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THE ROLE OF ABANDONMENT IN THE LAW OF SEARCH AND SEIZURE: AN APPLICATION OF MISDIRECTED EMPHASIS

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INTRODUCTION

With the evolvement of an increasingly urban culture and civilization, law enforcement agencies in the United States have been faced with problems of major proportions. Although only some of these problems are of recent vintage, they all have been magnified by the acute density of population in our urban centers. Accompanying this shift in population emphasis has been a growing frequency in street encounters between the police and the citizen. These encounters "are incredibly rich in diversity"[1] and pregnant with potential confrontation.

Since our society has chosen to reserve to the people all power not required for effective rule under a government of laws, we have deemed it necessary to safeguard "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[2]

The foundation of this policy is the fourth amendment,[3] having as its essence the protection against arbitrary intrusions by government into the privacies of life.[4] Thus, while a police officer must be vigilant and resourceful in combating crime, he is required to do so within a constitutional framework that seeks the preservation of the dignity of the individual.

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1. Terry v. Ohio, 392 U.S. 1, 13 (1968).

2. Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891).

3. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

4. Texas v. Gonzales, 388 F.2d 145, 147-48 (5th Cir. 1968).

Since encounters between the police and the individual are varied and unpredictable, no *a priori* ground rules for analysis are feasible. Each encounter will require separate examination, taking into consideration the surrounding circumstances. However, they will usually fall into three major categories: those of a chance variety; those initiated by the police; and those effected through the execution of either search or arrest warrants.[5] In each, the ultimate result may be the same: the individual encountered discards a piece of incriminating evidence which is retrieved by the officer. The issue raised, then, is whether the disclosure of the evidence was the product of, and was prompted by, unreasonable activity under the fourth amendment, thereby necessitating its suppression under the exclusionary rule,[6] or was the result of an act of abandonment lying beyond the protection of the amendment.

The resolution of this issue will hinge, in turn, on a number of variables: the type of encounter involved; its locale; the identity and motivation of its prompter; and the initial legality of an officer's presence prior to the confrontation. It is to this issue, and its surrounding variables, that this article is directed. An attempt will be made to categorize the several authorities passing upon this issue, to critically analyze, where appropriate, their attempted solutions, and to propose a new approach for the effective solution of an increasingly frequent problem of constitutional importance.

I. The Meaning of Abandonment and Its Significance in the Law of Search and Seizure

The significance of abandoned property in the law of search and seizure lies in the maxim that the protection of the fourth amendment does not extend to it.[7] Thus, where one abandons property, he is said to bring his right of privacy therein to an end,[8] and may not later complain about its subsequent seizure and use

5. The first two categories will usually involve public confrontations, whereas the last will frequently arise in private.

6. The exclusionary rule is essential to the fourth amendment. *E.g.*, Simmons v. United States, 390 U.S. 377, 389 (1968); Mapp v. Ohio, 367 U.S. 643, 656 (1961).

7. Abel v. United States, 362 U.S. 217, 241 (1960); Moss v. Cox, 311 F. Supp. 1245, 1249 (E.D. Va. 1970); Jackson v. State, 235 So. 2d 382, 385 (Ala. Crim. App. 1970); People v. Prisco, 61 Misc. 2d 730, 733, 305 N.Y.S.2d 1006, 1010 (Sup. Ct. 1969).

8. Corngold v. United States, 367 F.2d 1, 7 (9th Cir. 1966); *see* United States v. Gibson, 421 F.2d 662, 663 (5th Cir. 1970).

in evidence against him.[9] In short, the theory of abandonment is that no issue of search is presented in such a situation,[10] and the property so abandoned may be seized without probable cause.[11]

It is readily apparent, then, that the issue of abandonment in criminal prosecutions cannot be resolved solely on the basis of its concept in the law of property, where the dual issues of incrimination and constitutional protection are primarily irrelevant. This is not to say, however, that its property law meaning is without significance in the field of search and seizure. What it does signify is that before a court may properly find abandonment in a criminal prosecution, it must take into consideration not only the property law concept of abandonment but also the issue of waiver of a basic constitutional protection. Thus, abandonment in the law of search and seizure is relevant to the voluntary relinquishment of a known right.[12]

When the issue of abandonment is raised in a criminal proceeding, the initial point of inquiry for a court should be directed toward the concept that has evolved with the development of property law. Although this concept is not controlling on the issue of abandonment in the law of search and seizure, it is a point of reference because it defines the property aspect of the issue. From this, a court should then proceed to the remaining, and critical, constitutional aspect, which determines whether the individual's activities had the effect of intentional and voluntary termination of his right of privacy in the property discarded. Thus, the issue of abandonment under the fourth amendment is composed of the dual qualities of property and privacy.

In the law of property, it has been recognized that the act of abandonment is demonstrated by an intention to relinquish all title, possession, or claim to property, accompanied by some type

9. United States *ex rel.* Fein v. Deegan, 298 F. Supp. 359, 365 (S.D.N.Y. 1967), *aff'd on other grounds,* 410 F.2d 13 (2d Cir.), *cert. denied,* 395 U.S. 935 (1969); People v. Prisco, 61 Misc. 2d 730, 733, 305 N.Y.S.2d 1006, 1010 (Sup. Ct. 1969).

10. Jackson v. State, 235 So. 2d 382, 385 (Ala. Crim. App. 1970); People v. Lopez, 22 App. Div. 2d 813, 254 N.Y.S.2d 806 (2d Dep't 1964); People v. Prisco, 61 Misc. 2d 730, 733, 305 N.Y.S.2d 1006, 1010 (Sup. Ct. 1969); *see* United States v. Gibson, 421 F.2d 662, 663 (5th Cir. 1970).

11. Moss v. Cox, 311 F. Supp. 1245, 1249 (E.D. Va. 1970) (rule applies, provided either that the area of abandonment is accessible to the public, or itself has been abandoned, or where the aggrieved party lacks the requisite standing to complain).

12. Which, of course, is the meaning of "waiver." *E.g.,* Brookhart v. Janis, 384 U.S. 1, 4 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Blalock, 255F. Supp. 268, 269-70 (E.D. Pa. 1966).

of activity or omission by which such intention is manifested.[13] As one court has stated:

> The abandonment of property is the relinquishing of all title, possession, or claim to or of it — a virtual *intentional* throwing away of it. It is *not presumed.* Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.[14]

It is ordinarily a question of fact,[15] is never presumed,[16] and does not require the performance of any ritual.[17] Ultimately, it is a question of *intent.*[18] Since, however, the conclusive effect of abandonment under the fourth amendment is the termination of an individual's right, or expectation, of privacy in a particular piece of property, its existence is finally a question of federal constitutional law, and not one governed by local property concepts.[19]

II. Standing and Burden of Proof

A. *Standing*

In view of the fact that whenever an individual discards personal property, he runs the potential risk of exposing himself to a claim of abandonment[20] which, if proved, will divest him of any

13. Glotzer v. Keyes, 125 Conn. 227, 233, 5 A.2d 1, 4 (1939); Boatman v. Andre, 44 Wyo. 352, 362, 12 P.2d 370, 373 (1932). For example, if an individual throws away objects in a public alley, they will be considered abandoned. People v. Prisco, 61 Misc. 2d 730, 733, 305 N.Y.S.2d 1006, 1010 (Sup. Ct. 1969). And, where a hotel guest vacates his room and checks out, any items of personal property voluntarily left behind will be classified as abandoned. Abel v. United States, 362 U.S. 217, 241 (1960); People v. Long, 86 Cal. Rptr. 227, 231 (Ct. App., 2d Dist. 1970).

14. Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237, 238 (1920) (emphasis added), *quoted with approval in* United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968). In view of this, the intentional concealment of property is not an act of abandonment. *See* State v. Chapman, 250 A.2d 203, 212 (Me. 1969).

15. Sharkiewicz v. Lepone, 139 Conn. 706, 707, 96 A.2d 796, 797 (1953).

16. Foulke v. New York Consol. R.R., 228 N.Y. 269, 127 N.E. 237, 238 (1920). Of interest is the related rule governing the waiver of constitutional rights, namely, the presumption against such waiver. *E.g.,* Brookhart v. Janis, 384 U.S. 1, 4 (1966).

17. United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968).

18. *Id.*

19. United States *ex rel.* Fein v. Deegan, 298 F. Supp. 359, 365 n.10 (S.D.N.Y. 1967), *aff'd on other grounds,* 410 F.2d 13 (2d Cir.), *cert. denied,* 395 U.S. 935 (1969). It has also been recognized that rights secured by the fourth amendment are not governed by local property law. *E.g.,* Silverman v. United States, 365 U.S. 505, 511 (1961); *see* Jones v. United States, 362 U.S. 257, 266-67 (1960).

20. There is also the risk that the discarded property will fall within the "plain view" doctrine, in which event no issue of search is presented. For representative examples of such an approach, *see* Burton v. United States, 414 F.2d 261, 263 (5th Cir. 1969); People v. Sylvester, 43 Ill. 2d 325, 327, 253 N.E.2d 429, 430 (1969); People v. Bridges, 123 Ill. App. 2d 58, —, 259 N.E.2d 626, 629 (1st Dist. 1970); People v. Rice, 122 Ill. App. 2d 329, —, 258 N.E.2d 841, 843 (4th Dist. 1970); Dansby v. State, 450 S.W.2d 338, 339 (Tex. Crim. App. 1970).

interest therein, the question naturally arises whether such discard deprives him of the requisite standing to complain. Although rarely discussed in the cases, the answer appears to be that the disposal of the property will not undercut the individual's right to complain.[21]

There is merit in this approach. First, abandonment is never presumed. Therefore, if the act of discard were to sever an accused's standing to complain, it would nullify the rule of non-presumption and would, in fact, effectively reverse it in favor of presumption. Second, the Supreme Court has rejected the requirements of ownership and possessory interest for standing.[22]

B. *Burden of Proof*

By its very nature, the issue of abandonment will arise only in situations involving warrantless activity, for otherwise, the prosecution would seek justification in the authority conferred by a warrant. Therefore, the question of burden of proof will be determined by reference to the rule pertaining to warrantless searches or seizures.

As with consent,[23] the burden rests with the prosecution to justify either a warrantless arrest[24] or search.[25] Thus, although the accused initially carries the burden of establishing warrantless activity,[26] once he has succeeded in this, the burden will shift to

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21. *E.g.*, Moss v. Cox, 311 F. Supp. 1245, 1249, 1250 (E.D. Va. 1970). The court reasoned that if a consent to search is invalid because it consists of no more than mere acquiescence to official demands, the discarding of property in the face of "impending discovery" should not preclude subsequent objection to the legality of official conduct which prompted such action. *Id.* at 1249. To deny standing to an individual so situated, reasoned the court, would be to indulge in a "fiction" and would effectively preclude access to exclusion, which is "aimed at official improprieties." *Id.* Although the situation in *Moss* dealt with imminent discovery, no sound reason appears to limit the rule to that situation, and the rule annouced should apply to any discard. Otherwise, a court will be deprived of the opportunity to ascertain the true factual situation.

22. Jones v. United States, 362 U.S. 257, 263-64, 267 (1960).

23. *E.g.*, Bumper v. North Carolina, 391 U.S. 543, 548 (1968); People v. Whitehurst, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969).

24. People v. Williams, 88 Cal. Rptr. 349, 351 (Ct. App., 2d Dist. 1970); *see* Beck v. Ohio, 379 U.S. 89, 97 (1964); People v. Satterfield, 252 Cal. App. 2d 270, 275, 60 Cal. Rptr. 733, 737 (1st Dist. 1967).

25. People v. Edwards, 71 Cal. 2d 1096, 1099, 458 P.2d 713, 715, 80 Cal. Rptr. 633, 635 (1969); People v. Faris, 63 Cal. 2d 541, 545, 407 P.2d 282, 285, 47 Cal. Rptr. 370, 373 (1965); State v. Keeby, 159 Conn. 201, 206, 268 A.2d 652, 655 (1970).

26. The law presumes the existence of a warrant. People v. Lyons, 87 Cal. Rptr. 799, 801 (Dist. Ct. App. 1970).

the prosecution to show proper justification for the challenged police conduct.[27]

III. Authorities Finding Abandonment

It is now appropriate to summarize the differing rationale of the cases finding abandonment or reasonable seizure. Critical analysis will follow.

Abandonment, being primarily a question of fact, must be resolved in terms of the circumstances surrounding the act of discard. Among the circumstances used by courts are the nature of the locale where the individual is observed in the act of discard; the area into which the property is thrown; the behavior (pattern) of the individual; and the propriety of the retrieving or seizing officer's conduct both prior to and at the moment of discard.

In the leading case of *Hester v. United States*,[28] Mr. Justice Holmes, speaking for the Court, held that since petitioner had been observed in the act of discarding property in an open field, it was proper for the officers to retrieve it, as it had been abandoned, and the protection accorded by the fourth amendment does not extend to the "open fields."[29]

It has also been held that if an individual, while under either observation or active surveillance by the police, but not under arrest, discards an object in a public area upon becoming cognizant of their presence, it will be considered abandoned.[30] State courts

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27. *Id.*; People v. Whitehurst, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969). It has been explicitly recognized that the burden rests with the prosecution to establish abandonment. *E.g.*, United States v. Robinson, 430 F.2d 1141, 1143 (6th Cir. 1970).

28. 265 U.S. 57 (1924).

29. *Id.* at 58, 59. It is not clear whether the primary basis for the court's decision was abandonment or the "open fields" doctrine. If the former, then there would have been no need to justify the seizure under the doctrine; if the latter, then there would have been no necessity for characterizing the property as "abandoned." It would appear, however, that the locus of the discard had a bearing on the court's determination of abandonment, thereby requiring a dual basis for its decision, because it further noted that the evidence had not been obtained by entry into petitioner's residence, and the examination of the discarded property took place in an open field. *Id.*

30. Vincent v. United States, 337 F.2d 891, 897 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965); Burton v. United States, 272 F.2d 473, 477 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960); People v. Superior Court, 76 Cal. Rptr. 712, 714 (Dist. Ct. App. 1969); Brown v. United States, 261 A.2d 834, 835 (D.C. App. 1970); People v. Bridges, 123 Ill. App. 2d 58,—, 259 N.E.2d 626, 629 (1st Dist. 1970).

have reached the same conclusion where the discard is effected while the individual is being lawfully detained for questioning,[31] or while the police are approaching him for such inquiry.[32]

Other cases addressing the abandonment issue have placed primary emphasis upon the type of area into which the property is thrown. Thus, in *United States v. Lewis*,[33] the court reasoned that since defendant had no constitutionally protected right of privacy in either an apartment roof from which a federal agent observed her toss out a package of heroin from her window, or the courtyard where it landed, she could not complain of any invasion of privacy.[34] And, in *Hobson v. United States*,[35] the court argued that one of the reasons why the contents of the discarded bag of heroin should have been suppressed was that it had landed within the curtilage of defendant's home—an area protected under the fourth amendment.[36] From this line of reasoning has evolved the rule that if an individual, in response to the lawful presence of law enforcement officers, discards property in an area lying outside the protective ambit of the fourth amendment, no issue of unreasonable search or seizure activity will be presented.[37]

A third line of cases has attached critical importance to the defendant's conduct, and has argued that if he divests himself of the property out of any consciousness of guilt, or because of a fear of potential apprehension, it will be reasonable for a police officer to retrieve it.[38]

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31. Martinez v. People, 456 P.2d 275, 277 (Colo. 1969); Dansby v. State, 450 S.W.2d 338, 339 (Tex. Crim. App. 1970).

