*

[113] United States v. Robinson, 414 U.S. 218 (1973).

[114] Gustafson v. Florida, 414 U.S. 260 (1973).

[115] 428 U.S. 364 (1976).

entirely proper. The hard-choice method is the only approach which places the emphasis where it should be.

Before concluding, let me respond to a possible criticism of the hard-choice approach. Some would say that once a doctrine is reevaluated and the balance struck, either as before or in a manner more favorable to individual liberty and privacy, some use of the doctrine for an unintended purpose will still occur. If, for instance, police remain free to stop traffic offenders, as presumably they will, pretext traffic stops will occur. The hard-choice approach seems to say, "So be it. That is the price society must pay for enforcing the traffic code." I would respond by observing that this result does not trouble me greatly. If the power to curb a driver who has committed a traffic offense is tolerable—and recall we are discussing cases where such an offense actually has occurred—then the officer's decision to use the power because he thinks something more serious may be involved is also tolerable.

Finally, to those who find my reasoning faulty and my conclusions untenable, let me address a word in mitigation of my case by returning to my opening remarks. My position is understandable, if not defensible, when viewed as a result of the *process* of lecturing police officers. After urging officers to learn the scope and limits of their fourth amendment powers, one feels awkward admonishing them, as I did for years, not to use their judicially-approved powers so as to maximize the legitimate law enforcement objective of discovering criminal evidence. Eventually my schizophrenic exhortations began to echo in my ears like some mock-Spenserian refrain: "Be wise, be wise, be very wise. But be not too wise." Little wonder I came to favor an approach which would narrow police power, but then would allow that power to be exercised, within the letter of the law, to maximize legitimate law enforcement objectives, including the discovery of criminal evidence.

III. Fourfold Probable Cause

Having criticized the "well-delineated exception" proposition in Part I and the use-exclusion proposal in Part II, the author hopes to provide an affirmative contribution to fourth amendment analysis in the concluding segment of this article. My thesis is that there exist four different *kinds* of probable cause: "crime," "offender," "search" and "seizure."[116] Various theories under which fourth amendent intrusions are permitted should be analyzed not only according to the quantum but also the type of probable cause which each theory requires. A fourfold probable cause analysis can prevent doctrinal confusion, provide a partial checklist for evaluating the validity of a search or a seizure, aid our understanding of the issues in some major Supreme Court cases, and suggest some unresolved questions which often are overlooked. On the other hand, the fourfold probable cause concept, like any schematic device which is offered to aid analysis, has its limitations. By no Procrustean trick can every fourth amendment issue be made to fit somewhere within this scheme. Nor is the concept an end in itself. Its utility is exhausted at the point where it no longer aids an individual's own thinking about fourth amendment problems.

That caveat set forth, let me define my terms and then apply the concept to some theories under which searches and seizures are permitted, at the same time dissecting some current fourth amendment issues with the aid of the fourfold probable cause analysis.

Definition of Terms

Crime probable cause ordinarily refers to the probability that a criminal offense has been or is being committed. Absent such a probability, an arrest, with or without a warrant, is invalid.[117] On the other hand, whether there exists a probability that a crime has been or is being committed is entirely irrelevant to the validity of a search under a theory of consent.[118]

Offender probable cause refers to the probability that a particular person has committed or is committing a criminal offense. It is necessary for an arrest, with or without a warrant.[119] Offender probable cause is not required for

[116] This concept originated in a discussion between Attorney James B. Zagel and myself amidst preparation of our materials for the 1975 Northwestern University Short Course for Prosecuting Attorneys. See note 3 *supra*. The analysis can be viewed as an effort to answer the question "Probable cause as to what?" which Professor LaFave asked at the Short Course for Criminal Defense Attorneys in the mid-1960's. *See also* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. Ill. L. F. 255, 260–262.

[117] See text accompanying notes 127–28 *infra*.

[118] See text accompanying notes 165–67 *infra*.

[119] See text accompanying notes 127–28 *infra*.

the issuance of a search warrant, that is, *H*'s home can be searched under a warrant without any probability that *H* committed a crime, as long as other search warrant requirements have been met.[120]

Search probable cause refers to the probability that a search will prove fruitful. In some contexts it is essential, such as the "moving vehicle" exception to the warrant requirement, where search probable cause refers to the probability that evidence of a crime will be discovered,[121] or in the stop-and-frisk context, where the requirement refers to the probability that a frisk will yield a weapon.[122] On the other hand, search probable cause is not essential to intrusions under some other fourth amendment theories. For instance, an officer's right to search incident to arrest does not depend upon the probability that the search will produce either criminal evidence or a weapon.[123]

Seizure probable cause refers to the probability that an item which is to be taken and carried away either is contraband or otherwise constitutes evidence of a crime.[124] It is necessary for the seizure of property which has been observed in plain view.[125] It is not essential to the seizure of property under the inventory search doctrine.[126]

Keeping these definitions in mind, let us now review some theories under which fourth amendment intrusions are permitted.

A. *Seizure Under Search Incident to Arrest*

To seize an object under the doctrine of search incident to arrest, an officer needs probable cause to believe that a crime has been or is being committed (crime probable cause) and probable cause to believe that the person searched has committed the crime (offender probable cause). He does not need probable cause to believe that the search will prove fruitful (search probable cause). It is an open and often overlooked question whether to take and carry away the arrestee's property on a search-incident theory the officer needs probable cause to believe that the property is contraband or evidence of a crime (seizure probable cause).

In discussing the probable cause which is necessary for a constitutionally valid arrest, we often telescope the separate requirements of crime probable cause and offender probable cause by saying that a lawful arrest of *D* requires probable cause to believe that *D* has committed an offense. This combination of two different concepts blurs a distinction which some writers believe existed at common law and which at one time was reflected in the law of some American jurisdictions.[127] Under this view, probable cause to believe that a crime had been committed and that *D* had committed it did not suffice to validate a warrantless arrest in a situation where, in fact, no crime had been committed. If there was no crime, the arrest was illegal no matter how reasonable the officer's conclusion that a crime had been committed. On the other hand, at common law, as now, if a crime had been committed but the officer's reasonable conclusion that *D* had committed it proved erroneous, *D*'s warrantless arrest would still be considered lawful. Thus, under this view, a lawful warrantless arrest necessitated something more than crime probable cause to be coupled with offender probable cause. Today, however, crime probable cause and offender probable cause suffice to validate an arrest.[128]

A recent dispute arose from the claim that the doctrine of search incident to arrest requires search probable cause. In *United States v. Robinson*,[129] the defendant asserted that the

[120] See text accompanying notes 158–62 *infra*.

[121] See text accompanying notes 168–76 *infra*.

[122] See text accompanying note 131 *infra*.

[123] See text accompanying notes 129–31 *infra*.

[124] "Seizure" probable cause is least familiar. Perhaps the earliest United States Supreme Court discussion of this requirement came in Stanley v. Georgia, 394 U.S. 557, 571 (1969) (Stewart, J., concurring). *See also* Coolidge v. New Hampshire, 403 U.S. 443, 466–67 (1971).

[125] See text accompanying notes 135–41 *infra*.

[126] See text accompanying notes 190–92 *infra*.

[127] *Compare* Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 568–78 (1936), *with* R. PERKINS, CRIMINAL LAW 870 n.7 (1957). Until January 1, 1964, Illinois statutes required that a felony actually have been committed for a warrantless felony arrest to be valid. *See* ILL. REV. STAT. ch. 38, § 657 (1961). *See also* Alvarez v. Reynolds, 35 Ill. App. 2d 54, 181 N.E.2d 616 (1962); McKendree v. Christy, 29 Ill. App. 2d 195, 172 N.E.2d 380 (1961). *But see* Aspen, *Arrest and Arrest Alternatives: Recent Trends*, 1966 U. ILL. L.F. 241, 244 & n.20.

[128] Illinois, for instance, ended the distinction when it adopted its 1963 Code of Criminal Procedures. *See* ILL. REV. STAT. ch. 38, § 107-2(c) (1975). The present author knows of no twentieth century fourth amendent United States Supreme Court opinion in which the distinction is reflected.

[129] 414 U.S. 218 (1973). See generally text following note 61 *supra*.

officers had no right to search his person incident to arrest without having data establishing some probability that the search would yield criminal evidence or a weapon.[130] The prosecution countered by asserting that a valid custodial arrest automatically justifies a search incident to arrest. The United States Supreme Court agreed with the prosecution's position and held that the officer is not required to engage in an estimation that the search will prove fruitful before he makes a full search incident to arrest. In other words, search probable cause is not required for a search incident to arrest.

Despite the Court's holding in *Robinson*, questions asked by both the prosecution and the defense at hearings on motions to suppress are often directed at search probable cause. If the prosecution's theory, or one of its theories, is that the evidence was discovered within the limited confines of a lawful stop-and-frisk, the officer does need to demonstrate a certain quantum of probability (reasonable suspicion) that the frisk would yield a weapon (search probable cause).[131] On the other hand, if the prosecution can establish the elements of a valid arrest, including crime probable cause and offender probable cause, inquiries directed to the probability that the search would prove fruitful are wholly irrelevant. The fourfold probable cause analysis serves as a reminder, particularly to prosecutors and judges, of the different probable cause requirements of stop-and-frisk and of search incident to arrest. The analysis indicates that the court must be concerned not only with the different amounts of probable cause (reasonable suspicion versus full probable cause) but also with the different types of probable cause necessary under each doctrine.

The unanswered probable cause question posed by the doctrine of search incident to arrest, and one which will probably remain unexplored until defense attorneys pursue the issue more vigorously than they have done in the past, is whether under the doctrine of search incident to arrest a police officer can take and carry away the property of an arrestee without probable cause to believe that it is contraband or constitutes evidence of a crime. Phrased another way, is seizure probable cause necessary to justify retention of property under the doctrine of search incident to arrest? Consider the following hypothetical:

> Officer Baker lawfully arrests Cain in Cain's apartment for an attempted burglary of a home alleged to have been committed one hour earlier. Baker searches Cain's person and finds a red capsule containing an unknown substance. He also opens and searches a drawer within Cain's reach and finds another red capsule. Baker also notes that lying within Cain's reach is a pair of sneakers capable of making a distinct mark upon dirt or upon a wet surface. As he stands there, Officer Baker has no probable cause to believe that either the capsules or the sneakers constitute evidence of either the burglary or any other crime. Can he nevertheless take and carry away the items under the doctrine of search incident to arrest?

Kremen v. United States,[132] a cryptic 1957 per curiam opinion, may be the only United States Supreme Court case focusing upon the issue. In *Kremen*, F.B.I. agents made lawful arrests in a cabin and conducted a full search of the cabin, as was permissible under the then-prevailing principles of search incident to arrest. The agents seized and carried to their office two hundred miles away the *entire* contents of the cabin. They took literally hundreds of items, including lipstick, eight bath towels, a recording of Mendelssohn's Violin Concerto, and a ping pong net with two holders. Without citation of authority, and without providing any analysis, the United States Supreme Court invalidated the seizure. It remained for Justice Harlan, a dozen years later, to provide a rationale for the Court's decision: "*Kremen* simply prohibits the police from seizing the entire contents of a building, without considering whether the property they take is relevant to the crime under investigation; it does not bar the removal of all property that may reasonably be considered evidence of a crime."[133]

Under Harlan's formulation, even under a search incident to arrest theory, to seize an item the police must have at least some reason to believe that it constitutes evidence of a crime.

[130] *Robinson's* search probable cause argument might be read so as to be limited to the minor traffic offense context in which it arose.

[131] Terry v. Ohio, 392 U.S. 1 (1968).

[132] 353 U.S. 346 (1957).

[133] Van Cleef v. New Jersey, 395 U.S. 814, 817 (1969) (Harlan, J., concurring).

It is not clear, however, whether the required degree of probability is "possible relevance," "reasonable suspicion" or "probable cause." Nor is it clear whether the necessary degree of probability is less where the evidence relates to the crime for which the arrest has been made. In our hypothetical, for instance, the sneakers could perhaps be probative of the crime of attempted burglary; but the capsules have no apparent evidentiary value to that charge. The law might allow the seizure of the capsules only if there is probable cause to believe that they are contraband but permit seizure of the sneakers under some lesser standard of probability. From a doctrinal point of view, then, the concept of seizure probable cause raises important questions which have not yet been answered in the context of a search incident to an arrest.