32. People v. Blackmon, 80 Cal. Rptr. 862, 864 (Ct. App., 2d Dist. 1969) (relying in part upon defendant's strong sense of guilt); Hardin v. State, 257 N.E.2d 671, 672-73 (Ind. 1970); Branning v. State, 222 So. 2d 667, 669 (Miss. 1969); *see* McGuire v. State, 468 P.2d 12, 14 (Nev. 1970).

33. 227 F. Supp. 433 (S.D.N.Y. 1964).

34. *Id.* at 436.

35. 226 F.2d 890 (8th Cir. 1955).

36. *Id.* at 894.

37. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968), *interpreting* Marullo v. United States, 328 F.2d 361, 363, 364 (5th Cir.), *rehearing denied*, 330 F.2d 609, *cert. denied*, 379 U.S. 850 (1964); Trujillo v. United States, 294 F.2d 583, 583-84 (10th Cir. 1961); *see* Lee v. United States, 221 F.2d 29, 30 (D.C. Cir. 1954); Branning v. State, 222 So. 2d 667, 669 (Miss. 1969); State v. Garcia, 76 N.M. 171, 175, 413 P.2d 210, 213 (1966).

38. United States v. Martin, 386 F.2d 213, 215 (3d Cir. 1967), *cert. denied*, 393 U.S. 862 (1968); United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965), *aff'd by order*, No. 20,059 (D.C. Cir. 1966); People v. Blackmon, 80 Cal. Rptr. 862, 864 (Ct. App., 2d Dist. 1969); State v. Shaw, 6 Conn. Cir. Ct. 17, 19, 262 A.2d 614, 615 (Tr. Div. 1968) (court ruled that defendant had abandoned property out of fear of apprehension).

The final line of cases approaches the issue with emphasis upon the reasonableness of police activity, and has reasoned that if no improper activity or presence by law enforcement officers prompts an individual to discard incriminating evidence, then it may not be said that its exposure was the product of either an illegal arrest or search and seizure.[39] A further rule states that if an accused discards property while in lawful custody or detention, or while peace officers are attempting to effect such custody, it may be lawfully retrieved.[40]

Since it may not always be readily perceivable whether the actions of law enforcement officers have prompted an accused to discard items of evidentiary interest, it has been suggested that the test is what "a reasonable man, innocent of any crime, would have thought, had he been in the defendant's shoes."[41]

IV. Authorities Not Finding Abandonment

The basis for the cases not finding abandonment appears to be threefold: either the discard was prompted by the unlawful presence of the police, was the product of an illegal arrest, or was

39. Capitoli v. Wainwright, 426 F.2d 868, 870 (5th Cir. 1970); Cutchlow v. United States, 301 F.2d 295, 297 (9th Cir. 1962); United States v. McKethan, 247 F. Supp. 324, 328-29 (D.D.C. 1965), *aff'd by order,* No. 20,059 (D.C. Cir. 1966); United States v. Lewis, 227 F. Supp. 433, 436-37 (S.D.N.Y. 1964) (also endorsing the locale doctrine); United States v. Festa, 192 F. Supp. 160, 165 (D. Mass. 1960) (dictum); State v. Everidge, 77 N.M. 505, 511-12, 424 P.2d 787, 792 (1967); State v. Romeo, 43 N.J. 188, 205-06, 203 A.2d 23, 32 (1964), *cert. denied,* 379 U.S. 970 (1965); *see* Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968) (existence of rule recognized); United States v. Merritt, 293 F.2d 742, 744-46 (3d Cir. 1961); Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957) (by implication). One case has even gone so far as to hold that police officers may validly seize abandoned property after gaining illegal entry to private premises, provided they did not force the discard by means of exploitation of their entry. United States v. Martin, 386 F.2d 213, 215 (3d Cir. 1967), *cert. denied,* 393 U.S. 862 (1968).

40. Capitoli v. Wainwright, 426 F.2d 868, 870 (5th Cir. 1970); Burton v. United States, 414 F.2d 261, 263 (5th Cir. 1969); People v. Sylvester, 43 Ill. 2d 325, 326-27, 253 N.E.2d 429, 430 (1969) (such property will be considered abandoned); Von Hauger v. State, 258 N.E.2d 847, 848 (Ind. 1970); Oliver v. State, 449 P.2d 252, 253 (Nev. 1969) (will be considered abandoned); People v. McKnight, 26 N.Y.2d 1034, 260 N.E.2d 552, 311 N.Y.S.2d 922, 923 (1970); Jackson v. State, 235 So. 2d 382, 385 (Ala. Crim. App. 1970); *see* Johnson v. United States, 370 F.2d 489, 491 (D.C. Cir. 1966); Hayes v. State, 44 Ala. Crim. App. 539,—, 215 So. 2d 604, 606 (1968); Maples v. State, 44 Ala. Crim. App. 491, —, 214 So. 2d 700, 703 (1968); Hamilton v. State, 438 S.W.2d 814, 815 (Tex. Crim. App. 1969); Parson v .State, 432 S.W.2d 89, 92 (Tex. Crim. App. 1968) King v. State, 416 S.W.2d 823, 824 (Tex. Crim. App. 1967).

41. United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965), *aff'd by order,* No. 20,059 (D.C. Cir. 1966). This approach, it is submitted, is unrealistic, for the obvious reason that there would be *nothing* for an innocent man to discard.

performed under circumstances demonstrating a continued expectation of privacy.

The main element of distinction between these cases and those finding abandonment appears to lie in the primary emphasis placed upon the activities of the police. Thus, in *Fletcher v. Wainwright,*[42] the court ruled that since defendants discarded stolen jewelry from their motel window in response to an unlawful attempt by the police to gain entry to their room, no true abandonment had been intended.[43] "To hold otherwise would abort the deterrent policy behind the exclusionary rule."[44] Furthermore, the court specifically rejected the principle that defendants could not complain for lack of a proprietary interest in the area where the jewelry was retrieved, on the ground that the proprietary-interest approach clouded the issues of privacy and public security, which should be the focal points of any inquiry under the fourth amendment.[45]

From this primary emphasis upon the legality of law enforcement activity has evolved the rule that if an individual discards or throws away evidence as a direct consequence of the unlawful presence of peace officers, his act will not be considered a voluntary abandonment, but rather a forced response to the unauthorized presence.[46] Therefore, the fact that the discard openly reveals

42. 399 F.2d 62 (5th Cir. 1968).