In actual practice police officers fairly frequently take and carry away an arrestee's property with no more than a glimmer of hope that further investigation or a crime laboratory analysis will establish that the property is contraband or has evidentiary value. Even though useful analogies, particularly in "plain view" cases, are available to defense counsel, defense lawyers often allow such speculative seizures of the arrestee's property to go unchallenged.[134] Absent a Supreme Court declaration that seizure probable cause is unessential to a seizure under a search incident to arrest, the defense should pursue the issue when the facts make plausible an argument based upon the absence of seizure probable cause. Attention to the concept of four distinct types of probable cause will remind the defense of this argument.

B. *Seizure Under Plain View Doctrine*

Although it is impossible to generalize about crime, offender, and search probable cause requirements under the plain view exception to the warrant requirement, seizure probable cause is necessary for the police to take and carry away property under a plain view theory. Subject to qualifications not relevant to our discussion,[135] the plain view doctrine permits a police officer to seize contraband or criminal evidence which he observes while standing in a place where he has a right to be or while looking into a place which he has a right to search. His right to be in that place or his right to search that place—a necessary prerequisite to the invocation of the plain view doctrine—may depend upon any one of a number of theories. For instance, the officer may have entered to make an arrest, or he may have been conducting a search under the authority of a search warrant. Before deciding the validity of a plain view seizure, we must consider what kinds and quanta of probable cause were needed to justify the entry to arrest or the issuance of the search warrant.

The common denominator of plain view seizures is seizure probable cause. Even though the United States Supreme Court has never invalidated a plain view seizure for want of seizure probable cause, and even though cases from other courts appear to overlook the requirement,[136] when defense counsel raises the issue, reviewing courts today appear unanimous in the conclusion that an officer cannot, under a plain view theory, seize and carry away items without probable cause to believe that the items are contraband or constitute evidence of a crime.[137] For example, if, while looking in a place which they have a right to search under a warrant which commands the seizure of heroin, officers discover bonds or securities, their right to seize those commerical documents will depend upon the presence of probable cause to believe that the documents are stolen or in some way are evidence of a crime.[138]

[134] See text accompanying notes 135–41 *infra* for a discussion of the plain view decisions. For an example of a search incident to arrest decision where defense counsel apparently failed to raise the seizure probable cause issue, see People v. Hightower, 20 Ill. 2d 361, 169 N.E.2d 787 (1960), *cert. denied*, 365 U.S. 845 (1961). For a decision where the seizure probable cause issue was successfully raised in a search incident to arrest situation, *see* State v. Elkins, 245 Ore. 279 422 P.2d 250 (1966).

[135] I refer to the reasonable expectation of privacy qualification. *See, e.g.*, People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); Cohen v. Superior Court, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970). I also refer to the "inadvertency" limitation. See note 113 *supra* and accompanying text.

[136] *See, e.g.*, People v. Myles, 2 Ill. App. 3d 955, 275 N.E.2d 691 (1971).

[137] *See, e.g.*, Christmas v. United States, 314 A.2d 473 (D.C. App. 1974); People v. Hermesch, 49 App. Div. 2d 587, 370 N.Y.S.2d 152 (1975); People v. Eastin, 8 Ill. App. 3d 512, 289 N.E.2d 673 (1972); State v. Sagner, 12 Ore. App. 459, 506 P.2d 510 (1973); People v. White, 46 Mich. App. 195, 207 N.W.2d 921 (1973); Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973).

[138] *See, e.g.*, Commonwealth v. Hawkins, 280 N.E.2d 665 (Mass. 1972). *See also* Commonwealth v. Wojcik, 358 Mass. 623, 266 N.E.2d 645 (1971). *Compare*

Consider again the hypothetical discussed above, this time placing the capsules and the sneakers out of the reach of the arrestee but within the plain sight of the arresting officer. Because of spatial limitations adopted in *Chimel v. California,*[139] the officer cannot seize the items under a search incident to arrest theory. The seizures are proper, if at all, only if the plain view theory can properly be invoked. This, in turn, will require an assessment of the probability that the items are contraband or have evidentiary value. Under the facts stated in the hypothetical, there is no seizure probable cause as to either the capsules or the sneakers. Their seizure under a plain view theory would be impermissible.

The issue which is most frequently disputed as a result of the seizure probable cause requirement under the plain view doctrine is whether the police can closely examine "plain view" items to determine whether there is seizure probable cause. Can they check the serial number of the bonds or the serial number of a television set against a "hot sheet" which lists stolen property? Can they pick up boots to examine their soles for tell-tale evidence related to a home invasion? Or does such conduct itself amount to a forbidden warrantless search? Although the "close look" cases reach no unanimous result, they all implicitly acknowledge the seizure probable cause requirement under the plain view doctrine.[140]

The fourfold probable cause analysis, utilized in plain view cases, reminds us that the right to look is not the right to take. The right to see is not the right to seize. Defense lawyers should not forget to argue the lack of seizure probable cause in appropriate plain view cases. Nor should the prosecution forget its obligation to elicit facts to establish that the items seized, at the time of their taking, could reasonably be thought to be contraband or evidence of a crime.[141] If a defense lawyer is alert, the prosecutor's proof that an item seized was in plain view from a vantage point where the officer had a right to be will be insufficient, without a demonstration of seizure probable cause, to uphold a seizure under a plain view theory.

C. *Search and Seizure of Abandoned Property*

Even without crime, offender, search or seizure probable cause, police officers can search or seize abandoned property without being guilty of a violation of the rights of the person who abandoned the property. For fourth amendment purposes at least, such a person is no longer a claimant of the goods.[142] With no danger of violating that person's constitutional protections, the police can intrude against the property without data demonstrating any particular degree or type of probability. The distinction should be kept in mind in the class of cases where "abandonment" and "plain view" may both be plausible theories for justifying a seizure: the "drop" cases. Consider the following hypothetical:

> While sitting on a park bench in jurisdiction *X*, Dore spots Officer Elwin walking his beat. Dore casually places a cigarette package on the bench about a foot from his thigh. Elwin seizes the packet, inspects it, and discovers heroin. Before he seized it, Elwin had no probable cause to believe that the cigarette package contained contraband or evidence of a crime. In jurisdiction *X*, absent such probable cause, the seizure cannot be upheld on a plain view theory because under the case law of *X*, inspection of Dore's property without search probable cause would itself amount to an unreasonable search. Can the seizure nevertheless be upheld?

The answer depends upon whether the property has been abandoned. Because an in-

Commonwealth v. DeMasi, 283 N.E.2d 845 (Mass. 1972).

[139] 395 U.S. 752 (1969).

[140] "Close look" cases include United States v. Clark, 531 F.2d 928 (8th Cir. 1976); United States v. Gray, 484 F.2d 352 (6th Cir. 1973), *cert. denied,* 414 U.S. 1158 (1974); Wilson v. State, 30 Md. App. 242, 351 A.2d 437 (1976); State v. Murray, 8 Wash. App. 944, 509 P.2d 1003, *aff'd,* 84 Wash. 2d 527, 527 P.2d 1303 (1974), *cert. denied,* 421 U.S. 1004 (1975). *See also* Stanley v. Georgia, 394 U.S. 557, 571 (Stewart, J., concurring). *Compare* State v. Proctor, 12 Wash. App. 274, 529 P.2d 472 (1974).

[141] In jurisdictions in which an inadvertency requirement limits plain view seizures, see note 112 *supra* and accompanying text, the prosecution may have to walk a narrow path. It will be required to show that *before* they entered to arrest (or under some other valid theory), the police did *not* have search probable cause for a particular item, but that they had seizure probable cause for that item before they took it away.

[142] Abel v. United States, 362 U.S. 217, 241 (1960). *See also* Rios v. United States, 364 U.S. 253 (1960); Hester v. United States, 265 U.S. 57 (1924).

tent permanently to give up all claim to property is usually considered an essential element of abandonment, not every case in which a person places or drops property somewhere allows the property to be seized on an abandonment theory. If seizure probable cause is lacking, and if the property has not been abandoned, then the police may not seize it even if the property is in plain view. Many cases involving "dropped" evidence fail to articulate the theory under which the seizure is justified. Some seem to use "plain view" and "abandonment" interchangably.[143] In those instances where seizure probable cause arguably was lacking, and where the conduct of the defendant arguably did not amount to abandonment, the fourfold probable cause analysis should lead defense counsel to press the court to distinguish between abandonment theory and plain view theory. The distinction can lead to the suppression of evidence which otherwise might be admitted.

D. *The Issuance of a Search Warrant for Criminal Evidence*

The issuance of a valid warrant commanding the seizure of contraband or criminal evidence requires information demonstrating a probability that a crime has been committed (crime probable cause). The information must also establish a probability that the item named in the warrant (a) constitutes evidence of that crime and (b) presently is located at the place to be searched.[144] In other words, a particular type of search probable cause is required. The issuance of a search warrant does not necessitate offender probable cause.[145] Nor do questions of seizure probable cause arise at the time of issuance.[146]

The discussion which follows treats two practical search warrant problems which appear under a fourfold probable cause analysis. The author, at a more theoretical level, then reflects upon the absence of an offender probable cause requirement for the issuance of search warrants.

1. *Circumstantial Evidence and Search Probable Cause*

Sometimes police officers or prosecutors request the issuance of search warrants without claiming that direct evidence establishes the probability that the item named for seizure is at the place to be searched. In such cases neither the affiant nor the affiant's source has observed the contraband or the criminal evidence in the specified place. Nevertheless, the government agents urge that circumstantial evidence demonstrates the required probability. What type of circumstantial evidence will suffice?

The typical dispute is whether a probability that *D* has committed a crime (crime and offender probable cause) is enough to impel the inference that evidence of that crime is located in his home, his car or his garage. If a woman has sold narcotics on the street this morning, is this sufficient, without other data, to justify the search of her apartment this afternoon? If a man committed a burglary last night, is this sufficient to establish probable cause for the issuance of a search warrant for his garage this afternoon?

Even a half century ago, defense lawyers were arguing that the probability that their clients had committed recent crimes did not, by itself, establish probable cause to search their property.[147] Nevertheless, the issue sometimes is overlooked and, when it is urged upon a court, the results vary widely. Most courts accept the search probable cause requirement as an abstract concept. They recognize that crime probable cause and offender probable cause, by themselves, do not suffice to justify the issuance of a warrant to search the sus-

[143] *See, e.g.*, People v. Brasfield, 28 Ill. 2d 518, 192 N.E.2d 914 (1963), *cert. denied*, 375 U.S. 980 (1964); People v. Jackson, 98 Ill. App. 2d 238, 240 N.E.2d 421 (1968). For an automobile case which correctly separates abandonment theory (with no seizure probable cause requirement) from plain view theory (with the seizure probable cause requirement), *see* People v. Hermesch, 49 App. Div. 2d 587, 370 N.Y.S.2d 152 (1975).

[144] People v. Francisco, 44 Ill. 2d 373, 376, 255 N.E.2d 413, 415 (1970).

[145] People v. Simmons, 330 Ill. 494, 161 N.E. 716 (1928); People v. Daugherty, 324 Ill. 160, 154 N.E. 907 (1926). For a recent example of a search warrant which was issued without any reason to believe that the property owner had committed the crime in question, *see* People *ex rel.* Carey v. Covelli, 61 Ill. 2d 394, 336 N.E.2d 759 (1975). *See also* T. TAYLOR, *supra* note 6, at 28.

[146] At execution seizure probable cause issues may arise if the officers seize an item not named in the warrant. See text accompanying notes 136–37 *supra*.