43. *Id.* at 64.

44. *Id.* at 64-65.

45. *Id.* at 64. As the Supreme Court has said:

> The premise that property interests control the right of the Government to search and seize has been discredited. * * * We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

Warden v. Hayden, 387 U.S. 294, 304 (1967).

46. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968); Massachusetts v. Painten, 368 F.2d 142, 144 (1st Cir. 1966), *petition for cert. dismissed,* 389 U.S. 560, 561 (1968); United States v. Merritt, 293 F.2d 742, 744-46 (3d Cir. 1961); Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957) (hiding narcotics in a trash can to avoid detection is not abandonment); Hobson v. United States, 226 F.2d 890, 894 (8th Cir. 1955); Ingram v. State, 226 So. 2d 169, 171 (Ala. App. 1969); *see* Von Utter v. Tulloch, 426 F.2d 1, 5 (1st Cir. 1970). Conversely, if the discard is prompted out of a sense of guilt, and not as a result of exploitation of the illegal entry, then there will be an abandonment. *E.g.,* United States v. Martin, 386 F.2d 213, 215 (3d Cir. 1967), *cert. denied,* 393 U.S. 862 (1968). Although these cases dealt with entry upon private premises, this element of situs should have no constitutional significance, as the crucial issue was one of intent: did the accused intend to permanently abandon the property, or was his intent one of only temporary divestment? Additionally, the Supreme Court has emphasized that the fourth amendment "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

the nature of the property will not alter the result so as to permit seizure under the "open view" doctrine.[47]

Closely allied to this situation is the one involving an illegal arrest. Here, too, the discard will not be considered voluntary if it was prompted by the attempted or executed illegal seizure of defendant.[48] The reasoning behind the refusal to find abandonment in these cases is that since there has been an illegal arrest, there can be no abandonment as a matter of law, because the "primary illegality would taint the [purported] abandonment. . . ."[49]

Occasionally, a court, when faced with the issue of abandonment, will be concerned primarily with the owner's continued expectation of privacy in the discarded property, rather than with illegal official presence or activity. In this situation, the court's inquiry will be directed to whether the disposal of the property was intended as a special, or a general, act of abandonment; that is to say, did the owner, by the manner of disposal, intend an abandonment to the world, or only to a special class of individuals? Thus, in *People v. Edwards,*[50] the court held that a bag of marijuana, placed in a trash can several feet from the back porch door of defendants' residence prior to their knowledge of any police presence, was not abandoned.[51] It reasoned that in putting the bag in the can, defendants had exhibited a reasonable expectation of privacy from the rest of the world, with the exception of trashmen authorized to remove the receptacle's contents, and at least until the trash had lost its identity and significance (meaning) by later

47. Ingram v. State, 226 So. 2d 169, 171 (Ala. App. 1969). The doctrine does not apply if the officer is illegally positioned or situated. Amador-Gonzales v. United States, 391 F.2d 308, 312 (5th Cir. 1968); Ingram v. State, *supra* at 171.

48. Williams v. United States, 237 F.2d 789 (D.C. Cir. 1956); Moss v. Cox, 311 F. Supp. 1245, 1253 (E.D. Va. 1970); United States v. Festa, 192 F. Supp. 160, 165 (D. Mass. 1960); People v. Baldwin, 25 N.Y.2d 66, 70, 250 N.E.2d 62, 64, 302 N.Y.S.2d 571, 574 (1969) (noting that the mere dropping of an envelope is insufficient to establish probable cause, *id.* at 71, 250 N.E.2d at 64, 302 N.Y.S.2d at 574; *see* Rios v. United States, 364 U.S. 253, 262 n.6 (1960)); Buse v. State, 435 S.W.2d 530, 532 (Tex. Crim. App. 1968) (*rehearing denied,* 1969); *see* Rios v. United States, *supra* at 261-62.

49. People v. Baldwin, 25 N.Y.2d 66, 70, 250 N.E.2d 62, 64, 302 N.Y.S.2d 571, 574 (1969).

50. 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

51. *Id.* at 1106, 458 P.2d at 718, 80 Cal. Rptr. at 638.

becoming part of a large conglomeration of trash elsewhere.[52] And in *State v. Chapman*,[53] the court ruled that a bottle deposited in a trash barrel located in a garage on private premises was not abandoned.[54] It reasoned that since the bottle had been positioned well down in the barrel and covered with paper and trash, this strongly suggested that it had been intentionally concealed there, rather than abandoned.[55]

V. Critical Analysis and Recommended Proposals

A. *Introductory Matters*

1. *Hester v. United States* and the "Open Fields" Doctrine

Permeating the whole issue of abandonment under the fourth amendment is the landmark case of *Hester v. United States*,[56] and the "open fields" doctrine which it espoused. The facts were relatively simple. After receiving certain information, revenue officers proceeded without warrant toward Hester's home, a residence belonging to his father.[57] As they approached the house, they observed one Henderson drive up. Positioning themselves some 50 to 100 yards distant, the officers saw Hester come out of the house and hand Henderson a quart bottle. Thereupon, an alarm was sounded, Hester seized a gallon jug from a nearby car, and both he and Henderson fled. One of the officers gave chase, and fired his pistol. Hester dropped the jug, which, although it broke, managed to retain approximately a quart of its contents. Henderson, who

52. *Id.* The court particularly felt that a person's trash is his own business, to be free from the rummaging of neighbors and others, from which might flow half-truths leading to idle gossip and rumor. *Id.* A somewhat contrary approach was adopted in Marullo v. United States, 328 F.2d 361 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964), where the court argued that a motel occupant had no right of privacy in the top of a brick pillar supporting the motel cabin, so as to preserve from official inquiry any item placed there for safekeeping. 328 F.2d at 364. In *Marullo*, the court expressly endorsed, by way of dictum, Judge Burger's dissent in Work v. United States, 243 F.2d 660 (D.C. Cir. 1957), that there is no constitutional right of privacy in a trash can. Marullo v. United States, *supra* at 363.

53. 250 A.2d 203 (Me. 1969).

54. *Id.* at 212.

55. *Id.*

56. 265 U.S. 57 (1924).

57. The opinion was silent as to the nature of the information. However, since the court did not attempt to justify the officers' actions on the basis of probable cause, it is reasonably safe to assume that at the time of their arrival, they did not possess probable cause to arrest.

was also carrying a bottle, proceeded to discard it. The officer retrieved both the jug and the bottle and recognized their contents as "moonshine" whiskey.

Meanwhile, the other officer, who had entered the house and left after being advised that there was no whiskey there, discovered outside a jar of whiskey that had been tossed out.

The crucial issue[58] raised was whether the seized receptacles were the product of an illegal search or seizure. In rejecting the claim of unreasonable conduct under the fourth amendment, the Court reasoned that the defendant's own acts, as well as those of his associates, had disclosed the receptacles, and that their contents could be retrieved without regard to the amendment, as they had been abandoned.[59] Furthermore, it argued that the commission of a trespass by the officers would not require the suppression of the evidence, noting that there had been an abandonment, and that the evidence had not been seized within the house.[60]

The Court did not stop there, however, but took the opportunity to adoptively apply the "open fields" doctrine to the fourth amendment. Claiming that the only ground for review arose from the fact that the contents of the receptacles had been examined on the land of Hester's father, the Court ruled that this was without constitutional significance, as the protective ambit of the fourth amendment did not extend "to the open fields."[61] It concluded, in reliance upon Blackstone,[62] that the distinction between the home and the open fields was "as old as the common law."[63]

The Court's reasoning can be faulted on several scores. First, its reliance upon Blackstone was completely misplaced. The passages therein cited dealt with a discussion of common law burglary, a crime which has never had any historical relevance to the fourth amendment. In his discussion, Sir William pointed out the heinous

58. The contention that defendant was compelled to incriminate himself as a reaction to the officers' actions was summarily dismissed without comment. 265 U.S. at 58-59.