[147] *See, e.g.*, People v. Billerbeck, 323 Ill. 48, 153 N.E. 586 (1926); People v. Prall, 314 Ill. 518, 145 N.E. 610 (1924).

pected offender's property. Courts do, however, vary greatly in determining how much *more*, besides crime and offender probable cause, is required.[148]

2. *Staleness and Probable Cause*

As Justice Marshall recently noted, crime and offender probable cause do not grow stale.[149] Once the police have acquired probable cause to believe that *D* has committed an offense, the mere passage of time before they arrest *D* creates no additional probable cause problem.[150] Search probable cause, however, does grow stale, and this creates difficulties in search warrant cases. Even if an affiant has personally observed heroin in a particular apartment, the magistrate must be concerned about whether the heroin is *still* likely to be present at the time the search warrant is sought.

The dimunition of search probable cause with the passage of time has given rise to two main classes of disputes. In the first, the affidavit does not expressly say when the relevant information was observed.[151] The affiant may state that he purchased and used marijuana in *X's* apartment and saw an additional quantity there before he left; but if the affiant does not say when he made these observations, the magistrate cannot determine whether there is a present probability that marijuana is at *X's* apartment. Obviously, it makes a difference whether the observations were made an hour ago or a year ago. This error in draftsmanship has occurred so frequently that a split in authority had developed between courts which strain to find that the affiant or hearsay source "obviously" was referring to recent observations, and courts which refuse to cover for the draftsman's mistake by giving a "present tense" construction to the affidavit.[152]

The second kind of case involves a more substantive issue. Here the affiant states when the last observations were made, and the issue is whether that was too long ago.[153] The frequency and the type of the criminal activity are relevant to the search probable cause calculation, so that no fixed period can be described as "permissible" or as "too long."[154] Sometimes a passage of six days from the last observations will destroy the requisite probable cause.[155] Sometimes three months will not.[156] To say that various factors must be weighed, however, is not to say that the decisions can all be reconciled. Some cases which find probable cause to search an offender's property many weeks after the last relevant observations seem so implausible that one might conclude that the judges have decided that it is proper to invade a probable offender's privacy, under the authority of a search warrant, even without search probable cause.[157] To this subject, we now turn our attention.

3. *Reflections Upon Search Warrants and Offender Probable Cause*

The commentators and reviewing court judges agree that under present law a warrant can issue to search *H's* home or business without any reason to believe that he has been a party to criminal activity.[158] The warrant can issue upon the demonstration that there is a probable cause to believe that specified evi-

[148] *See* United States v. Bailey, 458 F.2d 408 (9th Cir. 1972); United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970); People v. Wright, 37 N.Y.2d 88, 332 N.E.2d 331 (1975); Commonwealth v. Kline, 234 Pa. Super. 12, 335 A.2d 361 (1975); State v. Joseph (114 R.I. 596, 337 A.2d 523 (1975). *Compare* United States v. DiNovo, 523 F.2d 197 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975); United States v. Spach, 518 F.2d 866 (7th Cir. 1975); United States v. Olt, 492 F.2d 910 (6th Cir. 1974). Often the issue is complicated by a passage of time between the crime and the search.

[149] 423 U.S. 411, 449 (1976) (Marshall, J., dissenting).

[150] Occasionally, however, new information pointing to the innocence of the suspect may destroy previously established offender probable cause. *Compare* United States v. Coughlin, 338 F. Supp. 1328 (E.D. Mich. 1972) *with* People v. Gwin, 49 Ill. 2d 255, 274 N.E.2d 43 (1971).

[151] *See, e.g.*, Dean v. State, 46 Ala. App. 365, 242 So. 2d 411 (1970); Bailey v. State, 131 Ga. App. 276, 205 S.E.2d 532 (1974); State v. Oropeza, 97 Idaho 387, 545 P.2d 475 (1976).

[152] *See* State v. Richardson, 22 Ariz. App. 449, 528 P.2d 641 (1974); State v. Boudreaux, 304 So. 2d 343 (La. 1974). *Compare* authorities cited in note 151 *supra*.

[153] *See* United States v. Harris, 403 U.S. 573, 579 (1971); People v. Holmes, 20 Ill. App. 3d 167, 312 N.E.2d 748 (1974); People v. Siemieniec, 368 Mich. 405, 118 N.W.2d 430 (1962); Wilson v. State, 47 Ind. 582, 333 N.E.2d 755 (1975); People v. Morrison, 13 Ill. App. 3d 652, 300 N.E.2d 325 (1973).

[154] *See generally* LaFave, *supra* note 116, at 264–66.

[155] *See* People v. Wright, 367 Mich. 611, 116 N.W. 2d 786 (1962).

[156] *See* People v. Mason, 15 Ill. App. 3d 404, 304 N.E.2d 466 (1973), where 107 days passed between observation of the last datum and the issuance of a warrant commanding the search of a home, garage, and car and the seizure of several specified lost or stolen credit cards and a lost or stolen drivers license.

[157] *See especially id.*

[158] See note 44 *supra*.

dence of a crime is presently located at *H*'s property. Professor LaFave is troubled by this absence of an offender probable cause requirement. He has suggested that without a showing that the criminal evidence could not otherwise be discovered (as, for instance, through a subpoena), a search warrant should not issue for *H*'s property unless there is information linking him to a crime.[159] Surely the reasonableness clause of the fourth amendent could be utilized to achieve such a result. The case law recognizes that sometimes it is not reasonable to issue a search warrant even if the probable cause requirement of the fourth amendment's second clause is fully satisfied. For instance, a warrant commanding the removal of a bullet from someone's body may be unreasonable under certain circumstances even if crime, offender and search probable cause are present.[160] Similarly, the present author would strongly argue that crime and search probable cause are not sufficient to justify a search even of a suspect's home for the purpose of obtaining handwriting exemplars when such exemplars might readily be available elsewhere.[161]

There is, however, another way to view absence of an offender probable cause requirement in search warrant cases. If we feel that an innocent person should have more privacy as to his house or his car than a probable offender, we may conclude that where offender probable cause is present, we should be less concerned about search probable cause. At least where the police have probable cause to arrest *H* and where they seek prior judicial approval, why not allow something less than traditional probable cause to suffice for the issuance of a warrant to search *H*'s property? Where offender probable cause is present, reasonable suspicion that criminal evidence would be found should perhaps permit issuance of the warrant. Although judicial opinons purport to require "full" probable cause, in actual practice many seem to be satisfied with reasonable suspicion where it is a probable offender whose privacy is being invaded.[162]

Can such a dimunition of the search probable cause requirement be defended without doing violence to fourth amendment theory? Some might argue that the amendment's warrant clause is not as flexible as the reasonableness clause. Reasonableness varies with the circumstances, but the term "probable cause," as used in the warrant clause, cannot mean one thing in one search warrant case and another in a different search warrant case.

Camara v. Municipal Court[163] appears to provide a complete answer to the argument that search warrant probable cause cannot vary with the circumstances. In *Camara*, judicial warrants permitting health inspections were permitted to issue without a demonstration of either probable cause to believe that a crime has been committed or probable cause to believe that criminal evidence would be found. If the *Camara* dissenters had prevailed, thus allowing search warrants to issue only upon a showing of traditional crime and search probable cause, then the fourth amendment's warrant clause in many cases would prevent striking a proper balance between the rights of the citizen and the needs of society. Courts could still sanction searches which had received *no* prior judicial approval, even on less than probable cause. They could also require a showing of crime and search probable cause for searches conducted *with* prior judicial approval. However, they would not be able, as a requirement of reasonableness, to demand prior judicial approval in any instance where crime or search probable cause was lacking. Thus, for instance, they would not be permitted to uphold a warrant for the seizure of fingerprints on less than full probable cause.[164] They would have to choose between requiring a warrant based upon full crime and search probable cause or permitting a warrantless seizure of prints, perhaps without full probable cause. The choice might lead a court to excuse prior judicial approval in a situation where a proper balance would require such approval, even though traditional crime and search probable cause are

[159] LaFave, *supra* note 71, at 159-60.

[160] *See, e.g.*, Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974).

[161] Thus, exemplars may constitute a type of evidence which is even lower on the list of "seizable" materials than is "mere evidence." *See* J. HADDAD, *supra* note 3, at § 16.25.

[162] The generalization is based upon my reading of decisions of the type cited in notes 153-57 *supra*.

[163] 387 U.S. 523 (1967).

[164] Thus, the Supreme Court would be required to withdraw the dictum in Davis v. Mississippi, 394 U.S. 721, 738 (1969), which suggested that under a warrant, but without full offender or search probable cause, government agents might validly secure comparison fingerprints. [I assume that "full" crime probable cause is necessary even under the *Davis* dictum. *See* ARIZ. REV. STAT. § 13-1424 (1973).]

lacking.[165] The *Camara* majority, rather than uphold so rigid a rule, permitted warrants to issue without crime and search probable cause.

E. *Seizures Following Consent Search*

A search under a valid consent is permissible without crime, offender or search probable cause. The validity of a seizure of an object discovered in a consent search, however, may depend upon the probability that the object is contraband or constitutes evidence of a crime. The typical consent to search probably would not be construed to permit the officer to take and carry away any object which he comes across in the course of the search. Indeed, one can argue that a consent to search is ordinarily not a consent to take even items which have apparent evidentiary value.[166]

Plain view principles, however, can justify the typical seizure of evidence discovered in consent searches even where there is no consent to carry away anything. If an officer, looking in a place where he has a right to look under the authority granted by consent, discovers an object, plain view doctrines allow him to take and carry away that item if there is probable cause to believe that it constitutes evidence of a crime.[167]

Thus, practical lessons can be learned from a fourfold probable cause analysis in consent cases. The defense lawyer should remember that absent a broadly worded consent, officers cannot in a consent search seize items without seizure probable cause.[168] On the other hand, prosecutors should keep in mind that once an officer during a consent search comes across an object for which seizure probable cause exists, the breadth of the consent is largely irrelevant. An effort to revoke the consent at that point cannot operate to invalidate the seizure of criminal evidence because such a seizure is permissible under plain view principles.[169]

F. *Searches Under the Moving Vehicle Exception*

Under the *Carroll*[170] doctrine, as refined in *Chambers v. Maroney*[171] and interpreted in *Texas v. White*,[172] without a warrant the police can curb a moving vehicle and search it if they have probable cause to believe that a crime has been committed (crime probable cause) and probable cause to believe that evidence of that crime is in the vehicle (search probable cause). Offender probable cause is irrelevant. Thus a search under the "moving vehicle" exception is permissible upon the same amount and kinds of probable cause necessary to justify the issuance of a search warrant.[173] There is only one small difference. If an officer has probable cause to believe that some evidence of an armed robbery will turn up in a car (perhaps masks or guns or proceeds), he can stop and search the car even without probable cause that a *particular* item of evidentiary value will be discovered. On the other hand, because of the specificity requirement of the warrant clause, a search warrant cannot issue without probable cause to believe that a specifically described item is located in the place to be searched.[174] Thus, to

[165] As a direct result of the "full" search probable cause requirement for the issuance of a search warrant under traditional theory, some courts—realizing that no warrant could issue for want of probable cause—have approved non-emergency warrantless searches of various types. *See, e.g.*, State v. Chapman, 250 A.2d 203, 211 (Me. 1969), in which the court approved a warrantless homicide scene search in part because of the realization that, for want of search probable cause for some specified item, no search warrant could issue.

[166] Several cases hold that the consenting party can limit the scope of the search authorized. *See, e.g.*, United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971); People v. Schmoll, 383 Ill. 280, 48 N.E.2d 933 (1943). I know of none, however, which decides whether a search conditioned upon the police agreement to *seize* nothing would prevent officers from carrying away contraband or other criminal evidence discovered during the authorized search. Perhaps *Schmoll, supra*, presented this issue, although it is not clear whether the police came upon the disputed records while keeping within the limits of the authorized search. Nor is it clear whether the police had seizure probable cause for the records which were the subject of the controversy.

[167] *See* People v. Stewart, 10 Ill. App. 3d 187, 293 N.E.2d 169 (1973).

[168] *See* People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236 (1962), *cert. denied*, 373 U.S. 951 (1963), for an example of a consent search case in which arguably the defendant should have urged that despite the consent to search, the seizure was impermissible for want of seizure probable cause.

[169] People v. Gorsuch, 19 Ill. App. 3d 60, 310 N.E.2d 695 (1974).

[170] Carroll v. United States, 267 U.S. 132 (1925).