59. *Id.* at 58. Consequently, the case has been interpreted as involving no issue of search under the fourth amendment. *E.g.*, Olmstead v. United States, 277 U.S. 438, 465 (1928).

60. Hester v. United States, 265 U.S. 57, 58 (1924).

61. *Id.* at 59. This pronouncement has been recognized as the first instance of the doctrine's application to the law of search and seizure. *E.g.* United States v. Watt, 309 F. Supp. 329, 330 (N.D. Cal. 1970).

62. *E.g.*, 4 W. BLACKSTONE, COMMENTARIES * 223, 225, 226.

63. Hester v. United States, 265 U.S. 57, 59 (1924).

nature of burglary and recognized the peculiar sanctity of the home.[64] He then proceeded to discuss the particular places where burglary could and could not be committed; but the basis for the distinction of situs was predicated upon the presence or absence of the element of "midnight terror."[65] Thus, in rejecting certain places as lying outside the ambit of burglary, Sir William observed:

> And therefore we may safely conclude that the requisite of its being *domus mansionalis* [the mansion house] is only in the burglary of a private house [as contrasted with a church or the walls and gates of a town], which is the most frequent, and in which it is indispensably necessary, to form its guilt, that it must be in a mansion-or dwelling-house. For no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore for the time-being are not mansion-houses, attended with the same circumstances of midnight terror.[66]

The attempt, then, to correlate the existence or absence of protection under the fourth amendment to the situs of either private or official activity is not only historically erroneous, but also illogical.[67] It would have the effect of making the right to privacy purely transitory, without regard to the issue of waiver. It would extend the right to the individual within his home, while withholding it once he steps foot outside. It would make the right ambulatory and not permanent, and would make places, rather than people, the focal point of fourth amendment inquiry.[68] Since,

64. 4 W. BLACKSTONE, COMMENTARIES * 223.

65. *Id.* at 225.

66. *Id.* If an attempt were made to historically connect common law burglary with the law of search and seizure, the results would be quite bizarre. For example, since burglary at the common law could be committed only at night, *id.* at 223, 224-25, there could be no condemnation of unreasonable daytime searches or seizures.

That the existence of unreasonable search-and-seizure activity is no longer predicated on historical support cannot be doubted. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967); Berger v. United States, 388 U.S. 41, 51 (1967). *See* Wong Sun v. United States, 371 U.S. 471, 485, 486 (1963).

67. It has been recognized that the rationale of *Hester* may not be harmonized with Katz v. United States, 389 U.S. 347 (1967). There the Court rejected the concept of constitutionally protected areas and embraced the principle that "the Fourth Amendment protects people, not places." *Id.* at 351. *Accord, e.g.*, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on Article 6, at 81 (Tent. Draft No. 3, 1970). For a recommended modification of the "open fields" doctrine, see *id.* at § *SS* 6.04.

68. "The focus in Fourth Amendment cases today is on privacy rather than on property rights." Brett v. United States, 412 F.2d 401, 406 (5th Cir. 1969); *accord*, Faubion v. United States, 424 F.2d 437, 440 (10th Cir. 1970).

however, the amendment protects people, and not simply areas,[69] it follows that wherever the individual harbors a reasonable expectation of privacy, without regard to the public or private nature of the situs of his presence, he is entitled to be free from unreasonable governmental intrusion.[70]

The Court's contention in *Hester* that the issue of trespass was without constitutional significance is also subject to criticism. It brushed aside the issue without inquiry into the purpose of the officers' presence. It blinded itself to the obvious fact that the officers entered upon the premises for the purpose of search,[71] and silently endorsed their right to do so without regard to the existence of probable cause.[72] By doing so, it rejected the principle that if a law enforcement officer's primary purpose is to search, then he will not be permitted to enter upon private "open lands" in the absence of probable cause.[73]

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69. Katz v. United States, 389 U.S. 347, 353 (1967).

70. Terry v. Ohio, 392 U.S. 1, 9 (1968). Conversely, one will lose the protection of the amendment if he *knowingly* exposes property is his home to the public. Katz v. United States, 389 U.S. 347, 351 (1967).

71. Unquestionably, search is a functional process, Lustig v. United States, 338 U.S. 74, 78 (1949); and, the searcher must have in mind some particular evidence he is seeking. United States v. Tate, 209 F. Supp. 762, 765 (D.C. Del. 1962). Hester and his confederates seemed to indicate by their actions that they were cognizant of these factors.

72. As a result of this permissiveness, a number of courts have espoused the doctrine that a simple trespass will not per se invalidate a subsequent search or seizure. *E.g.*, United States v. Romano, 330 F.2d 566, 569 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965); United States v. Lewis, 227 F. Supp. 433, 436 (S.D.N.Y. 1964); People v. Terry, 70 Cal. 2d 410, 426, 454 P.2d 36, 48, 77 Cal. Rptr. 460, 472 (1969); Commonwealth v. Dolan, 352 Mass. 432, 433, 225 N.E.2d 910, 911 (1967); State v. Brown, 89 Ore. Adv. Sh. 741, —, 461 P.2d 836, 838 (Ore. App. 1969). In *Brown*, the court did acknowledge, however, that evidence suppressed as the product of a trespass is that uncovered as a result of an intrusion that inherently seeks to pry into hidden places for something that has been intentionally concealed. *Id.*

73. *E.g.*, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § *SS* 6.04 (Tent. Draft No. 3, 1970). *See also* Texas v. Gonzales, 388 F.2d 145, 147, 148 (5th Cir. 1968); Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955). Although these cases premised their holdings on the theory that there had been an actual intrusion into a protected zone of privacy, Texas v. Gonzales, *supra* at 148, they would appear to be equally supportable under the "expectation-of-privacy" doctrine announced in *Katz*. For example, in State v. Dias, 470 P.2d 510 (Hawaii 1970), the court ruled that a group of individuals meeting and socializing in a passageway located on private property between two buildings were entitled to "every expectation of freedom from governmental intrusion as to the premises," even though the members might have been trespassers. *Id.* at 514. Accordingly, it held that observations of the group made with the aid of binoculars by a police officer stationed some 150 to 200 yards distant could not form the basis for a warrantless search of the passageway. Such intrusion could only be sanctioned under the authority of a warrant. *Id.* at 515. And in Kirby v. Superior Court, 87 Cal. Rptr. 577 (Ct. App., 2d Dept. 1970), the court recognized that observations made by a police officer of an individual in a locale where the latter has exhibited a reasonable expectation of privacy may

Finally, the Court was unrealistic in characterizing the discarded receptacles as "abandoned." In doing so, it literally presumed the existence of abandonment from the mere act of discard without regard to the realities of the situation, and without a demand for affirmative proof demonstrating an intentional desire on the part of Hester to permanently relinquish all title or claim to the property. The Court made its determination on the sole basis of Hester's reaction to the officers' presence, and irrespective of his intent. The net result, then, was a baseless conclusion of the existence of a legal concept in clear disregard of its basic premise.

2. The Curtilage Doctrine

Closely allied to the "open fields" doctrine is the concept of the "curtilage"[74]—a concept that is both physical and constitutional. The physical limits of the curtilage are generally defined to be the ground and buildings in the immediate area surrounding a dwelling.[75]

The constitutional significance of the concept lies in the fact that the protection afforded by the fourth amendment, while not reaching to the open fields, does extend to the curtilage so as to include open areas immediately adjacent to a private home.[76] Thus, the differentiation between an immediately adjacent area falling within the ambit of the amendment and an unprotected open field has usually been analyzed in terms of the limits of the

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constitute an unreasonable search. *Id.* at 579. Thus, if the officer was present without authority of a warrant, and if it was reasonable for the individual to expect privacy, and had exhibited such expectation, the observations could be unreasonable. *Id.*

If it may be argued that in *Hester* the defendant had not exhibited any reasonable expectation of privacy, it can be claimed with equal logic that he had exhibited as much as could be expected under the circumstances. After all, he resided on the premises, and he had no way of knowing of the officers' presence. Therefore, it cannot be seriously contended that he *knowingly* exposed the receptacles to their view. *See* Katz v. United States, 389 U.S. 347, 351 (1967). Although the defendant in *Hester* did reveal the jug from its place of concealment within the car, he did so only after an alarm was given. Hence, rather than being a voluntary disclosure, it was actually a reaction to the officers' unauthorized presence.

74. It might be said that the former literally commences where the latter terminates. *See* United States v. Campbell, 395 F.2d 848 (4th Cir.), *cert denied,* 393 U.S. 834 (1968); United States v. Watt, 309 F. Supp. 329, 330 (N.D. Cal. 1970).

75. Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966). As originally conceived, it was an area usually enclosed by some fence or barrier. *Id.*

76. Olmstead v. United States, 277 U.S. 438, 466 (1928); United States *ex rel.* Boyance v. Myers, 398 F.2d 896, 899 (3d Cir. 1968); Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968).

curtilage.[77] The curtilage, then, sets the fourth amendment boundaries that may not be officially invaded without probable cause.[78] It is in this regard that the curtilage doctrine is relevant to the issue of abandonment, for if evidence is thrown out of a private residence in response to the illegal presence of law enforcement officers, and lands within the curtilage, it will be suppressed.[79]

Not only is the question of the physical limits of the curtilage "somewhat fictional,"[80] but the very applicability of the doctrine to the issue of unreasonable conduct is highly questionable. In the first place, as is also true with "open fields," it is a test for the gauging of reasonableness that is "predicated upon a common law concept which has no historical relevance to the Fourth Amendment guaranty."[81] Secondly, and most critically, it has the effect of maximizing property interests, thereby shifting the focal point of inquiry away from those of personal privacy.[82] Therefore, the preserved privacy approach should be favored over the area concept, without regard to the issue of public accessibility. This would mean that personal property, irrespective of its physical relationship to a residence or private sleeping quarters, will be protected, without regard to its accessibility to the public, if its owner or possessor seeks to preserve its privacy; the rationale being that since the fourth amendment protects people, and not places, the issue of reasonableness should be resolved by assessing the degree

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77. *See* cases cited *supra* note 76. The concept of privacy extending to the curtilage evolved from a judicial enlargement of the meaning of "houses" contained in the amendment. Rosencranz v. United States, 356 F.2d 310, 313 (1st Cir. 1966).

78. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968). Contrast this approach with the one pertaining to "open fields," where the issue of probable cause is irrelevant. *But see* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § *SS* 6.04 (Tent. Draft No. 3, 1970) where the requirement of probable cause to seize "things" located on "open lands" is advocated.

79. *E.g.*, Hobson v. United States, 226 F.2d 890, 894 (8th Cir. 1955).

80. Fletcher v. Wainwright, 399 F.2d 62, 64 (5th Cir. 1968).

81. Wattenburg v. United States, 388 F.2d 853, 858 (9th Cir. 1968) (noting that Blackstone discussed the curtilage in relation to the common law concept of burglary, *id.* at 858 n.5).

82. The modern trend is in the opposite direction. *E.g.*, Faubion v. United States, 424 F.2d 437, 440 (10th Cir. 1970); Brett v. United States, 412 F.2d 401, 406 (5th Cir. 1969).

of privacy a person is seeking to preserve, even in an area accessible to the public, rather than by defining the scope of the curtilage.[83]

B. *Argument and Recommendations*

Cases dealing with the issue of abandonment usually involve a discard of contraband, so that when the retrieve is effected, the officer will have probable cause to arrest. Additionally, the majority of instances will arise in public places,[84] in particular, on sidewalks. Since, however, the individual is moving in a public area, where the risk of disclosure is potentially harmful, any revealment made by him should be suspect, absent circumstances clearly demonstrating its voluntary character.

It is not difficult to imagine the factual context.[85] An individual, while walking down a street, observes a police officer on his beat. Obviously, the individual knows the nature of the property he is carrying, as well as the danger posed by any activity that will arouse the officer's suspicions. Therefore, it behooves him to move with circumspection, and to avoid any semblance of panic or furtiveness.[86]

At this point he has two options open to him. Either he continues to proceed with the contraband concealed on his person, thereby gambling on non-detection, or he opts in favor of a surreptitious discard. As now staged, there is a twofold risk facing the individual. If he decides against a discard, he is faced with the danger of exposal through a frisk. If he elects to discard, he runs the dual risk of retrieval and abandonment.

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83. Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968), relying upon *Katz*. Although the continued vitality of the "curtilage" test is questionable post-*Katz*, 388 F.2d at 857, 858 n.6, it has been intimated that *Katz* has no substantial bearing on the "open fields" doctrine. *E.g.*, United States v. Campbell, 395 F.2d 848, 849 (4th Cir.), *cert. denied*, 393 U.S. 834 (1968). *Contra*, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary on Article 6, at 81 (Tent. Draft No. 3, 1970).

84. The reasons for this are apparent. A police officer will not be permitted to conduct a warrantless search of private premises, even though he has probable cause to believe that contraband is situated there. *E.g.*, Jones v. United States, 357 U.S. 493, 497 (1958); Agnello v. United States, 269 U.S. 20, 33 (1925); People v. King, 88 Cal. Rptr. 273, 275 (Ct. App., 2d Dist. 1970); People v. Baird, 470 P.2d 20, 24 (Colo. 1970). Therefore, in a house search, the police will wisely seek, and defend, a seizure on the basis of a search warrant. Also, the issue of abandonment is more sharply etched in the context of public activity, where the police do not have to initially justify their presence.

85. For a typical example *see* State v. Shaw, 6 Conn. Cir. Ct. 17, 18, 262 A.2d 614, 615 (Tr. Div. 1968).

86. That furtive activity may have a bearing upon probable cause has been recognized. *E.g.*, United States v. Cunningham, 424 F.2d 942, 943 (D.C. Cir. 1970).