[171] 399 U.S. 42 (1970).

[172] 423 U.S. 67 (1975). See generally text accompanying notes 56-61 *supra*.

[173] See text accompanying notes 144-64 *supra*.

[174] See text accompanying note 144 *supra*.

get prior judicial approval to stop and search a car, an officer would need more data than is necessary for a warrantless search under the *Carroll* doctrine.

One probable cause question arising under the *Carroll* doctrine is the center of a current dispute. Over the years many decisions have assumed that if the police have probable cause to believe that evidence or contraband is somewhere in the vehicle, they can search the entire vehicle, including the glove compartment and the trunk. Recently some defense lawyers have argued that the requisite search probable cause must relate to the component which is to be searched.[175] For instance, if following a lawful traffic stop an officer detects the odor of burning marijuana, he may not have probable cause to believe that contraband or other evidence is in the car's trunk. Some courts have accepted the argument, holding that the search probable cause must relate to each separate component which is to be searched under the *Carroll* doctrine.[176]

Litigants can be confused if they forget that the *Carroll* doctrine is not the only theory which can apply to automobile searches. If a police officer arrests an occupant of a vehicle, under the doctrine of search incident to arrest, he can search the area of the vehicle within the arrestee's reach.[177] In such a case, the law is concerned with crime probable cause and offender probable cause. Search probable cause is wholly irrelevant if the search is incident to a lawful arrest and is properly confined within the spatial limits prescribed by *Chimel*.[178]

Thus, talk of the "probable cause" requirement in car searches is utterly meaningless unless we know what *type* of probability we are measuring. The fourfold probable cause analysis again reminds us of the necessity of keeping separate the various fourth amendment doctrines, each of which has distinct types of probable cause requirements.

[175] *See, e.g.*, People v. Gregg, 43 Cal. App. 3d 137, 117 Cal. Rptr. 496 (1974); Wimberly v. Superior Court, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); People v. Blixt, 37 Ill. App. 3d 610, 346 N.E.2d 31 (1976); People v. Kreichman, 45 App. Div. 2d 697, 357 N.Y.S.2d 82 (1974), *rev'd*, 37 N.Y.2d 693, 339 N.E.2d 182, 376 N.Y.S.2d 497 (1975).

[176] *Id.*

[177] *See, e.g.*, Application of Kiser, 419 F.2d 1134 (8th Cir. 1969). *Compare* People v. Hendrix, 25 Ill. App. 3d 339, 323 N.E.2d 505 (1974).

[178] Chimel v. California, 395 U.S. 752 (1969).

G. *Entries into Homes Without Search Warrants*

Several different theories may justify a government agent's entry into a home without a search warrant.[179] Sometimes the entry is permissible to effect an arrest. Sometimes it is necessary to preserve life or health. In limited circumstances, a warrantless entry may be proper to prevent the destruction of criminal evidence. The kinds and the quanta of probability required vary with the theory which justifies the entry. To demonstrate the point, let us examine the three justifications for entry just described, recognizing that our list is by no means exhaustive.

1. *Entry to Arrest*

An entry into a home to arrest *S* requires probable cause to believe that an offense has been committed (crime probable cause) and that *S* has committed it (offender probable cause). The entry itself, with or without an arrest warrant, is a search within the meaning of the fourth amendment.[180] This suggests a search probable cause issue. How likely must it be that the intrusion will bear fruit; that is, that it will result in the arrest of *S*? What probability must there be that *S* is within the home?

Most courts hold that to enter a third person's home to arrest *S*, the police must have full probable cause to believe that *S* is within.[181] Contrary to the assumption of many commentators, however, some courts have held that to justify an entry into *S*'s home for purposes of arresting *S*, the police need much less than full probable cause to believe he is at home.[182] Indeed, Illinois courts have held that unless the police know that *S* is *not* at home, they can enter to eliminate the home as a hiding place before looking elsewhere.[183] Other jurisdictions have required a lesser quantum of search probable cause where the police have obtained an

[179] See note 29 *supra* and accompanying text.

[180] *See* Dorman v. United States, 435 F.2d 385, 390 (D.C. Cir. 1970); Commonwealth v. Forde, 329 N.E. 2d 717, 722 (Mass. 1975). *See generally* Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L. J. 56 (1974).

[181] *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

[182] *See* Haddad, *supra* note 36, at 510–14.

[183] People v. Sprovieri, 43 Ill. 2d 223, 252 N.E.2d 531 (1969); People v. Morales, 48 Ill. 2d 396, 271 N.E.2d 33 (1971).

arrest warrant than in cases where they seek to make a warrantless arrest.[184] Perhaps a hot pursuit entry would also require less search probable cause than a warrantless entry to arrest under non-emergency circumstances.[185]

Whatever the law of a particular jurisdiction requires, a fourfold probable cause analysis reminds us to consider whether and to what degree the likelihood of success (search probable cause) is a constitutional prerequisite for a particular type of fourth amendment intrusion. In the entry-to-arrest cases it suggests an issue which might otherwise be overlooked.

2. *Entry to Preserve Life or Health*

When officers enter *H*'s home to preserve life or health, they need not justify their actions by pointing to data which demonstrate that a crime probably has been committed, that *H* probably is the offender, or that evidence of the offense probably is within the home. Crime, offender and search probable cause, as heretofore discussed, have no place in analyzing a civil emergency entry. Nevertheless, "civil emergency" is not a talismanic phrase which makes unnecessary any calculation of probabilities. In determining the reasonableness of an emergency entry, among several factors to be weighed are (1) the probability that an emergency exists, and (2) the probability that the entry will do some good.[186] The first concept is different from but analogous to crime probable cause. The second concept is akin to search probable cause.

Because emergencies require prompt action, courts may be reticent to engage in a hindsight weighing of the probabilities and to criticize officers for acting on too little data.[187] They may not demand full probable cause to believe that life or health was imperiled or that an emergency entry would prove helpful. Nevertheless courts, no more than counsel, cannot entirely refuse to consider the probabilities which were present at the time of the emergency entry.[188]

3. *Entry to Prevent Destruction of Evidence*

Some courts have held that police officers, under limited circumstances, can make warrantless entries into homes to prevent the destruction of criminal evidence.[189] Obviously, as in a search warrant case, we must be concerned about the probability that a crime has been committed (crime probable cause) and the probability that evidence related to the crime is within the home (search probable cause). Must the minimum quantum of probable cause required for such an emergency entry be greater than, the same as, or less than the probability required for the issuance of a search warrant?

One view is that, as in the civil emergency cases, a situation where evidence may be destroyed is a now-or-never emergency where we cannot demand from the officer a fine calculation of probabilities.[190] This view would allow emergency action in quest of evidence on less data than is required for the issuance of a search warrant. The contrary view is that a warrantless invasion of a home to obtain criminal evidence should be permitted only where there is a near certainty that the evidence is within and a very substantial probability that, absent swift police action, the evidence will be destroyed. Thus, under this view (1) the required quantum of search probable cause is greater in the warrantless entry case than in warrant cases; and (2) a separate type of probable cause (the probability that the evidence will otherwise be destroyed) is also required. In most of the cases which permit warrantless entries to prevent destruction of evidence, the facts seem to satisfy the more stringent of the two views outlined above.[191]

H. *Inventory and Other Administrative Searches*

In *South Dakota v. Opperman*,[192] the Supreme Court held that where police officers have taken lawful possession of a vehicle, they can search the car without a warrant under an inventory search theory. The rationale of the doctrine—the need to protect the citizen's property and to discourage false claims of po-

[184] *See* Rotenberg & Tanzer, *supra* note 180, at 57, 65.

[185] This assumes that non-emergency entries to arrest are constitutionally permissible. See note 37 *supra*.

[186] *See* People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, *cert. denied*, 426 U.S. 953 (1976).

[187] Wayne v. United States, 318 F.2d 205, 211–12 (D.C. Cir. 1963).

[188] *See* People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, *cert. denied*, 426 U.S. 953 (1976).

[189] See note 37 *supra* and accompanying text.

[190] *See* People v. DiVito, 77 Misc. 2d 463, 353 N.Y.S.2d 990 (1974), which upheld an emergency intrusion (although not of a house) to seize evidence upon less than probable cause.

[191] *See, e.g.*, United States v. Guidry, 534 F.2d 1220 (6th Cir. 1976); Thomas v. Parett, 524 F.2d 779 (8th Cir. 1975); People v. Clark, 547 P.2d 267 (Colo. App. 1975).

[192] 428 U.S. 364 (1976).

lice theft—has nothing to do with efforts to discover criminal evidence. Thus, it is not surprising that search probable cause, as generally understood, need not be present to justify an inventory search. Additionally, where authorities have lawfully taken temporary custody of a law-abiding citizen's property, as for instance the vehicle of a motorist suddenly taken ill while driving alone on a highway, neither crime nor offender probable cause is a necessary prerequisite of an inventory search.[193]

The inventory search is one type of intrusion among a broader class of administrative intrusions which are justified on a rationale that is unrelated to the need to detect crime, to secure criminal evidence or to arrest criminals. Others include searches under implied consent regulatory schemes, shakedowns of prison cells, border searches, antihijacking measures utilized at airports, inspections of persons seeking entrance to public buildings, and a variety of additional fourth amendment intrusions.[194] Each doctrine has its separate nuances and limitations, which often vary from jurisdiction to jurisdiction. The common element, for purposes of our analysis, is that crime, offender and search probable cause are unnecessary because the rationale of the doctrines is something other than the need to detect crime and to prosecute criminals.

Sometimes the administrative search rationale also allows authorities to retain, at least temporarily, the citizen's property without a showing of seizure probable cause. For instance, an administrative prohibition against prisoners' keeping currency in their cell may justify removal of currency found in a cell even though the inmate's possession violated no criminal law. On the other hand, in some situations there is no administrative justification for the retention of the property. For instance, if inspection of a woman's purse at a courthouse entrance reveals nothing which could aid a prisoner's escape or pose a danger to those within the building, then the administrative search rationale does not permit anything in the purse to be seized. If, however, the inspection has revealed an item as to which there is seizure probable cause, since the item has been discovered in a place where the agent had a right to look, under traditional plain view theory the contraband or criminal evidence can be retained.

The fourfold probable cause analysis is probably less useful to the practicing attorney in inventory and other administrative search cases than elsewhere. The analysis, however, does bring into focus a theoretical concern which was treated in Part II of this article: the anomaly that, under an individual motivation test for resolving claims of sham use of administrative searches, the more data pointing to search probable cause, the more likely is a court to invalidate an administrative search.[195]

Final Thoughts on Fourfold Probable Cause

The fourfold probable cause analysis could be applied to a variety of other doctrines which authorize warrantless intrusions. Attention to such an analysis may suggest, to both practitioner and theoretician, important issues arising under these various doctrines. To ask what type or types and what quantum of probable cause is necessary to justify any particular fourth amendment intrusion may not lead us to every important fourth amendment issue, but the approach will provide a good beginning and will quickly bring us to some current problems as well as some future areas of controversy in fourth amendment litigation.

Conclusion

As indicated at the outset, my discussions of the three topics treated herein have a common origin but no real common theme. To Professor Fred E. Inbau, I am grateful for the opportunity and the encouragement to participate in the training programs which gave rise to my ideas. Whatever else is true, I have learned that a thoughtful effort to present fourth amendment law in a practical way demands serious attention to theory.

[193] *See* People v. Smith, 44 Ill. 2d 82, 254 N.E.2d 492 (1969).

[194] See text accompanying notes 11-27 *supra*. In some types of administrative search, the reason for the search may be the prevention of criminal acts or acts against the public interest: *e.g.*, even in the absence of a law which prohibits carrying a toy gun into a courthouse or onto a plane, security may demand that such toys be discovered. In other cases, the purpose is neither to detect nor prevent crime: *e.g.*, inventory search and search for money in the jail cell. Implied consent regulatory schemes may have as their justification an intent to safeguard workers or consumers—even though in many cases discovered violations could lead to criminal prosecutions. The rationale for these various administrative searches which justifies a search without probable cause is some (or some additional) purpose other than discovery of criminal evidence.

[195] See text accompanying notes 99-101 *supra*.