The wiser course for him to follow will be to retain the contraband on his person and to act in a manner that will minimize the risk of detention for investigative purposes, which would risk potential exposure. There are several factors sanctioning this course of conduct. In the first place, as he continues down the street, he will walk under the protection of the fourth amendment.[87] And, secondly, even if he is temporarily detained by the officer, and frisked for weapons, the discovery of the contraband will probably be suppressed.[88]

Until now, the individual has been in full command of the situation, and all activity has to be judged in terms of his intent. If he has elected to discard the goods by throwing them away, then it will be clear that he has decided to abandon them.[89] If, however, he should choose to retain them in his custody, then he will have freely assumed the risk. In either event, if the discard, or the individual's presence, goes unnoticed, the matter will end there.

An entirely different situation will arise if the officer observes the individual, for here the focus of inquiry will be directed toward the former's intent as manifested by his reaction to the latter's presence. If the officer does nothing, or if he simply places the individual under surveillance, in the belief that he may possibly witness some criminal activity, then there will be no issue of unreasonableness. If, however, the officer, without benefit of probable cause, and acting strictly on a "hunch," or because of suspicion based upon personal knowledge or hearsay, decides to follow the individual, and proceeds to hound him in a harassing manner, hoping that the individual will panic in the belief that he had better "ditch the stuff" before there is a shakedown, then an issue of major constitutional proportions will arise. Since the individual cannot possibly know in advance how far the officer will go, he has no way of gauging a prudent course. If the officer continues to close in, the individual has to anticipate a search. To do nothing

87. Terry v. Ohio, 392 U.S. 1, 9 (1968).

88. A frisk for weapons cannot be expanded into a general exploratory search for evidence of crime. Sibron v. New York, 392 U.S. 40, 65 (1968).

89. *See* People v. Prisco, 61 Misc. 2d 730, 733, 305 N.Y.S.2d 1006, 1010 (Sup. Ct. 1969). Should he elect to remove them from his person and to select a place for their temporary concealment, with the purpose of retrieving them later, then it would be equally clear that he has intended no abandonment. For an example of attempted concealment which, while avoiding abandonment, did expose the individual to the risk of "open view," *see* State v. Riddick, 5 Conn. Cir. Ct. 613, 614, 615-16, 260 A.2d 419, 421-22 (App. Div. 1969).

means certain discovery. To attempt a discard[90] is to invite a retrieve, thereby giving the officer probable cause to arrest.

In this context, then, it is unrealistic to argue justification in terms of either consciousness of guilt[91] or the "plain view" doctrine.[92] Reliance upon consciousness of guilt is particularly unsatisfactory. In the first place, it would eliminate every reactive discard from fourth amendment considerations. Secondly, it would accord the protection of the amendment only to innocent persons, thereby violating the principle that both the innocent and the guilty fall within its protective sphere.[93] However, because of their very innocence, there would be nothing for them to discard. Thus, the issue of abandonment could never arise in the case of an innocent person, thereby leaving the police free to force a discard from the guilty and then to deny to them the protection of the amendment by claiming abandonment on the basis of consciousness of guilt.

Reliance upon "plain view" would also be misplaced, because it would deny the reality of the situation by overlooking its coercive atmosphere. Undoubtedly, in a given situation, a discard will make an object plainly visible, and if it is done voluntarily, no issue of search will be presented.[94] But this is a far cry from the overweening coerciveness inherent in a situation where a police officer hounds and harasses an individual into a discard. Such action, which effectively prompts a reaction, cannot be considered immaterial to the critical issue of intent, nor can it serve to divest the individual of his right to privacy; for only when exposure is know-

90. Undoubtedly, some individuals will opt in favor of discard, in the mistaken belief that they will not be prosecuted for a possessory offense if the goods are not discovered on their persons. For an interesting example of the wisdom of retention, *see* Capitoli v. Wainwright, 426 F.2d 868, 869, 870 (5th Cir. 1970), where all the evidence in a car, except a package thrown from it, was suppressed.

91. *See* State v. Shaw, 6 Conn. Cir. Ct. 17, 19, 262 A.2d 614, 615 (Tr. Div. 1968). *See also* United States v. Martin, 386 F.2d 213, 215 (3d Cir. 1967), *cert. denied,* 393 U.S. 862 (1968); United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965), *aff'd by order,* No. 20,059 (D.C. Cir. 1966).

92. Under the doctrine, what is in plain view is not the object of a search. *E.g.,* Capitoli v. Wainwright, 426 F.2d 868, 870 (5th Cir. 1970); Poore v. Ohio, 243 F. Supp. 777, 784 (N.D. Ohio 1965), *aff'd on other grounds sub nom.* Townsend v. Ohio, 366 F.2d 33 (6th Cir. 1966); People v. Lawson, 1 Cal. App. 3d 729, 732, 81 Cal. Rptr. 883, 884 (1969); Hughes v. State, 471 P.2d 245, 247 (Nev. 1970). For the doctrine to apply, the viewer must be lawfully positioned so as to make his observation. Amador-Gonzalez v. United States, 391 F.2d 308, 312 (5th Cir. 1968); State v. Miller, 80 N.M. 227, 229, 453 P.2d 590, 592 (1969); *see* Harris v. United States, 390 U.S. 234, 236 (1968).

93. *E.g.,* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

94. This will be so on two scores: abandonment and "plain view."

ingly and intentionally accomplished, may it be considered beyond the pale of fourth amendment protection.[95]

Wherever an individual may legitimately be, he carries with him expectations of privacy with regard to the integrity and dignity of his person.[96] This means that he may properly invoke this protectable right to privacy wherever he may reasonably anticipate freedom from governmental intrusion.[97] It is this broad doctrine of expectation of privacy that is the essence of the decision in *Katz v. United States*.[98] There, in discarding[99] the "trespass" doctrine announced in *Olmstead v. United States*,[100] and in exalting privacy over property,[101] the Supreme Court held that wherever the individual habors a reasonable expectation of privacy, he is guaranteed freedom from unreasonable governmental intrusion.[102] Thus, if he walks down a public street, the fourth amendment walks with him, so as to preserve his body from unreasonable invasion.[103] And, if he seeks to preserve as private an item by concealing it upon his person, he has the right to know that it will also be constitutionally protected.[104] Therefore, the test of reasonableness under the fourth amendment is not whether there has been a physical invasion of property, but rather whether there has been an intrusion upon one's reasonable expectation of privacy.[105]

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95. Katz v. United States, 389 U.S. 347, 351 (1967).

96. State v. Dias, 470 P.2d 510, 514 (Hawaii 1970); *see* Terry v. Ohio, 392 U.S. 1, 9 (1968).

97. State v. Matias, 51 Hawaii 62, —, 451 P.2d 257, 259 (1969).

98. 389 U.S. 347 (1967).

99. *Katz* has been so interpreted vis-à-vis *Olmstead*. *E.g.*, United States v. White, 405 F.2d 838, 843 (7th Cir.), *cert. granted*, 394 U.S. 957 (1969).

100. 277 U.S. 438, 464-66 (1928).

101. "For the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

102. *Id.* at 351, 359.

103. Terry v. Ohio, 392 U.S. 1, 9 (1968).

104. *See* Katz v. United States, 389 U.S. 347, 351 (1967).

105. People v. Christman, 61 Misc. 2d 1084, 1087, 307 N.Y.S.2d 545, 549 (Monroe Cty. Ct. 1970); *see* Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (the issue is not one of property interest in the place invaded, but rather of the individual's reasonable expectation of privacy in the area). The justifiable-expectation-of-privacy premise of *Katz* has been recognized and followed. *E.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968); United States v. White, 405 F.2d 838, 846 (7th Cir.), *cert. granted*, 394 U.S. 957 (1969); United States v. Poole, 307 F. Supp. 1185, 1189 (E.D. La. 1969); People v. Berutko, 71 Cal. 2d 84, 93, 453 P.2d 721, 726, 77 Cal. Rptr. 217, 222 (1969); State v. Dias, 470 P.2d 510, 514 (Hawaii 1970); Commonwealth v. Hernley, 216 Pa. Super. 177, —, 263 A.2d 904, 907 (1970).

There is no meaningful distinction of constitutional significance between unreasonable search and seizure activity, and harassing official conduct outside the legitimate investigative sphere which prompts an individual to reveal what would otherwise be impermissible for the police to seek by means of a search of his person. In short, the police may not do indirectly what is denied to them directly. In either event, they will be engaging in conduct equally unreasonable under the fourth amendment, which, apparently, has been recognized by both the Supreme Court and several lower courts.[106] If a question,[107] an observation,[108] or an act of hearing,[109] can each be considered part of the search process, there seems little reason why the same reasoning may not equally apply to harassing police conduct that seeks to prompt the victim into revealing what would otherwise be the product of an unreasonable search and seizure if conducted by the officer. Therefore, if overbearing conduct outside the realm of legitimate investigation falls beyond the pale of the fourth amendment, any attempt to exploit it by retrieving its fruits for subsequent use in a criminal prosecution should be condemned and suppressed under the same authority.[110]

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106. For example, in Terry v. Ohio, 392 U.S. 1 (1968), the court, while endorsing a temporary detention for legitimate investigative purposes, and a limited patting of outer garments for concealed weapons, sounded a warning to the police to reasonably limit their on-the-street activities to "the legitimate investigative sphere." *Id.* at 15. As the court admonished:

> Nothing we say today is to be taken as indicating approval of police conduct *outside* the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is *overbearing* or *harassing*, or which trenches upon personal security *without the objective evidentiary justification* which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and *its fruits must be excluded from evidence* in criminal trials.

Id. (emphasis added). And, in People v. Bridges, 123 Ill. App. 2d 58, 259 N.E.2d 626 (4th Dist. 1970), the court inferentially acknowledged that if police officers, by means of provocation, force an individual to drop, discard, or reveal either contraband or other incriminating evidence, its seizure will be unreasonable. *Id.* at —, 259 N.E. 2d at 630 (dictum by implication); *see* authorities cited *supra* note 39.

107. People v. Whitehurst, 25 N.Y.2d 389, 392, 254 N.E.2d 905, 906, 306 N.Y.S. 2d 673, 675 (1969).

108. Williams v. United States, 263 F.2d 487, 489 (D.C. Cir. 1959); People v. Terrell, 53 Misc. 2d 32, 40, 277 N.Y.S.2d 926, 935 (Sup. Ct. 1967); People v. Kramer, 38 Misc. 2d 889, 892, 239 N.Y.S.2d 303, 307 (App. T. 1963); *see* Kirby v. Superior Court, 87 Cal. Rptr. 577, 579 (Dist. Ct. App. 1970).

109. Katz v. United States, 389 U.S. 347, 352, 353 (1967).

110. Although a cogent argument can also be made for suppression under the privilege against self-incrimination, that privilege broadly applies to only testimonial communications, either in oral or documentary form. *E.g.*, Gilbert v. California, 388 U.S.

It must be acknowledged, however, that it will not always be an easy matter for a court to clearly detect, or identify, such harassment; but this should never deter it from its duty to inquire whenever the issue is properly raised. Most likely a denial will be forthcoming from the police, and the court will be faced with the always vexing question of credibility. To believe the accused is to set him free; to disbelieve him is to sanction what might, in truth, be unconstitutional behavior.

In resolving this problem of credibility, a court would do well to guide itself by a common sense approach, and not blind itself to the realities of the situation.[111] In the first place, the incident may not have been the first of its kind between the accused and the officer, or the police in general.[112] Rather than limit its interpretation of the victim's reaction to consciousness of guilt, the court would be prudent if it gave equal attention to the possibility of prior similar instances of police harassment of the accused.[113] If such incidents are brought to light, especially those involving actual shakedowns, it will go a long way toward establishing the reasonableness of the victim's fears, and militating against consciousness of guilt. Secondly, the court should pay due consideration to the unnatural behavior being attributed to the victim by the arresting officer in his testimony at the suppression hearing. Is it normal for a person to incriminate himself by voluntarily exposing to a police officer contraband he has previously

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263, 266 (1967); United States v. Wade, 388 U.S. 218, 222-23 (1967); Schmerber v. California, 384 U.S. 757, 761, 763-64 (1966); Holt v. United States, 218 U.S. 245, 252-53 (1910); 8 WIGMORE EVIDENCE § 2264, at 363-64 (3d ed. 1940). Thus, the scope of the privilege has not been given the full application which the values it helps to protect might suggest. Schmerber v. California, 384 U.S. 757, 762 (1966).

111. As Mr. Justice Frankfurter admonished:

> [T]here comes a point where this Court should not be ignorant as judges of what we know as men.

Watts v. Indiana, 338 U.S. 49, 52 (1949).

112. *See* State v. Shaw, 6 Conn. Cir. Ct. 17, 262 A.2d 614 (Tr. Div. 1968), wherein the officer recognized defendant from previous criminal involvement. *Id.* at 18, 262 A.2d at 614. This, undoubtedly, was a factor in the officer's decision to follow him. *See* Capitoli v. Wainwright, 426 F.2d 868, 869 (5th Cir. 1970).

113. This would be an area that could be best explored by defense counsel through the testimony of his client establishing specific dates and locales for such encounters. That law enforcement officers engage in illegal activity under the fourth amendment has been judicially acknowledged. Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion of Mr. Justice Jackson); *see* Irvine v. California, 347 U.S. 128, 137 (1954).

taken pains to conceal?[114] Although such testimony is certainly not beyond the realm of credibility, a court should subject it to very careful analysis before attaching credence to it.[115] Finally, the court should attach critical importance to the officer's motives. What prompted him? What aroused his suspicions?[116] What was he seeking? What motivated him? What was he trying to accomplish? These are the questions that must be raised, and answered, before the factual issue of reasonableness can be properly resolved.[117]

In making this determination, however, the court should divorce itself from any consideration of property rights and interests in either the locus of the discard or the area of the retrieve. The ultimate focale points of inquiry must be the manner of intrusion into the individual's zone of privacy, and its motivating purpose.

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114. For example, in the situation involving search-by-consent, it has been recognized that the certainty of incrimination is a factor militating against voluntariness.

> But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by a denial of guilt do not show consent; at least in the absence of some extraordinary circumstance such as ignorance that contraband is present.

Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954).

115. The factors to be considered here are consciousness of guilt, motivating and prompting a voluntary discard, and a truly genuine intent to abandon.

116. It must be kept in mind that in the situation presented, the officer will be functioning or operating without benefit of probable cause; for, otherwise, he would have a constitutional basis for his actions, and would not have to seek justification in either abandonment or under the "plain view" doctrine.

117. Since the court can anticipate self-serving responses from the officer, it should be prepared to analyze them in the context of the abnormal behavior pattern being attributed to the accused.